THE BAR
REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

Volume 21 Number 1
February 2016

Patrick Pearse in King's Bench

New titles from...
Bloomsbury Professional

Irish Landlord and Tenant Acts: Annotations, Commentary and Precedents

by Professor John Wylie LLB (Queens), LLM (Harvard), LLD (Queens)

This new book by a well-established and much-respected author contains detailed annotations and commentary on all the Landlord and Tenant Acts still in force in Ireland.

If your focus is landlord and tenant law, you'll find all the information you need to help you make decisions on behalf of your clients.

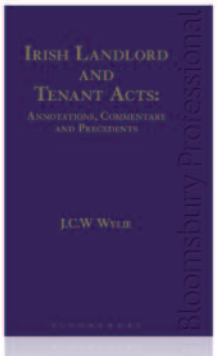
Comprehensive coverage includes:

- Part 1 deals with pre-1922 legislation, including up-to-date annotations to Deasy's Act 1860
- Part 2 contains annotations and commentary on the Landlord and Tenant (Ground Rent) Acts Part 3 covers the other post-1922 Landlord and Tenant Acts

These Parts include the associated statutory instruments dealing with procedure and providing the relevant forms to be used

- Part 4 contains precedents from various forms of leases and agreements, including licences, renunciations and consents.
- Practitioners will be able to download each precedent from the accompanying ebook and amend as required.

The book includes comprehensive cross-references to other relevant material throughout, including Law Reform Commission reports and the author's Landlord and Tenant Law, winner of the DSBA Law Book of the Year Award 2015.



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Format: Hardback + eBook

Price: €225.00 + 23% VAT on 50% of product (€250.87)

Pub date: October 2015

Arthur Cox Employment Law Yearbook 2015

by the Arthur Cox Employment Law Group

Now in its fifth year, this annual Irish publication, written by the experienced lawyers of the Arthur Cox Employment Law Group, is a must have title for all employment law practitioners and human resource professionals.

Arthur Cox Employment Law Yearbook 2015 contains selected cases and materials relevant to developments in employment law in 2015 with which practitioners need to be completely up to date.

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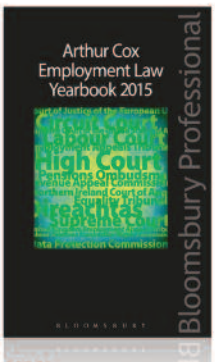
- English law so far as relevant eg selected common law decisions;
- EU law: decisions of the Court of Justice of the European Union and relevant Directives/ Regulations;
- Other material such as Annual Reports of the EAT, the Labour Court, the Health & Safety Authority, the activities of NERA.



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The Bar Review
The Bar of Ireland
Distillery Building
145-151 Church Street
Dublin DO7 WDX8

Direct: +353 (0)1 817 5166
Fax: +353 (0)1 817 5150
Email: rfisher@lawlibrary.ie
Web: www.lawlibrary.ie

PUBLISHERS

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Editorial: Ann-Marie Hardiman, Paul O'Grady
Design: Tony Byrne, Tom Cullen, Ruth O'Sullivan
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Commercial matters and news items relating to *The Bar Review* should be addressed to:

Paul O'Grady
The Bar Review
Think Media Ltd
The Malthouse, 537 NCR,
Dublin DO1 R5X8

Tel: +353 (0)1 856 1166
Fax: +353 (0)1 856 1169
Email: paul@thinkmedia.ie
Web: www.thinkmedia.ie

www.lawlibrary.ie

Papers and editorial items should be addressed to:
Rose Fisher at: rfisher@lawlibrary.ie

A new era for *The Bar Review*

Chairman of Council DAVID BARNIVILLE SC introduces some of the important work currently underway at *The Bar of Ireland*.

This is my first Chairman's column in the newly launched *Bar Review*. I am delighted that the Editor, Eilis Brennan BL, has agreed to continue to perform that role. I am also very grateful to the members of the Editorial Board for enthusiastically volunteering to assist the Editor.

Regulatory change

Following much debate and discussion, the Legal Services Regulation Act, 2015, was finally enacted in December 2015 and will be commenced on a phased basis over the coming months. The Act will make a number of very significant changes to important aspects of the way we practise as barristers. A series of CPD lectures on the Act are being held this term.

Broadly speaking, the Act will:

1. Establish a statutory authority, the Legal Services Regulatory Authority (LSRA), to regulate the provision of legal services by barristers and solicitors.
2. Establish an independent complaints and disciplinary system, which will include a Legal Practitioners Disciplinary Tribunal to replace existing structures.
3. Establish the Office of Legal Costs Adjudicator to replace the Office of the Taxing Master. It also provides for certain principles to be applied in adjudicating or assessing legal costs.
4. Make provision for legal partnerships and multidisciplinary partnerships (including partnerships among barristers or with solicitors and other professionals), and also provide for direct professional access for barristers in certain circumstances.

In addition, the Act addresses a number of miscellaneous areas including the criteria for the grant of patents of precedence, permitted advertising by barristers and solicitors, and for pre-action protocols in clinical negligence cases. A Working Group of Council has been established to examine the many ways in which the practices and procedures of Council and of The Bar itself will have to change and adapt in light of the provisions of the Act. Council is well aware of the fact that in order to retain members, we must make the offering to members in terms of services, representation, education and facilities as attractive as possible so as to ensure that practice in the Law Library, as a member of The Bar of Ireland, continues to be regarded as the gold standard for the independent Bar.

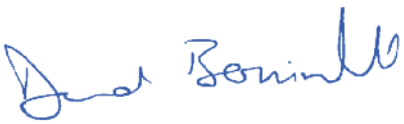
Positive developments

I want to highlight some other important developments of the past couple of months. I am particularly pleased that the Young Bar Committee (YBC) has been formally established and is operating very effectively with Claire Hogan BL as Chair. One of its first initiatives was to organise a conference entitled 'Discovery and the Junior Bar' on January 29, 2016, to showcase the talents of the Junior Bar and to promote their particular skills to solicitors. The Committee will be launching a database of young barristers who are available for discovery projects, which should make it more efficient for solicitors to identify those interested in undertaking this type of work. The Criminal and State Bar Committee, working with members of the YBC, has also been focusing on the particular plight of "young juniors" practising in crime in the District Court on a "split fee" basis. Serious issues have emerged in the practice adopted by some solicitors in this area to the detriment of the Junior Bar, which are being addressed by those Committees and by Council itself. I am also pleased to report that the Criminal and State Bar Committee has made the first of a number of submissions to be made to the State authorities, seeking to restore fees that were savagely cut in the period since 2008/2009.

Council of The Bar of Ireland is also taking steps to address the particular difficulties faced by women in law. Law & Women was recently established as a joint initiative with the Law Society, in collaboration with the Irish Women Lawyers Association, to support women in legal practice. It launched a pilot mentoring programme in January 2016 for barristers and solicitors at various stages of their careers.

On the *pro bono* front, I am sorry to announce that Diane Duggan BL is stepping down from her role as co-ordinator of the Voluntary Assistance Scheme (VAS). Diane has worked tirelessly in co-ordinating this important Scheme, and in ensuring that requests for legal assistance from charities and other bodies are matched with barristers who are willing to provide such work on a *pro bono* basis. This is also an opportunity for me to remind members of the great voluntary legal work done by Irish Rule of Law International (IRLI), a charitable joint venture between Council of The Bar of Ireland and the Law Society, which operates various rule of law projects in developing countries. I would encourage members to continue to take part in these various initiatives, which were highly praised by President Michael D. Higgins in the Daniel O'Connell Memorial Lecture for The Bar of Ireland, delivered in November 2015.

Finally, I would urge all members to ensure that they read the first quarterly report setting out progress on the implementation of our three-year strategic plan, which was issued to members in February. It sets out detail on the vast amount of work undertaken by Council and the staff of The Bar of Ireland.



David Barniville SC
Chairman, Council of The Bar of Ireland

A showcase for Law Library talent

The newly relaunched Bar Review will continue to reflect the high standards of The Bar of Ireland, says Editor EILIS BRENNAN BL.

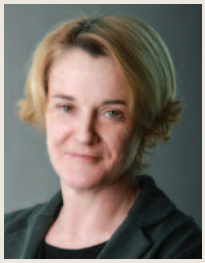
Welcome to the very first edition of a relaunched, revamped and, hopefully, a much improved *Bar Review*.

Thanks to our Director, Ciara Murphy, for spearheading the relaunch, to the Editorial Board for their expertise and enthusiasm, and to Think Media for coming on board as our new publishers. We are very grateful to all the team at Round Hall, our former publisher, for their considerable support and assistance over a great number of years.

In this edition, we explore the ramifications of the far-reaching Court of Appeal decision in *Russell v HSE* and how this will affect future damages awards. We also analyse the recently promulgated Building Control Regulations and their impact on the liability of building professionals. The reform of the Guardian *ad Litem* system is an area of great concern for family lawyers and we include the Council of The Bar of Ireland submission to the Department of Justice on this topic.

In life outside of the Law Library, we carry an interview with barrister and international rugby referee, Wayne Barnes. Patrick Pearse BL is the subject of our 1916 commemorative piece. We also feature news and updates from our members, including a column from the Young Bar Committee.

The success of The *Bar Review* has always been due to the high quality contributions from our members, and the publication is a showcase for the well of talent and expertise within our profession. We hope to continue that tradition, and to generate a new energy and vitality in our professional publication. To this end, we encourage all our members to consider submitting articles or story ideas in your area of expertise.



Eilis Brennan BL,
Editor

We are currently drawing up Author Guidelines and these will be available shortly on The Bar of Ireland website. Any articles or suggestions for articles can be emailed to ebrennan@lawlibrary.ie.

Legal Services Regulation Bill passed

Following its initial presentation to Dáil Éireann on October 9, 2011, the Legal Services Regulation Bill was finally passed by both Houses of the Oireachtas and signed into law by the President on December 31, 2015.

The new Act provides for:

- **the regulation of the provision of legal services;**
- **the establishment of the Legal Services Regulatory Authority;**
- **the establishment of the Legal Practitioners Disciplinary Tribunal to make determinations as to misconduct by legal practitioners;**
- **new structures in which legal practitioners may provide services together or with others;**
- **the establishment of a roll of practising barristers;**
- **reform of the law relating to the charging of costs by legal practitioners and the system of the assessment of costs relating to the provision of legal services;**
- **the manner of appointment of persons to be senior counsel;**
- **matters relating to clinical negligence actions; and,**
- **other related matters.**

A series of CPD events is taking place to assist members in their understanding of various aspects of the new legislative requirements. There will be ongoing interactions with the new Authority when established, which will now form part of the continued workload for representatives of Council and the executive staff. Council of The Bar of Ireland, at its meeting on January 28, 2016, resolved to nominate David Barniville SC for appointment by the Government as a member of the new Legal Services Regulatory Authority. Council was also asked to appoint an alternate, and has confirmed Sara Moorhead SC in this regard.

Innocence scholarships 2016 launched

Pictured at the launch of The Bar of Ireland's 2016 Innocence Scholarships were (from left): Geraldine McMenamin BL; Ruth O'Connor BL; Kate Hanley BL; Colleen Rohan, International Criminal Law Bureau; Michelle Mortell BL; Grainne Larkin BL; and, Susan Lennox BL.

For the last number of years, Council of The Bar of Ireland has sponsored junior members to work on Innocence Projects in the USA to assist them in overturning wrongful convictions. This year's innocence scholarships were launched at an event on January 21, 2016, at which Colleen Rohan, a founding member of the International Criminal Law Bureau, spoke on the topic 'The Burden of Proving Innocence'. Ms Rohan is currently serving as counsel and legal consultant on a number of cases at the International Criminal Tribunal for the former Yugoslavia (ICTY) and a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990s, and her talk focused largely on the US criminal justice system and miscarriages of justice. Ms Rohan welcomed The Bar's participation in innocence work in the US, and was impressed with the fact that over 82% of barristers undertake *pro bono* work, a statistic she also highlighted during an interview with Sean O'Rourke on RTÉ Radio One.

Five barristers will be awarded scholarships to work with innocence projects in Wisconsin, Duke, Florida, Cincinnati and Washington in summer 2016.

Members wishing to apply for an innocence scholarship should submit a CV and cover letter by email to communications@lawlibrary.ie by February 26, 2016.

The Bar of Ireland files *amicus curiae* brief in petition to US Supreme Court

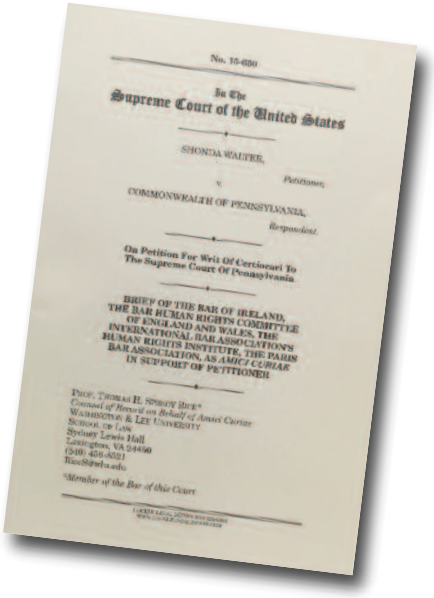
The Bar of Ireland, along with the International Bar Association's Human Rights Institute and other bar associations, recently filed an *amicus curiae* brief in a petition to the US Supreme Court to hear a challenge to the death penalty in the United States.

In *Walter v. Commonwealth of Pennsylvania,* Shonda Walter claimed that all death penalties, including that imposed in her own case, violate the Eighth Amendment to the US Constitution prohibiting cruel and unusual punishment.

The Bar of Ireland Human Rights Committee vetted the request on behalf of The Bar of Ireland and, thereafter, drafted The Bar of Ireland's submission for the *amicus* brief.

The Bar of Ireland submission refers to the abolition of the death penalty by constitutional amendment in 2002 and the ratification of the ECHR Protocol abolishing the death penalty in all circumstances.

The US Supreme Court declined to hear the petition in Ms Walter's case.


No. 15-650

In The
Supreme Court of the United States

SHONDA WALTER,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF OF THE BAR OF IRELAND, THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES, THE INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE, THE PARIS BAR ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Medical Negligence and Childbirth

Medical Negligence and Childbirth by Doireann O'Mahony BL was recently launched by Mr Justice Kevin Cross at events in Dublin and Cork. Medical negligence claims around childbirth regularly come before Irish courts and, regrettably, it is the case that they are as contentious as they are tragic. *Medical Negligence and Childbirth* is a practical guide for lawyers, explaining the clinical scenarios that commonly lead to litigation. For the first time, both medicine and law are married together to explain childbirth-related injury to mother and baby.

The book includes contributions from a number of eminent medical experts in the relevant fields, including obstetrics and neonatology, and a foreword by Mr Justice Kevin Cross, head of the High Court Personal Injuries List, who says: "It is truly innovative in its combination of legal and medical learning".

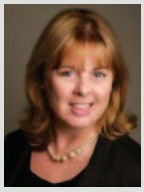
Mr Justice Cross launched the book in the Sheds Bar, Distillery Building, on December 2, and at The Library, Hayfield Manor Hotel, Cork, on December 7. Both events attracted a very large turnout and Mr Justice Cross commended the book warmly as both unique and useful to practitioners in the field.

Medical Negligence and Childbirth by Doireann O'Mahony BL is published by Bloomsbury Professional.

Author Doireann O'Mahony BL with Mr Justice Kevin Cross at the recent launch of Medical Negligence and Childbirth. Photograph: Paddy Cummins.

Library values

The Bar of Ireland Library recently undertook a survey of Library users – *The Bar Review* presents the results.



Nuala Byrne
Library and Information Services Manager

The delivery of an efficient, relevant and timely library service was identified as a key objective of the new Strategic Plan for The Bar of Ireland. The goal to deliver a user-centred service to meet members' needs into the future requires us to deliver relevant services where, when and in the format required by members. To this end, a survey of Library users was carried out during November and December 2015. One objective was to evaluate if the Library is currently delivering a relevant and timely service in the format required.

Results

Of the 2,300 members of the Law Library, 279 responded to the survey, giving a response rate of 12%. Of those who responded, 88% were junior counsel and 12% were senior counsel. The split of responses between Dublin and non-Dublin practising members was 76% Dublin and 24% non-Dublin. In terms of years in practice, 33% of respondents were in years one to five; 38% were in years six to 12, and 29% were over 12 years. The survey was comprised of 28 questions and assessed the usage and value of the Library under a number of headings.

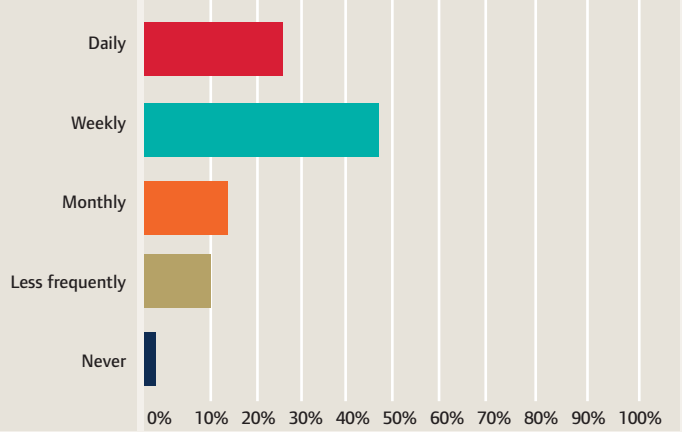
Library desks

The Library has five information desks where members may borrow items and get reference or research assistance, as well as access to other services provided by the Library.

When asked how often they used the desks, 73% use them daily or weekly, 61% use them weekly or monthly, and 24% use them monthly or less

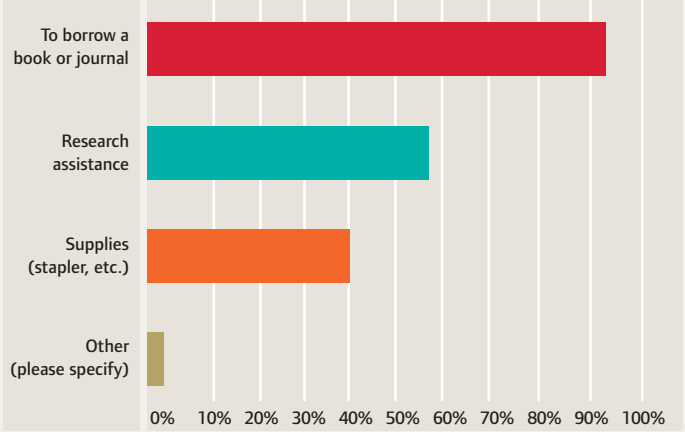
On average, how often do you make use of the Library information desks?

Answered: 262 Skipped: 17



If you used an information desk, what did you use it for? (tick as appropriate)

Answered: 256 Skipped: 23



frequently. By practice location, 8% of Cork-based practitioners use the desks daily, 68% weekly, 8% monthly and 8% less frequently, while of those who practise outside Dublin and Cork, 39% use them daily or weekly, and 60% use them weekly or monthly.

Purpose of using a Library desk

Respondents were asked why they used a Library desk. Unsurprisingly, 94% said it was to borrow library material and 58% for reference or research assistance. When asked how frequently they borrow, 67% borrow material weekly and 86% monthly. For Cork members, 65% borrow weekly and 15% monthly. For those who practise outside Dublin and Cork, 32% borrow daily or weekly, 31% monthly, and 33% less frequently. Only 4% never borrow. By year of practice, first years borrow most frequently: 95% borrow on a weekly basis, with 43% borrowing daily. In years two to five, 12.5% borrow daily, 62.5% borrow weekly and 12.5% borrow monthly.

Also in years two to five, 9.5% borrow less frequently and 3% never borrow from the Library. Borrowing frequency remains similar for years six to 12 and from year 12 onwards. Borrowing rates are high across year of practice and by practice location.

Satisfaction with material in the Library

When asked if respondents usually found the material they were looking for in the Library, 98% responded usually or always; only 2% accounted for rarely or never.

By year of practice, first years borrow most frequently: 95% borrow on a weekly basis, with 43% borrowing daily. In years two to five, 12.5% borrow daily, 62.5% borrow weekly and 12.5% borrow monthly.

Online services

Access to digital resources is as much a part of the Library collection as the printed material on the shelves. We constantly strive to expand access at competitive rates through negotiation with publishers. Members rate access highly: 80% rate it as "very important" and 16% as "important".

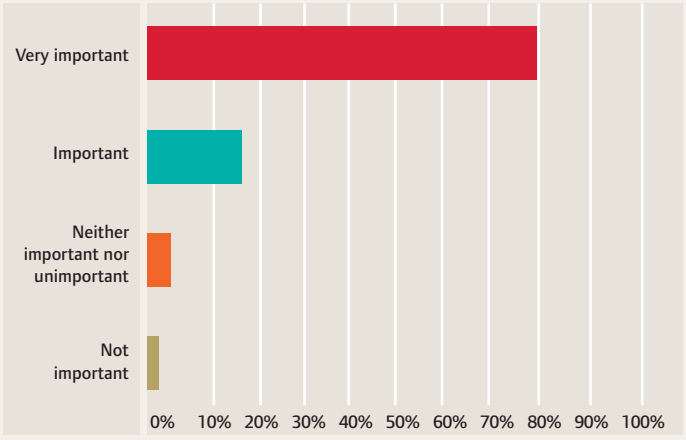
As one member commented:
"The Library service is one of the great benefits of Law Library membership. If there was no Library service, many members would face great difficulty practising given the cost of legal textbooks and subscription to legal databases".

Ebooks

When asked about using ebooks, 63% said yes, 25% said no and 12% said that they did not know the Library had ebooks. By year of practice, 86% of year one

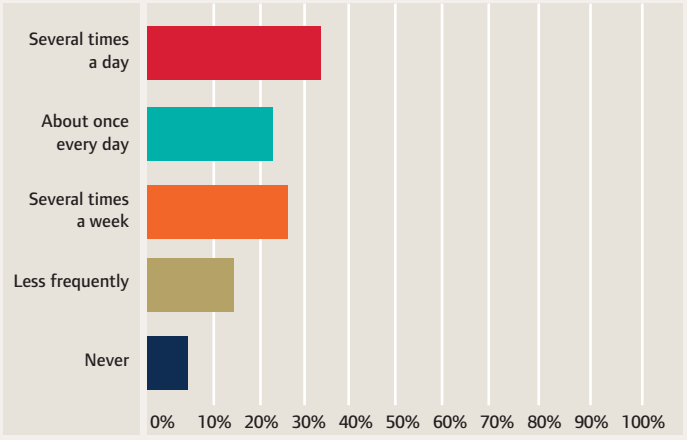
How important to the Library's service are the electronic resources it provides?

Answered: 257 Skipped: 22



Typically, how often do you use the Library databases (e.g., Justis, Westlaw, Bloomsbury)?

Answered: 257 Skipped: 22



use ebooks, 78% in years two to five, 65% in years six to 12, and 43% with over 12 years' practice. While these figures show good usage of the collection, further communication and training is necessary to maximise usage.

Databases

Respondents were asked how frequently they use Library databases.
Of the total number of respondents, 53% use them daily and 80% use them weekly or more. Some 32% use them several times a day.
When asked if they had a personal subscription to a database, 91% said no. Of the 9% who said yes, only one database on world sports law was not accessible in the Library. The majority of the 9% (14 people) subscribed to Stare Decisis, a current awareness website with access to unreported judgments.

Information skills training

A key service offered by the Library is our information skills training events, which are offered in various formats, from one-to-one training to group demonstrations and training fairs. Each training session qualifies for CPD points. When asked how many training sessions they had attended in the previous 12 months, 62% of respondents stated that they did not attend any and 38% attended between one and five sessions. One respondent attended six or more events. There was little if any variation by practice location. This is a disappointing result and indicates that how we offer this service must be reviewed. Lack of a dedicated, resourced training location does not help; however, this is not the only reason why uptake is low.

Other services

Document supply

As well as informal document supply, whereby Library staff email articles and cases to members or send library material in the DX to members, the Library also has formal document supply or inter-library loan (ILL) arrangements with numerous other libraries.

These include Trinity College Dublin, the King's Inns Library, the British Library, the Inns of Court in London, and the Institute of Advanced Legal Studies (IALS) in London.

Inter-library loan, email and DX

When asked about ILL, 20% of respondents had used the service in the previous 12 months. When asked if articles, cases or other material were requested by email, 50% of respondents stated yes, and 50% said no. Results were not affected by practice location.
When asked if they used DX for library material, 84% said no and 16% said yes. The service was used most frequently (70%) by members in Cork.

Importance to profession

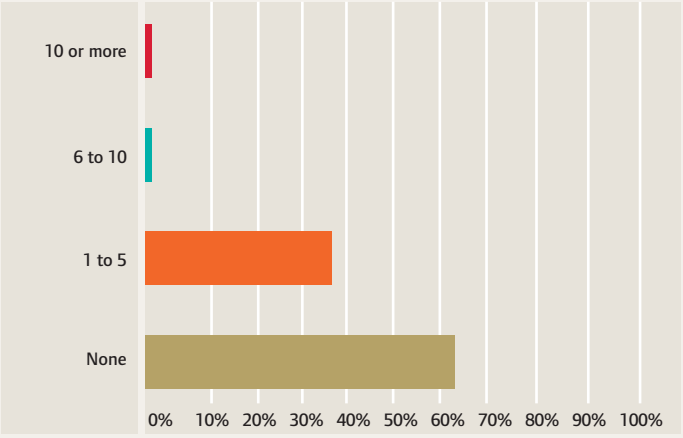
When asked if the profession would suffer if the Library did not exist, 75% of respondents strongly agreed and 16% agreed that the profession would suffer. Only 5% neither agreed nor disagreed, and 4% disagreed or strongly disagreed that the profession would suffer.
This implies that 91% of respondents value the Library and its importance to the profession generally. This view was most strongly held by respondents with a practice based mainly in Cork.

As one member commented:
"The Library is an essential tool and one of the reasons why people stay members of the Law Library".

The Library would like to take this opportunity to thank members for all their continued support and to thank those who took the time to complete the questionnaire.
Over the coming weeks and months we will evaluate the answers in more detail, and will use the information to improve our services. We strive to provide the most efficient and timely service to our members at all times and your help in achieving our goals is much appreciated.

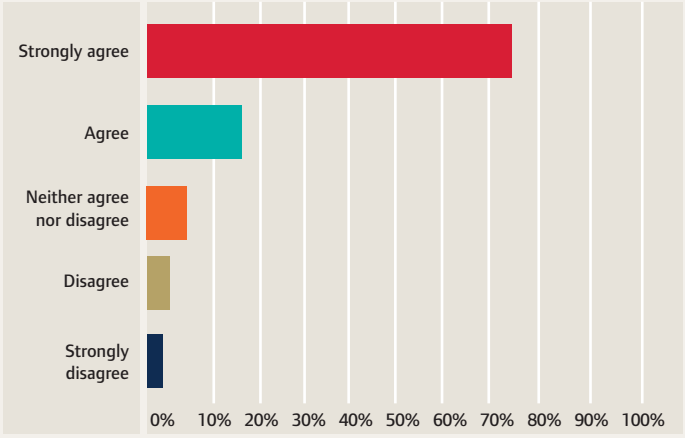
How many Library training sessions do you attend each year?

Answered: 255 Skipped: 24



"The profession of barrister would suffer if the Library did not exist."

Answered: 242 Skipped: 37



The Bar of Ireland Conference – April 8-9, 2016

Kilkenny has been selected as the destination for the 2016 Biannual Conference of The Bar of Ireland, to be held on Friday and Saturday, April 8 and 9. This year's Conference offers an outstanding line-up of international expert speakers on topical issues such as 'Media in the Courtroom', including contributions from Joshua Rozenburg QC (Britain's leading legal commentator) and John Carlin (journalist and author of *Chase Your Shadow: The Trials of Oscar Pistorius*). The Conference will also focus on the US criminal justice system, which has recently become the focus of public fascination arising from the popular *Making a Murderer* documentary, with a talk from leading US criminal lawyer Cristi Charpentier, who works on behalf of men and women sentenced to death and of Guantanamo Bay detainees.

The excellent CPD-accredited conference sessions will be complemented by a busy social programme, including an opening reception in the stunning surrounds of Kilkenny Castle and a gala dinner in Conference hotel The Lyrath Estate. There will also be a Kids Club and babysitting service available, so all the family can come to enjoy what promises to be a very entertaining and informative weekend. We look forward to welcoming members to Kilkenny in April.

The voice of youth

The Young Bar Committee aims to provide a channel of communication between members of the Junior Bar and Council of The Bar of Ireland in relation to important issues affecting the professional development of members in years one to seven of practice.

Claire Hogan BL
Chair, Young Bar Committee

The Year Representatives for the Young Bar Committee were elected at the start of Michaelmas 2015, and are as follows:

Year 1: **Hugh Good BL and Ellen O'Brien BL**
Year 2: **Anita Finucane BL and Hannah Cahill BL**
Year 3: **Ellen O'Callaghan BL and Paul E. Murphy BL**
Year 4: **Liam O'Connell BL and Eoin Martin BL**
Year 5: **Gary Hayes BL and Seán O'Quigley BL**
Year 6: **George Maguire BL and Eve Bolster BL**
Year 7: **Hugh Madden BL and Rachel Baldwin BL**

The representatives have canvassed the views of the Junior Bar in order to frame our agenda for the year and we are grateful for all the helpful responses received.

Legal Aid fees

As an early priority, the Committee looked at the issue of District Court Criminal Legal Aid fees. Committee members who practise in crime produced a policy document on 'The Plight of the District Court Criminal Barrister'. This document highlighted the unique issues faced by junior criminal practitioners, specifically with regard to issues surrounding Legal Aid and payment. Seán O'Quigley BL and Jane Horgan-Jones BL have been working with the Criminal and State Bar Committee, which drafted submissions on fees for various interested parties, including the Law Society. They have aimed to make sure that the voice of the junior end of criminal practice has been included in submissions.

Young Bar Hub

In December 2015, the Committee launched the Young Bar Hub in the Members' Section of The Bar of Ireland website. The site contains information and guidance notes and papers that have been written and collated by the Information, Guidance and Templates Working Group, whose membership includes Tomás Keys BL, George Maguire BL, Ellen O'Callaghan BL and Seán O'Sullivan BL. It is designed for barristers in their early years of practice and includes papers such as 'Practice and Procedure in the Master's Court' and 'Guidance on Applying for Civil Legal Aid Panel'.

Members can access the Young Bar Hub at https://www.lawlibrary.ie/secure/young-bar.aspx.

Discovery work

The Committee has been examining the issue of the Junior Bar's engagement in discovery work. A conference entitled 'Discovery and the Junior Bar' was held on January 29, 2016. The conference was chaired by Mr Justice Frank Clarke, and an audience composed of 100 colleagues and litigation solicitors was in attendance.

The Conference showcased the talent of junior colleagues who are expert in discovery work.

The Committee is now working to set up a database of discovery counsel on The Bar of Ireland website.

EU law and junior practitioners

A free CPD event on EU law and the junior practitioner, hosted by the Irish Society for European Law (ISEL), will be held on Thursday February 25 at 6.30pm in the Atrium of the Distillery Building. There shall be an opportunity for junior barristers to receive a year's membership of ISEL for the reduced rate of €30.

The Committee is currently discussing other issues affecting the Junior Bar, in particular, Family Law Legal Aid in the District Court, fees, the structure of the devil–master relationship, and seating and facilities.

All suggestions for events or agenda topics can be sent to youngbar@lawlibrary.ie.

In the interests of justice

The Bar of Ireland Voluntary Assistance Scheme (VAS) is operated by Council of The Bar of Ireland and accepts requests for legal assistance from NGOs, civic society organisations and charities acting on behalf of individuals who are having difficulty accessing justice. Please contact us for further details or see the Law Library website under 'Legal Services'.

Speaking for Ourselves – advocacy workshop

On Thursday, November 12, VAS hosted its second advocacy training workshop for charities. The aim was to assist charities in the process of making presentations and submissions, writing letters and generally advocating more effectively to achieve their aims. We had attendees from the Immigrant Council, Focus Ireland, the Society of Saint Vincent de Paul, Community Law and Mediation, the Migrant Rights Centre of Ireland, Dublin City Volunteer Centre, Enable Ireland, the National Advocacy Service for People with Disabilities, Robert Emmett Community Development Project and Plan International.

The programme was comprised of four presentations and a practical exercise, which had been well received at the first workshop: 'Preparation for Advocacy', delivered by Michael Cush SC; 'Oral Advocacy', delivered by Mary Rose Gearty SC; 'Written Advocacy', delivered by Bairbre O Neill BL; and, 'Principled Negotiation', delivered by Turlough O'Donnell SC. Michael Lynn SC and Aoife Carroll BL prepared a practical exercise. In addition to these presentations from The Bar, we invited two speakers from the Oireachtas to give a presentation on 'Effective Engagement with Public Bodies'. Alan Guidon (Clerk of the Joint Committee on Justice, Defence and Equality) and Brid Dunne (Clerk of the Joint Committee on European Union Affairs and Clerk to the Committee on Members' Interests) gave this presentation.

VAS is grateful to the speakers and presenters who were so generous with their time. It is hoped to run this workshop once again in early 2016. If you know of any charities who would be interested in attending, please ask them to contact vas@lawlibrary.ie for further information.

Once again, feedback on this workshop was very positive:

"I have done this type of training previously but it has been from the private sector, and it has a business slant to it so it is very hard to transfer the skills, but I found this so useful and so transferable. It was so clear, so focused. Honesty and integrity were mentioned time and time again, which is great to hear in our sector."

"Very well done and executed professionally."

Pictured at the recent VAS advocacy workshop were (from left): Miriam Lewis, Dublin City volunteer; David Barniville SC, Chairman, Council of The Bar of Ireland; and, Diane Duggan BL, VAS Co-ordinator.

"This was one of the most worthwhile and engaging training events/ workshops I have ever attended. I would highly recommend it to others."

Requests for assistance

VAS has recently received requests for assistance from a number of organisations, including Transparency Ireland, Mental Health Reform, the National Advocacy Service, Le Cheile Youth Justice and Mentoring Programme, Dublin Aids Alliance and a housing co-operative in Ballymun. At the request of VAS, Arthur Cox Solicitors and Niall Handy BL helped to negotiate a successful agreement between the housing co-operative (whose members would not otherwise have had access to legal services) and Dublin City Council.

Please contact vas@lawlibrary.ie if you are interested in getting involved.

The Barnes brief

Lawyers and rugby were familiar bedfellows in the days of amateurism. Now the top level of the game is professional, including the referees. Wayne Barnes is a high-profile international rugby referee, and a practising barrister. How does he do it?

Paul O'Grady

Managing editor and journalist at Think Media

"It would be an added bonus if Wayne Barnes refrained from refereeing like a deranged old Eton headmaster with a ferret down his pants."

Risteard Cooper, *The Irish Times*, February 11, 2010.

The barrister and international rugby referee, Wayne Barnes, has real friends because only real friends would be in a hurry to send that quote to a mate – and he got sent it several times. It's now Barnes' favourite quote about himself, with one caveat – he didn't go to Eton.

In fact, he went to a state comprehensive in the Forest of Dean in the West Country of England, right up against the border with Wales. He describes it lovingly as a place where you were dragged up with rugby and brass bands. He comes from the village of Bream, where he played with the local rugby club from the age of seven, describing himself as "a non-tackling back row". At 15 he picked up an injury and got asked to help with some refereeing.

He did and while he continued to play on Wednesdays when in university, he refereed at the weekends. It helped him to pay his way through his law degree at the University of East Anglia. While there, at the age of 21, he became the youngest ever member of the English Rugby Union's panel of national referees. He was dedicated to his legal career, though, and had always wanted to be a barrister.

The inspiring teacher

Why law? Were there many lawyers in his family? "No, in fact, I was the first member of my family to go to university." The reason he wanted to become a barrister goes back to a teacher. (How often do special teachers inspire people?) Mrs Davies was his English teacher, but she also served as a lay magistrate in a UK court that hears lower level offences.

Photograph: Mark Stenning.

She encouraged Wayne, brought him to sittings of her three-magistrate court, and he subsequently got a work experience term with barristers in Cardiff. He really enjoyed it and set himself the ambition of a career as a barrister. He completed his law degree at the highly-ranked East Anglia in Norwich, and after a year as President of the Students' Union in the University, he got a position on the Barrister Vocational Course at the College of Law in London. Similar to the Master–Devil arrangement in Ireland, he underwent pupillage with a barrister for 12 months before applying for and getting a position in Chambers at 3 Temple Gardens. He practised in south-east England and in central London, defending or prosecuting in sexual offences, assaults, grievous bodily harm and similar cases. He describes it as a fantastic experience, learning a great deal and enjoying his time in court.

Twin track careers

At the very same time, his refereeing career was also developing. He got asked to referee in the 2003/'04 World Rugby Sevens series. Interestingly, so did two other referees who were coming through the world ranks at the time: Nigel Owens and Craig Joubert. That shared experience has led to the development of close friendships, something which Wayne describes as common in the refereeing community. So close are they now, that when Wayne married Polly a few years ago, Nigel Owens sang 'How great thou art' in the chapel at the wedding ceremony. Polly, by the way, is also from the Forest of Dean, sharing that rugby and brass band culture (she was a cornet player). Together they have a 16-month-old daughter, Juno.

That World Rugby Sevens necessitated four weeks away, so being self-employed was certainly a help. He could manage his time reasonably well. However, in 2006, he got appointed as a professional referee so, from that point, rugby had to take first call. Nonetheless he continued to practise a couple of days a week. He was involved in bribery and corruption cases and developed a special interest in the area. When new regulations were introduced in the UK, they allowed barristers to form new groupings and, where appropriate, limited companies. The Bribery Act was enacted on July 1, 2011, and Wayne and a group of other barristers decided to form Fulcrum Chambers, specialising in bribery and corruption issues. The Head of Chambers is David Huw Williams QC who was instructed by the UK Serious Fraud Office in the BAE Systems inquiry (the Saudi arms deal). Based on the 25th floor of The Shard building in central London, it is a limited company, and provides advice to multinational corporations on the structure of their investigatory and administrative processes. If a firm is being investigated, Fulcrum Chambers can take over

acting on that firm's behalf with the investigating body. Fulcrum Chambers includes solicitors and corporate investigators as well as barristers, and this allows Wayne to have great cover in terms of his time commitments. "It has worked out very well for us," he says. "We do mainly corporate work and advise companies that are under investigation. It fits very well with refereeing as I can do plenty of work while on a plane or in a hotel."

The routine

Wayne trains every Monday and Tuesday at Twickenham with the English referees. The two days include serious fitness work and a great deal of time in assessment and analysis. Typically on a Monday, Wayne will spend time analysing his weekend performance with his own refereeing coach/mentor, and on Tuesdays there is an assessment session, with the group of referees analysing issues in each other's games. Wayne says these sessions are very intense and that he will spend hours watching scrums and other technical aspects of the game. The referees also have rugby coaches and players (especially former props) join them for discussions of the playing and refereeing of the game. Interestingly, there is quite a deal of cross-code communication, certainly between rugby, football and cricket, in England. Through that work, he has become good friends with the football referee Howard Webb. Every weekend there is a game and normally that involves travel on a Friday. That leaves him Wednesday and Thursday for the office. He is always there on a Wednesday and can be there or out at meetings on a Thursday. Given that he and Polly have Juno as well, it sounds like it's all a bit hectic. However, he says he absolutely loves it and given the excitement with which he spoke about refereeing in the forthcoming Six Nations ("I've got Wales vs France in the Millennium Stadium on a Friday night – I can't wait"), it's easy to believe him.

Small margins

However, the criticism referees get in every sport can be overwhelming. How does he cope with that? "Criticism upsets you. I deal with it by trusting the RFU group that I work with." That group includes coaches, analysts and sports psychologists. While it seems that this process might in itself be harsh, he trusts it to become a better referee. It also helps that he is not a big press reader and is not on digital or social media at all. He is, though, a fan of the use of technology in the game. As he says: "It is about getting the big decisions right. We shouldn't leave it up to chance, but don't have to review everything".
Is there any benefit or crossover from being a referee and a barrister? "Yes, in rugby we are extremely analytical of our performances. We get better by being honest about the need to constantly do better. And small margins can make the difference between a good performance and a great performance. That approach can help in anything you do, including the law."

Wayne Barnes shorts

His favourite game

Getting to referee the Lions vs Orange Free State in 2009 is a highlight for Wayne. He says he was a huge fan of the Lions growing up. "The Lions selected a very strong side and it was almost a test. This was a very special game." How did he remain objective? "It's about the right decision not the colour of the jersey."

Backchat

Not long after appointment to the national panel in England, he had to referee Leicester including Martin Johnson – an intimidating prospect even for seasoned referees. Early in the game, Johnson didn't retreat when the opposition took a quick tap penalty and took out the runner within a metre leaving Barnes with no choice but to produce a yellow card. As he trudged away, Johnson mumbled: "I suppose you might have got that one right!"

His greatest mistake

His greatest error happened while still a very young referee and it was the result of having the red and yellow cards in the wrong pocket. He remembers enquiring of the captain as to why the hooker he thought he had sin binned hadn't come back on? "Because you sent him off ref!" came the reply.

The biggest cheer

He says the biggest cheer he ever got was when Ian Keatley kicked the ball with some force directly into his face during a Munster vs Racing Metro game in Thomond Park three years ago. He was, he says, very dazed for several minutes, and even the two team physios were laughing. He can remember the next penalty was definitely against Munster!

Photograph: Sportsfile©2016.

Pay for referees

"Well it's not as much as for barristers. We don't do it for the money; we do it to be involved. It shouldn't be as much as the players because they put their bodies on the line."

On shenanigans in the scrums

"I thought the scrums at the World Cup were great contests. They were legal, straight and at good heights. We (referees) spend a lot of time looking at scrums with experts. After games we get feedback from former props and that's always good."

On Irish players

"Players always challenge you: Paul O'Connell was very good at it. Paul O'Connell, Brian O'Driscoll, Ronan O'Gara: it was a joy to be on a pitch with these players."

Does he ever play?

Once a year, he hosts the Wayne Barnes XV vs the Bream All Stars. It's a charity match in his home village in aid of breast cancer because his wife Polly's mum died from the disease. It takes place in May and, inevitably, every year, an early hospital ball will come his way.

Rate of risk and return

A recent Court of Appeal judgment has significant implications for future compensation awards.

Sara Moorhead SC
Claire Hogan BL

On November 5, 2015, the Court of Appeal delivered an important judgment in *Russell v HSE*.[1] Gill Russell sustained catastrophic injuries at the time of his birth in July 2006 due to the admitted negligence of the defendants. He requires 24-hour care for the rest of his life, the expectancy of which is 45 years.

The appeal centred on two main issues. First, the defendants appealed the ruling on the appropriate real rate of return that could be obtained by the plaintiff in investing his lump sum. Cross J. in the High Court had ruled that this was 1.5% per annum on the investment of his award.[2] Second, the Court took the opportunity to lament the lack of periodic payment orders, and press the Oireachtas for their urgent introduction. The two issues of real rate of return and periodic payment orders are interdependent. Indeed, the overwhelming tenor of the judgment is that in the absence of periodic payment orders, adjustment of the real rate of return is equivalent to applying a sticking plaster to a terminally ill patient.

Reduction in the real rate of return

The real rate of return is the return that a plaintiff can obtain on investment of a lump sum award. It translates to a discount rate applied to the sum, and aims to avoid over-compensation of the plaintiff.

Since the case of *Boyne v Dublin Bus*,[3] the courts in this jurisdiction have assumed that an injured plaintiff will obtain a real rate of return of 3%. However, in setting a lower rate, Cross J. decided to break with orthodoxy, and the Court of Appeal affirmed his decision. The stakes were high, despite these apparently trivial increases in percentage points. In this case, the new rate resulted in an award for special damages of €13 million, whereas had the old rate been used, it would have been approximately €9 million.

On behalf of the Court of Appeal, Irvine J. highlighted the delicate nature of its task in this case:

"The interest rate selected is critical in that the objective of the exercise is to decide upon a lump sum which, when invested, will be sufficient to allow the plaintiff, by drawing down both interest and capital, to have exactly what has been determined by the court will be required to meet his needs for the period of his agreed life expectancy, but no more."[4]

The real rate of return is the return that a plaintiff can obtain on investment of a lump sum award. It translates to a discount rate applied to the sum, and aims to avoid over-compensation of the plaintiff.

100% compensation rule

Starting from first principles, the Court stressed that calculation of future financial loss must be done on a 100% basis, regardless of the economic consequences that the award may have on a defendant, on the insurance industry or on public finances. The Court was critical of the appellant's resort to public policy arguments. While the appellant did not dispute the principle of 100% compensation, it was noted that its submissions "include reference to the likely effect of increased awards on public policy, the insurance industry, the State's finances, the defendant's constitutional rights to private property and the principle of proportionality".[5] However, it was acknowledged that over-compensation is to be avoided also.

The Court stressed that the role of the trial judge must centre upon ensuring that each distinct element of the award is calculated as accurately as possible. After this, the trial judge has no entitlement to increase or modify that figure "on account of his or her own subjective assessment that the intended award seems unduly large".[6]

Injured plaintiff is not an ordinary "prudent investor"

Considerable reliance was placed on the House of Lords decision in *Wells v Wells*,[7] where it was held that an injured plaintiff was not in the position of an ordinary prudent investor, and was entitled to pursue an investment strategy that would afford greater security and certainty, and that would best be achieved by investment in Index-Linked Government Stock (ILGS).

In *Boyne*, Finnegan P. had proceeded upon the assumption that the lump sum would likely be invested in a mixed portfolio of equities and gilts.[8] He noted that there were no securities available within this jurisdiction equivalent to the ILGS that had been central to the decision in *Wells*. The Court of Appeal remarked that a rather "one size fits all" approach had applied since the *Boyne* decision.[9]

It was noted in the High Court in *Russell* that the Bank of England pension fund was invested in ILGS. Cross J. was of the view that the plaintiff's requirement for security was far greater than that of the staff of the Bank of England, and felt the defendant had failed to explain why ILGS should be considered an excessively cautious or expensive approach to securing his future essential care needs. Cross J. concluded that the plaintiff should be entitled to invest in the "safest possible portfolio, whether of ILGS or in a mixed fund with substantially less equities".[10]

The Court of Appeal agreed with the High Court that the plaintiff was entitled to have his damages calculated on the basis that he should be entitled to pursue the most risk-averse investment reasonably available to meet his needs.

Irvine J. underlined the stark contrast between plaintiffs and other investors:

"The catastrophically injured plaintiff who needs to replace their lost income or to provide for their future care is simply not in the same position as the ordinary investor who has an income and has surplus funds to invest."[11]

Irrelevance of probable investment strategy

The Court held that there was no authority to support the proposition that it should decide upon the level of the award by reference to what the plaintiff might do with it in terms of investment or expenditure. The Court colourfully observed that plaintiffs can be sensible or foolhardy, but that their conduct is irrelevant:

"Of course, many plaintiffs who recover large awards of damages take professional advice and invest accordingly. However, a plaintiff is equally entitled to take their award to Las Vegas or place it on a horse in the Grand National in the hope that they may enhance it".[12]

The appellant argued that the High Court erred in determining the multiplier by reference to a safe type of investment, namely ILGS, without evidence that this was the approach that would *likely* be pursued. The Court rejected this argument.

The court also rejected the argument that the trial judge was required to have regard to the fact that, as a matter of probability, the plaintiff would remain in wardship and that his funds would thus remain under the control of the Court's Investment Service, which had historically achieved a 3% real rate of return by investing the awards of those under its care, and who were in a similar position to the plaintiff, in mixed portfolios of assets that included a high percentage of equities.[13]

The Court stressed that the role of the trial judge must centre upon ensuring that each distinct element of the award is calculated as accurately as possible. After this, the trial judge has no entitlement to increase or modify that figure.

Expert evidence on rates of return

While no ILGS are available in this jurisdiction, such as were available in the UK at the time of the decision in *Wells*, such securities can be purchased in Germany and France, and also in the UK and the USA.

The Court of Appeal reviewed the complicated economic evidence on potential devaluation and loss associated with government securities, such as currency risk and the risk of sovereign default. It was satisfied that the evidence supported the High Court's conclusion that a prudent investor in the plaintiff's position, seeking the most risk-averse investment strategy to protect his award, would best achieve that objective by investing in ILGS with varying dates of maturity.[14]

Furthermore, there was evidence to support the calculation of 1.5% as the real rate of return based upon investment in ILGS.[15]

The Court also agreed with the analysis of the High Court on the relevance of wage inflation. The expert evidence was to the effect that wages of carers were likely to outstrip the inflation protection afforded by ILGS over the period of the plaintiff's loss, and thus an adjustment in the real rate of return of 0.5% was warranted.

In conclusion, the Court held that the discount rate to be used for the purposes of calculating all of the plaintiff's outstanding claims for future pecuniary loss was 1.5%, with the exception of his claim for future care, where the rate should be reduced by 0.5% to 1% to take account of wage inflation.

Periodic payment orders

The Court of Appeal described as a "major structural flaw" the requirement placed on courts to assess, on a once-off basis, the lump sum required to compensate a plaintiff with lifelong injuries for all of their future pecuniary loss.[16] The core of the problem is as follows:

"The system will prove itself enormously wasteful should Gill not achieve his anticipated life expectancy, as in such circumstances, he will have been over compensated. Regrettably, the converse scenario will also produce an

injustice in that, if he outlives the agreed life expectancy, he will run out of money in the course of his lifetime, assuming that the annual sum awarded in respect of his care is spent each year. The greater the inaccuracy of the agreed predicted life expectancy, the greater the potential injustice".[17]

Irvine J. described the current law as "inherently fallible", "unjust" and also "grossly outdated" by reference to the approach in other jurisdictions.[18] The Court somewhat wearily rehearsed the reports going back decades, which advocated a move to periodic payment orders.[19]
In May 2015, a general scheme of a Civil Liability (Amendment) Bill 2015 designed to provide for a periodic payment regime was published.[20]
However, the pace of progress has been glacial. Indeed, in October 2012, the *Russell* proceedings were adjourned for two years on the basis of an agreed interim payment in the hope that the relevant legislation would be enacted – a hope that was not realised.
While the Court was "mindful of the doctrine of the separation of powers", it was trenchant in calling for the Oireachtas "to bring to an end, by legislative reform, the potentially unjust manner in which the court is presently required to assess damages for future pecuniary loss in catastrophic injury cases".[21]

Consequences of decision

The consequences of this decision are significant in monetary terms. The case is under appeal to the Supreme Court and it will be interesting to see what view will be taken.
Irvine J. was at pains to emphasise the irrelevance of public policy as a consideration for the Court. She stated as follows:

"It is thus of vital importance to state, in no uncertain terms, that it is mandatory for the court to approach its calculation of future pecuniary loss on a 100% basis regardless of the economic consequences that the resultant award may have on the defendant, on the insurance industry or on the public finances. It is acknowledged that it is equally important that the sum awarded does not over compensate the plaintiff and that the defendant is given every opportunity to contest each integral component of the final award. Public policy has no part to play in the assessment of damages of this nature. If large awards in respect of claims of this nature have an adverse effect on insurance premiums or place pressure on the pockets of State defendants, that is not something that the court can take into account and, as a result, in some way moderate or reduce its award. The damages so awarded are, after all, destined to do no more than restore a plaintiff in financial terms to as close a position as they would have enjoyed in terms of wealth and independence had they not been the unwitting victim of the defendant's wrongdoing."[22]

This view of the Court of Appeal would appear to be somewhat at variance with the view taken by the Supreme Court in *Kearney v McQuillan*.[23] In that case, the plaintiff had been awarded the sum of €450,000 in respect of general damages for a symphysiotomy procedure. Liability and quantum were at issue in the appeal but the primary concern in the case was in respect of quantum and the cap on general damages. The Court reduced the general damages in the case from €450,000 to €325,000. In so doing, MacMenamin J. stated:

"An award of damages must be fair to both the plaintiff and defendant. It must be proportionate to social conditions, bearing in mind the common good. It should logically be situated within the legal scheme of awards made for other personal injuries. All these elements fall to be "balanced weighed and determined". (see *M.N. v. S.M.* p. 474; [2005] I.R. 474; see also *Sinnott v. Quinnsworth [1984] ILRM 523* O'Higgins C.J. at p. 532.) It is important in this context to recollect, particularly at this time, those criteria of social conditions and common good. These are not just empty words. The resources of society are finite. Each award of damages for personal injuries in the courts may be reflected in increased insurance costs, taxation or, perhaps, a reduction in some social service. We are living in a time where ordinary people often find it difficult to make ends meet. The weight to be given to each of these factors must always be a consideration in the balance".[24]

> *"The catastrophically injured plaintiff who needs to replace their lost income or to provide for their future care is simply not in the same position as the ordinary investor who has an income and has surplus funds to invest."*

The relevant passages in each judgment show that there is a marked divergence between the attitude taken by the Court of Appeal and that of the Supreme Court.
It is not clear whether the decision will apply to all plaintiffs or just catastrophically injured ones who need a very low-risk strategy. However, Irvine J. refers to "most injured plaintiffs" in a non-distinguishing way, which suggests that the former scenario is more likely:

"The catastrophically injured plaintiff who needs to replace their lost income or to provide for their future care is simply not in the same position as the ordinary investor who has an income and has surplus funds to invest. The latter is clearly in a position to absorb greater risk. They are not dependant on such monies to meet their basic day-to-day requirements and indeed may not need to access these surplus funds for many years. Accordingly, they might prudently be in a position to invest in equities given their ability, should the market fall, to hold onto their investment and wait until the market recovers before selling. Even if they end up losing on their investment the outcome is not catastrophic. However, most injured plaintiffs enjoy no such comfort. Almost inevitably they are dependant upon their award of damages to meet their needs as they arise on a day-to-day basis."[25]

Another aspect of this decision that falls to be determined is the extent to which it is confined to future care costs. Irvine J. makes it clear that while it was not argued before her, she would favour a view that loss of earnings would also attract a lower real rate of return:
"For the purposes of clarity it is perhaps of importance for this court to

state that we do not accept the *albeit obiter* view expressed by the High Court judge in the present case insofar as he indicated that a plaintiff with a claim for future pecuniary loss confined to loss of earnings might possibly be treated as less risk averse than a plaintiff who has a claim for the cost of future care.

Another aspect of this decision that falls to be determined is the extent to which it is confined to future care costs. Irvine J. makes it clear that while it was not argued before her, she would favour a view that loss of earnings would also attract a lower real rate of return.

There appear to be a number of arguments against such a proposition. It would seem to admit of the adoption of a potentially higher real rate of return in the loss of earnings claim on the assumption that the plaintiff can necessarily absorb a greater risk when investing their award to secure their future income. While of course there may be the rare case where a particular plaintiff may not need their earnings to survive on a day-to-day basis and might thus be in a position to take risks in terms of the investment of their award, most plaintiffs do not fall into that category. A plaintiff who will never be in a position to work again and is dependent upon the investment of his lump sum for their own support and that of his family may be entitled to be treated similarly in terms of the investment risk he should have to absorb to the plaintiff who needs to cover the cost of their future nursing care on an annual basis. As this did not arise on the facts herein we consider that a decision on this issue should be left over to an appeal where it does so arise".[26]

In effect, the entire thrust of the judgment is to the effect that a plaintiff should not be obliged to speculate.
It will be important to determine to what extent the judgment is universally applied in terms of the real rate of return. The instructions practitioners should give to actuaries depend on this point. The tenor of the judgment would appear to be that all plaintiffs should not have to take risk and, therefore, that the courts will favour a cautious approach to the real rate of return.

There is no doubt that the judgment is profound in its effect on defendants, both State and private. The introduction of periodic payments would appear to be more urgent than ever. The judgment makes it clear that it is difficult to avoid injustice in the current regime. In this regard, the Court of Appeal noted:

"It is highly regrettable that, regardless of the outcome of this appeal, it is absolutely certain that whatever award is made will visit an injustice on one or other party. The only issue will be extent of that injustice".[27]

The Supreme Court decision is awaited with interest.

References

1. [2015] IECA 236.
2. [2014] IEHC 590.
3. [2003] 4 I.R. 47.
4. [2015] IECA 236 at [80].
5. *Ibid* at [63].
6. *Ibid* at [70].
7. [1999] 1 A.C. 345.
8. He decided that a prudent investor would invest 70% of their award in equities and the remaining 30% in gilts.
9. [2015] IECA 236 at [25].
10. [2014] IEHC 590 at [50].
11. [2015] IECA 236 at [85].
12. *Ibid* at [90].
13. *Ibid* at [94].
14. *Ibid* at [132].
15. Noting that Cross J. held that government securities were to be preferred over equities as the most risk-averse investment for this plaintiff, the Court of Appeal declared it to be unnecessary to deal to any great extent with the High Court's conclusion that if for some reason those in charge of Gill's investment strategy were unable to conveniently invest his entire fund in ILGS, he might nonetheless be expected to achieve a real rate of return of 1.5% on his fund by taking 50% of the risk that might be taken by the ordinary investor and by investing in a more conservative mixed portfolio. The Court nonetheless made some comments demonstrating support for government securities, mentioning "unnecessary investment risks" and describing it as "difficult to see a valid basis for this alternative approach to assessing the discount rate". *Ibid* at [147] – [148].
16. *Ibid* at [3].
17. *Ibid* at [4].
18. *Ibid* at [5].
19. For example, the 1972 interim report of the Committee of Inquiry into the Insurance Industry, the 1996 Law Reform Commission *Report on Personal Injuries: Periodical Payments and Structured Settlements* (LRC 54-1996), and the report of the Working Group on Medical Negligence and Periodic Payments chaired by Quirke J., and published on October 29, 2010.
20. Compensation by periodic payment order has been in place in the UK since 2003.
21. [2015] IECA 236 at [13].
22. *Ibid* at [64]. See also [40] & [157].
23. [2012] IESC 43.
24. *Ibid* at [28].
25. [2015] IECA 236 at [80].
26. *Ibid* at [89].
27. *Ibid* at [3].

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

Volume 21 Number 1
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A directory of legislation, articles and acquisitions received in the Law Library from November 11, 2015, to January 18, 2016.
Judgment information supplied by The Incorporated Council of Law Reporting.
Edited by Deirdre Lambe and Vanessa Curley, Law Library, Four Courts.

ADMINISTRATIVE LAW

Acts

National Cultural Institutions (National Concert Hall) Act 2015 – Act No. 44 of 2015 – signed on December 10, 2015

AGENCY

Library acquisitions

Singleton, S. Commercial agency agreements: law and practice – N25

ANIMALS

Statutory Instruments

European Union (birds and natural habitats) (sea-fisheries) (amendment) regulations 2014 – (DIR/2009-147, DIR/92-43 [DIR/1992-43]) – SI 565/2014

European Union (control of avian influenza) regulations 2006 (amendment) (no. 2) regulations 2014 – (DIR/2005-94) – SI 570/2014

ARBITRATION

Library acquisitions

Joseph, D. Jurisdiction and arbitration agreements and their enforcement – N398

St. John Sutton, D., Gill, J., Gearing, M. Russell on arbitration – N398

AVIATION

Statutory Instruments

Aviation regulation act 2001 (levy no. 15) regulations 2014 – SI 563/2014

BANKING

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Personal injuries

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Asylum

Application for leave to seek judicial review – Telescoped hearing – Well founded fear of persecution – Adverse credibility finding – Internal relocation – Availability of state protection – Female genital mutilation – Whether decision of tribunal member involved necessary careful enquiry – Whether inconsistent and incoherent approach adopted by tribunal member – *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701; *PD v Minister for Justice* [2015] IEHC 111, (Unrep, Mac Eochaidh J, 20/2/2015); *VFAA v Minister for Justice* [2010] IEHC 117, (Unrep, Birmingham J, 20/4/2010) and *KD (Nigeria) v Refugee Appeals Tribunal* [2013] IEHC 481, (Unrep, Clark J, 1/11/2013) applied – *EI v Minister for Justice* [2014] IEHC 27, (Unrep, Mac Eochaidh J, 30/1/2014); *AMN v Refugee Appeals Tribunal* [2012] IEHC 393, (Unrep, McDermott J, 3/8/2012); *IR v Minister for Justice* [2009] IEHC 353 (Unrep, Cooke J, 24/7/2009; *RO v Minister for Justice* [2012] IEHC 573, (Unrep, Mac Eochaidh J, 20/12/2012); *PD v Minister for Justice* [2015] IEHC 111, (Unrep, Mac Eochaidh J, 20/2/2015) and *OAYA v Refugee Appeals Tribunal* [2011] IEHC 373, (Unrep, Hogan J, 7/10/2011) considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 7 – Leave granted; *certiorari* granted (2010/757JR – Faherty J – 19/5/2015) [2015] IEHC 341
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INSURANCE

Acts

Health Insurance (Amendment) Act 2015 – Act No. 54 of 2015 – Signed on December 24, 2015

Statutory Instruments

Health insurance act 1994 (information returns) (amendment) regulations 2015 – SI 608/2015
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JUDICIAL REVIEW

Residential institutions redress

Finding that applicant not subjected to abuse – Appeal to Residential Institutions Redress Review Committee – Whether treatment constituted discipline or abuse – Whether strip searching intrusive and demeaning – Whether respondent erred in law in interpretation of definition of "abuse" – Whether wide and liberal interpretation ought to be given to remedial statute – Whether decision of Committee unreasonable or irrational – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 and *JMcE v Residential Institutions Redress Board* [2014] IEHC 315, (Unrep, Moriarty J, 20/6/2014) applied – *Ryan v AG* [1965] 1 IR 294; *The State (C) v Frawley* [1976] 1 IR 365; *State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 642; *Kennedy v Ireland* [1987] 1 IR 587; *People (DPP) v McFadden* [2003] 2 IR 105; *AG v Residential Institutions Redress Board* [2012] IEHC 492, (Unrep, Hogan J, 6/11/2012) and *Wiktorko v Poland* (2013) 56 EHRR 30 – Mental Treatment Regulations 1961 (SI 261/1961) – Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI 551/2006) – Mental Health Act 2001 (No 25) – Residential Institutions Redress Act 2002 (No 13), ss 1, 7 and 13 – European Convention on Human Rights and Fundamental Freedoms 1950, art 3 – Relief refused (2014/295JR – O'Malley J – 19/5/2015) [2015] IEHC 335
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Ní Ghadhra, C. The paradox of the rule of law: functionally neutral or dangerously aspirational? *Irish Law Times* 2015; (33) (19): 288.

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LANDLORD AND TENANT

Tenancy agreement

Appeal from Circuit Court – Appropriate rent – Commencement of lease – Terms of lease – Readiness for occupation after refurbishment work – Duty to minimise loss – Strict definition of repairing covenants – Costs – Appropriate rent fixed; terms of lease clarified; costs order upheld (2014/18CAT and LNT2/06 – White J – 14/5/2015) [2015] IEHC 292
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LEGAL CAPACITY

Acts

Assisted Decision-Making (Capacity) Act 2015 – Act No. 64 of 2015 – Signed on December 30, 2015

LEGAL SERVICES

Acts

Legal Services Regulation Act 2015 – Act No. 65 of 2015 – Signed on December 30, 2015

LOCAL GOVERNMENT

Library acquisitions

Morrell, J., Foster, R. Local authority liability – M361

Acts

Dublin Docklands Development Authority (Dissolution) Act 2015 – Act No. 55 of 2015 – Signed on December 24, 2015

MARITIME LAW

Acts

Harbours Act 2015 – Act No. 61 of 2015 – Signed on December 25, 2015

MEDICAL LAW

Articles

MacDaid, C. Blood brothers: is it time to change the rules in blood donation? Medico-Legal Journal of Ireland 2015; 21 (2): 78.
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MENTAL HEALTH

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Statutory Instruments

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Library acquisitions

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PERSONAL INSOLVENCY & BANKRUPTCY

Acts

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Statutory Instruments

Personal insolvency (amendment) act 2015 (commencement) (no. 2) order 2015 – SI 514/2015
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PLANNING & ENVIRONMENTAL LAW

Library acquisitions

Thomson Round Hall, Flanagan, D., Flynn, T., Dodd, S., Galligan, E. Spence, D., Simons, G., Browne, D. Round Hall planning and environmental law conference 2015 – N96.4.C5

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POWER OF ATTORNEY

Registration

Enduring power of attorney – Capacity of donor – Validity of power of attorney – Certification of capacity by medical professional – Burden of proof – Whether burden of proving invalidity of instrument lay with objectors – Whether donor suffering from dementia at time of execution – Whether requirement on medical professional to carry out independent medical assessment of donor – Whether solicitor for attorney followed best practice – Whether contemporaneous or near contemporaneous medical examination required – Whether court could apply functional test of capacity – Whether on balance of probabilities donor had sufficient cognitive capacity to understand nature and effect of instrument purported to be created – Whether nature and import of enduring power of attorney properly explained to or understood by donor – *Re W (Enduring Power of Attorney)* [2001] Ch 609 approved – *In re Glynn (deceased)* [1990] 2 IR 326; *O'Donnell v O'Donnell* (Unrep, Kelly J, 24/3/1990); *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79; *Fitzpatrick v FK* [2008] IEHC 104, [2009] 2 IR 7; *Scally v Rhatigan* [2010] IEHC 475, [2011] 1 IR 639; *AA v FF* [2015] IEHC 142, (Unrep, Baker J, 20/2/2015); *Banks v Goodfellow* (1870) LR 5 QB 549 and *Key v Key* [2010] EWHC 408 Ch, [2010] 1 WLR 2020 considered – Enduring Powers of Attorney Regulations 1996 (SI 196/1996) – Powers of Attorney Act 1996 (No 12), s 10 – Enduring Powers of Attorney Act 1985 (England and Wales) – Registration refused (Baker J – 20/5/15) [2015] IEHC 308

In re an application for registration of an enduring power of attorney of SCR dated 1st November 2013

PRACTICE AND PROCEDURE

Amendment of pleadings

Statement of claim – Claim to invalidate securities for loans – Illegality of underlying loans – Market abuse regulation – Whether amendment of pleadings ought to be allowed – Whether substance of amendment *res judicata* – Whether plaintiffs delayed in seeking amendment – Whether amendment constituted abuse of process – Whether arguments sought to be made ought to have been raised at outset or earlier stage in proceedings – Whether amendment would cause prejudice – *Croke v Waterford Crystal Ltd* [2004] IESC 97, [2005] 2 IR 383; *Clarke v O'Gorman* [2014] IESC 72, (Unrep, SC, 30/7/2014); *Morrissey v Irish Bank Resolution Corporation Ltd (in special liquidation)* [2015] IEHC 200, (Unrep, Costello J, 11/3/2015); *Re Vantive Holdings* [2009] IESC 69, [2010] 2 IR 118; *Henderson v Henderson* (1843) 3 Hare 100; *Scott v Browne Doering McNab & Co* [1892] 2 QB 724 and *Barrow v Bankside Ltd* [1996] 1 WLR 257 considered – Market Abuse (Directive 2003/6/EC) Regulations 2005 (SI 342/2005) – Rules of the Superior Courts 1986 (SI 15/1986), O 28, r 1 – Companies Act 1963 (No 33), s 60 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50) – Application refused (2011/4336P – Haughton J – 20/5/2015) [2015] IEHC 313

Quinn v Irish Bank Resolution Corporation Limited (in special liquidation)

Delay

Motion to strike out part of proceedings seeking to challenge planning legislation – Inadmissible by reason of delay – Collateral challenge – Substituted consent – Conformity with European Union law – Whether collateral challenge – Whether inadmissible by reason of delay – *Commission v Ireland* (Case C-215/06), [2008] ECR I-04911 considered – Planning and Development Act 2000 (No 30), ss 52 and 261 – Relief sought refused (2015/2JR – Hedigan J – 15/5/2015) [2015] IEHC 285

Sweetman v An Bord Pleanála

Discovery

Further and better discovery – Privilege – Dominant purpose – Documents prepared in contemplation of litigation – Whether documents prepared for purpose of engaging with regulatory and investigative processes – Whether defendants entitled to assert privilege – *Ahern v Mahon* [2008] IEHC 119, [2008] 4 IR 704 – Application refused (2011/4336P – McGovern J – 19/5/2015) [2015] IEHC 315

Quinn v Irish Bank Resolution Corporation Limited (in special liquidation)

Discovery

Application for discovery – Fraud – Falsification of signature – Defence of power of attorney – Relevant – Necessary for disposing fairly of cause or for saving of costs – Possession, power or procurement – Discovery as process of trust – Discretion of court – Unlimited in time – Excessively vague – Rules of the Superior Courts 1986 (SI 15/1986), O 31, r 12 – Order for discovery (2014/5751P and 2014/142COM – Costello J – 13/5/2015) [2015] IEHC 281

Wheelock v O'Leary

Particulars

Claim against company auditors regarding preparation of financial statements – Technical provisions by insurer for future claims – Whether defendant entitled to further and better particulars arising out of pleadings – Whether defendant entitled to further and better particulars in order to know case being made – *Mahon v Celbridge Spinning Co Ltd* [1967] IR 1; *McGee v Reilly* [1996] 2 IR 229; *Moorview v First Active plc* [2005] IEHC 329, (Unrep, Clarke J, 20/10/2005); *Playboy Enterprises International Incorporated v Entertainment Media Network Works Ltd* [2015] IEHC 102, (Unrep, Baker J, 19/2/2015); *Cooney v Browne* [1985] IR 185, *Thema International Fund plc v HSBC Institutional Trust Services (Ireland)* [2010] IEHC 19, (Unrep, Clarke J, 26/1/2010); *Quinn Insurance Ltd v Tribune Newspapers plc* [2009] IEHC 229, (Unrep, Dunne J, 13/5/2009); *Burke v Associated Newspapers (Ireland) Ltd* [2010] IEHC 477, (Unrep, Hogan J, 10/12/2010) and *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 19 – Relief granted (2012/1540P – Costello J – 19/5/2015) [2015] IEHC 303

Quinn Insurance Limited (under administration) v Pricewaterhousecoopers (a firm)

Security for costs

Application for security for costs – *Prima facie* defence – Ability to pay costs if unsuccessful – Specific circumstances – Discretion of court – Only significant asset of company property subject of proceedings – Whether *prima facie* defence – Whether plaintiff able to pay costs if moving party successful – *Usk and District Residents Association Ltd v The Environmental Protection Agency* [2006] IESC 1, (Unrep, Supreme Court, 13/1/2006) and *Interfinance Group Limited v KPMG Peat Marwickt/a KPMG Management Consulting* [1998] IEHC 217 (Unrep, Morris P, 29/6/1998) applied – Rules of the Superior Courts 1986 (SI 15/1986), O 29, r 1 – Companies Act 1963 (No 33), s 390 – Order for security for costs made (2014/2827P – Keane J – 15/5/2015) [2015] IEHC 291

Property & Investment Company (SE) Ltd v Maloney

Stay

Mental health – Detention – Personal rights under Constitution – Inherent jurisdiction of High Court to vindicate personal rights under Constitution – Care plan – Appeal to determine policy obligations of State to vulnerable adults – Application for stay pending appeal – Principle in determining whether to grant stay – *Bona fides* appeal – Balance of convenience – Stay on terms – Paramount factor of best welfare interests of vulnerable adult – Whether grounds of appeal *bona fides* – Whether balance of convenience favoured stay – *National Irish Bank v Mc Fadden* [2010] IEHC 119, (Unrep, Clarke J, 27/4/2010) followed – *Irish Press v Ingersoll Irish Publications Limited* [1995] 1 ILRM 117 considered – Constitution of Ireland 1937, Art 40.3 – Stay refused (2015/459P – O'Hanlon J – 14/5/2015) [2015] IEHC 526

Health Service Executive v KW

Summary summons

Liquidated debt – Loan agreement – Interim judgment – Jurisdiction – *Bona fide* defence – Service of summons – Substituted service – Unconditional appearance – Duress – Right to fair hearing – Lack of evidence of relationship of deponents to plaintiff – Technical inaccuracy in affidavit – Proof of loan agreement under Bankers' Books Evidence Acts – Privity of contract – Compliance with statutory code – Solvency of plaintiff – Securitisation of loan – Whether *bona fide* defence – *Freeman and Anor v Bank of Scotland plc and Anor* [2014] IEHC 284, (Unrep, McGovern J, 29/5/2014); *Harrold v Nua Mortgages Ltd* [2015] IEHC 15, (Unrep, Kearns P, 16/1/2015) and *Kearney v KBC Bank Ireland plc and others* [2014] IEHC 260, (Unrep, Birmingham J, 16/5/2014)

followed – Direction that copies of securitisation documentation be put on affidavit and defendants given opportunity to consider; case adjourned; finding that no *bona fide* defence apart from any possible defence under this heading (2011/2142S – Haughton J – 12/5/2015) [2015] IEHC 378
Permanent TSB v McMahon

Summons

Renewal – Application to set aside renewal of summons – Whether good reason for renewal – Whether interests of justice favouring renewal – Whether balance of prejudice lay in favour of renewal – Whether defendant aware of existence of proceedings prior to service – Whether renewal close to end of limitation period valid – Whether failure to serve renewed summons fatal to subsequent renewal – *Chambers v Kenefick* [2005] IEHC 402, [2007] 3 IR 526 and *Bingham v Crowley* [2008] IEHC 453, (Unrep, Feeney J, 17/12/2008) applied – *Baulk v Irish National Insurance Company Ltd* [1969] IR 66; *O'Brien v Fahy* (Unrep, Barrington J, 21/3/1997); *Roche v Clayton* [1998] 1 I.R. 596; *Martin v Moy Contractors Ltd* (Unrep, SC, 11/2/1999); *Moloney v Lacey Building and Civil Engineering Ltd* [2010] IEHC 8, [2010] 4 IR 417 and *Mangan v Dockery* [2014] IEHC 477, (Unrep, Costello J, 23/10/2014) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 8, rr 1 and 2, O 122, r 7 – Application to set aside renewal granted in one case and refused in two others (2012/11327P, 2012/11328P & 2012/11329P – Moriarty J – 19/5/15) [2015] IEHC 422
Crowe v Kitara Limited; O'Neill v Collen Group Limited; and Gibbons v CPM Architecture

Time limits

Application for extension of time to appeal – Judgment for liquidated sum – *Locus standi* – Consent judgment – Principles to be applied in determining whether to grant extension of time to appeal – *Bona fide* intention to appeal within permitted time – Existence of something like mistake – Arguable ground of appeal – Length of delay – Limited jurisdiction of appellate court – Whether *bona fide* intention to appeal within permitted time – Whether existence of something like mistake – Whether arguable ground of appeal – *Eire Continental Trading Co Ltd v Clonmel Food Ltd* [1955] IR 170 considered – Constitution of Ireland 1937, Art 64 – Rules of the Superior Courts 1986 (SI 15/1986), O 58, r 3(1) – Relief refused (1371/2014 – CA – 15/5/15) [2015] IECA 103
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Naessens, P. The "exquisite dilemma": unsolicited cheques in settlement. *Commercial Law Practitioner* 2015; 22 (10): 256[part I]; *Commercial Law Practitioner* 2015; 22 (11): 267 [part II].

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PRISONS

Acts

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Library acquisitions

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Articles

Keating, A. Setting aside caveats. *Conveyancing and Property Law Journal* 2015; (20) (4): 86.

PUBLIC HEALTH

Library acquisitions

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RECTIFICATION

Library acquisitions

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RESTITUTION

Library acquisitions

Virgo, G. The principles of the law of restitution – N20.2

RETENTION OF TITLE

Library acquisitions

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REVENUE

Statutory Instruments

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ROAD TRAFFIC

Library acquisitions

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SOCIAL WELFARE

Acts

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Statutory Instruments

Social Welfare (Consolidated claims, payment and control) (amendment) (no.8) (assessment of means) regulations 2014 – SI 595/2014
Social welfare (rent allowance) (amendment) (no. 1) regulations 2016 – SI 5/2016

SOLICITORS

Statutory Instruments

The Solicitors Acts 1954 to 2011 (practising certificate 2016) regulations 2015 – SI 577/2015

TAXATION

Library acquisitions

Clarke, G., Lawrance, D., Wilne, A. Clarke's offshore tax planning 2015-2016 – M336.76

TORT

Negligence

Duty of care – Liability for fire – Local authority – Fire caused by person formerly in care of local authority – Provision of assistance to person leaving care on attaining majority – Whether local authority had special relationship with person who caused fire – Whether fire actually caused by unknown third parties – Whether reasonable foreseeability – Whether proximity of relationship – Whether countervailing public policy considerations – Whether just and reasonable to impose duty of care – Whether trial judge correct in imposing duty of care – *Glencar Exploration plc v Mayo County Council (No 2)* [2001] 1 IR 84 applied – *Breslin v Corcoran* [2003] 2 IR 203; *John C Doherty Timber Ltd v Drogheda Harbour Commissioners* [1993] 1 IR 315; *Flanagan v Houlihan* [2011] IEHC 105, [2011] 3 IR 574; *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342; *Smith v Littlewoods Organisation Ltd* [1987] 1 AC 241 and *Bolton v Stone* [1951] AC 850 considered – *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and *Vicar of Writtle v Essex County Council* (1977) LGR 656 distinguished – Childcare Act 1991 (No 17), s 45 – Appeal allowed; proceedings dismissed (2014/15 – CA – 18/5/2015) [2015] IECA 105
Ennis v Child and Family Agency

TRADE UNIONS

Library acquisitions

Kerr, A. The trade union and industrial relations acts – N195.C5

TRANSPORT

Acts

Motor Vehicle (Duties and Licences) Act 2015 – Act No. 41 of 2015 – Signed on December 2, 2015

Statutory Instruments

Córas Iompair Éireann pension scheme for regular wages staff (amendment) scheme (confirmation) (no. 2) order 2015 – SI 476/2015
Córas Iompair Éireann superannuation scheme 1951 (amendment) scheme (confirmation) (no. 2) order 2015 – SI 475/2015
European Communities (interoperability of the rail system) regulations 2011 (amendment) regulations 2015 – (DIR/2008-57, DIR/2014-106) – SI 551/2015

VALUATION

Statutory Instruments

Valuation act 2001 (global valuation) (apportionment) (BT Ireland) order 2015 – SI 487/2015
Valuation act 2001 (global valuation) (apportionment) (Eircom Limited) order 2015 – SI 488/2015
Valuation act 2001 (global valuation) (apportionment) (Gas Networks Ireland) order 2015 – SI 489/2015
Valuation act 2001 (global valuation) (apportionment) (Iarnród Éireann) order 2015 – SI 491/2015
Valuation act 2001 (global valuation) (apportionment) (Meteor) order 2015 – SI 492/2015
Valuation act 2001 (global valuation) (apportionment) (Three Ireland) order 2015 – SI 490/2015
Valuation act 2001 (global valuation) (apportionment) (Vodafone) order 2015 – SI 493/2015

Bills initiated in Dáil Éireann during the period November 11, 2015 – January 15, 2016

[pmb]: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Motor Vehicle (Duties and Licences) Bill 2015 – Bill 103/2015
Vulnerable Persons Bill 2015 – Bill 101/2015 [pmb] – Deputy Mattie McGrath
Gradam an Uachtaráin Bill 2015 – Bill 106/2015 [pmb] – Senator Feargal Quinn
Post and Telecommunications Services (Amendment) Bill 2015 – Bill 107/2015
Rent Certainty and Prevention of Homelessness Bill 2015 – Bill 108/2015 [pmb] – Deputy Dessie Ellis
Houses of the Oireachtas Commission (Amendment) Bill 2015 – Bill 113/2015
Equality in Education Bill 2015 – Bill 114/2015 [pmb] – Deputy Jonathan O'Brien
Equal Participation in Schools Bill 2015 – Bill 115/2015 [pmb] – Deputy Joe Higgins, Deputy Paul Murphy and Deputy Ruth Coppinger
Appropriation Bill 2015 – Bill 116/2015
Electoral (Amendment) (Registration of Political Parties and Groups) Bill 2015 – Bill 117/2015 [pmb] – Deputy Shane Ross
Broadcasting (Amendment) Bill 2015 – Bill 118/2015 [pmb] – Deputy Willie Penrose
Bankruptcy (Amendment) Bill 2015 – Bill 119/2015
Technological Universities Bill 2015 – Bill 121/2015
Land and Conveyancing Law Reform Bill 2015 – Bill 123/2015 [pmb] – Deputy Mattie McGrath
Dying with Dignity Bill 2015 – Bill 125/2015 [pmb] – Deputy John Halligan
Access to Public Services and Banking other than by Electronic Means Bill 2015 – Bill 126/2015 [pmb] – Deputy Michael McNamara
Planning and Development (Amendment) (No.2) Bill 2015 – Bill 127/2015 [pmb] – Deputy Brian Stanley
Industrial Relations (Blacklists) Bill 2015 – Bill 128/2015 [pmb] – Deputy Peadar Tóibín
Health (Pricing and Supply of Medical Goods) (Amendment) Bill 2015 – Bill 129/2015 [pmb] – Deputy Sean Fleming
Prohibition of Hydraulic Fracturing Bill 2015 – Bill 130/2015 [pmb] – Deputy Richard Boyd Barrett
Suicide Prevention Authority Bill 2015 – Bill 131/2015 [pmb] – Deputy Derek Keating
Public Sector Standards Bill 2015 – Bill 132/2015
Planning and Development (Amendment) Bill 2016 – Bill 1/2016
Heritage Bill 2016 – Bill 2/2016
River Shannon Management Agency Bill 2016 – Bill 4/2016 [pmb] – Deputy Gerry Adams and Deputy Brian Stanley
Shannon River Agency Bill 2016 – Bill 5/2016 [pmb] – Deputy Robert Troy
Flood Insurance Bill 2016 – Bill 6/2016 [pmb] – Deputy Michael McGrath

Bills initiated in Seanad Éireann during the period November 11, 2015 – January 15, 2016

International Protection Bill 2015 – Bill 102/2015
Roads (Criminal Activity) (Amendment) Bill 2015 – Bill 104/2015 [pmb] – Deputy Niall Collins
Seanad Electoral (Amendment) Bill 2015 – Bill 105/2015 [pmb] – Senators Diarmuid Wilson and FF Senators
Planning and Development (Amendment) Bill 2015 – Bill 109/2015 [pmb] – Senator Maurice Cummins
Prisons Bill 2015 – Bill 110/2015
Courts Bill 2015 – Bill 111/2015
Public Health (Alcohol) Bill 2015 – Bill 120/2015
Residential Tenancies (Amendment) Bill 2015 – Bill 122/2015 [pmb] – Senator Katherine Zappone
Copyright and Related Rights (Innovation) (Amendment) Bill 2015 – Bill 124/2015 [pmb] – Senator Sean D. Barrett
Road Traffic Bill 2016 – Bill 3/2016

Progress of Bill and Bills amended during the period November 11, 2015 – January 15, 2016

Mental Health (Amendment) Bill 2008 – Bill 36/2008 – Committee Stage – Passed by Dáil Éireann
Equality (Miscellaneous Provisions) Bill 2013 (changed from Employment Equality (Amendment) (No. 2) Bill 2013) – Bill 23/2013 – Committee Stage
Dublin Docklands Development Authority (Dissolution) Bill 2015 – Bill 45/2015 – Report Stage – Passed by Dáil Éireann
Garda Síochána (Policing Authority and Miscellaneous Provisions) Bill 2015 – Bill 47/2015 – Report Stage
Public Transport Bill 2015 – Bill 62/2015 – Committee Stage
Harbours Bill 2015 – Bill 66/2015 – Committee Stage – Report Stage – Passed by Dáil Éireann
Finance (Tax Appeals) Bill 2015 – Bill 71/2015 – Report Stage – Dáil
Criminal Justice (Burglary of Dwellings) Bill 2015 – Bill 76/2015 – Committee Stage
Credit Guarantee (Amendment) Bill 2015 – Bill 77/2015 – Committee Stage
Horse Racing Ireland Bill 2015 – Bill 83/2015 – Committee Stage
Electoral (Amendment) (No.2) Bill 2015 – Bill 87/2015 – Committee Stage – Report Stage
Finance (Miscellaneous Provisions) Bill 2015 – Bill 89/2015 – Report Stage
Financial Emergency Measures in the Public Interest Bill 2015 – Bill 91/2015 – Committee Stage – Report Stage
Finance Bill 2015 – Bill 95/2015 – Committee Stage – Report Stage – Passed by Dáil Éireann
Social Welfare and Pensions Bill 2015 – Bill 98/2015 – Report Stage
Health Insurance (Amendment) Bill 2015 – Bill 100/2015 – Committee Stage
International Protection Bill 2015 – Bill 102/2015 – Committee Stage – Passed by Dáil Éireann
Planning and Development (Amendment) Bill 2015 – Bill 109/2015 – Passed by Dáil Éireann
Prisons Bill 2015 – Bill 110/2015 – Passed by Dáil Éireann
Finance (Local Property Tax) (Amendment) (No. 2) Bill 2015 – Bill 112/2015
Committee Stage – Appropriation Bill 2015 – Bill 116/2015 – Passed by Dáil Éireann
Technological Universities Bill 2015 – Bill 121/2015 – Committee Stage
Legal Services Regulation Bill 2011 – Bill 58/2011 – Committee Stage – Seanad – Report Stage
Residential Tenancies (Amendment) (No. 2) Bill 2012 – Bill 69/2012 – Committee Stage – Report Stage
Assisted Decision-Making (Capacity) Bill 2013 – Bill 83/2013 – Committee Stage – Report Stage
Criminal Law (Sexual Offences) (Amendment) Bill 2014 – Bill 41/2014 – Committee Stage
Medical Practitioners (Amendment) Bill 2014 – Bill 80/2014 – Passed by Seanad Éireann
Climate Action and Low Carbon Development Bill 2015 – Bill 2/2015 – Report Stage
National Cultural Institutions (National Concert Hall) Bill 2015 – Bill 52/2015 – Committee Stage – Report Stage
Harbours Bill 2015 – Bill 66/2015 – Committee Stage
Criminal Law (Sexual Offences) Bill 2015 – Bill 79/2015 – Committee Stage
Finance (Miscellaneous Provisions) Bill 2015 – Bill 89/2015 – Committee Stage
Child Care (Amendment) Bill 2015 – Bill 94/2015 – Committee Stage – Report Stage
Finance Bill 2015 – Bill 95/2015 – Committee Stage – Report Stage
Social Welfare and Pensions Bill 2015 – Bill 98/2015 – Committee Stage – Report Stage
International Protection Bill 2015 – Bill 102/2015 – Committee Stage – Passed by Seanad Éireann
Planning and Development (Amendment) Bill 2015 – Bill 109/2015 – Committee Stage
Prisons Bill 2015 – Bill 110/2015 – Committee Stage
Courts Bill 2015 – Bill 111/2015 – Committee Stage
Finance (Local Property Tax) (Amendment) (No. 2) Bill 2015 – Bill 112/2015 – Committee Stage

For up-to-date information, please check the following websites:

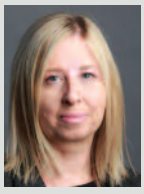
Bills & Legislation – http://www.oireachtas.ie/parliament/

Government Legislation Programme updated September 22, 2015 – http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Cherishing the children?

Council of The Bar of Ireland has made a submission on proposed reforms to the Guardian *ad Litem* system.





Conor Dignam SC
Diane Duggan BL
Natalie McDonnell BL

Section 26 of the Child Care Act 1991 provides that Guardians *ad Litem* are appointed in child care cases to represent the wishes, feelings and interests of the child.

Guardians *ad Litem* are also appointed in High Court cases involving children in secure care. In October 2015, the Department of Children initiated a consultation process regarding key aspects of a reformed Guardian *ad Litem* service.

The above-named authors drafted a response on behalf of The Bar of Ireland. It was not intended to comment on all matters proposed by the Department of Children, but simply those that were relevant insofar as they impacted the administration of justice. These included:

- the appointment of a Guardian *ad Litem* to a child in the context of proceedings pursuant to the Child Care Act 1991, as amended, at the discretion of the Court;
- the status of a Guardian *ad Litem* and the potential risks of diminishing the role from being a party to the proceedings to being a court-appointed expert; and,
- the entitlement of the Guardian *ad Litem* to legal advice and/or representation, including the potential risks of it only being available on an exceptional basis and on application to the Court, and that the Court would decide whether to permit such advice/representation and appoint a solicitor giving directions as to the performance of the duties of the solicitor, including directions as to the instruction of Counsel.

What follows herein is an edited version of those submissions. The full submission is available on the Law Library website at *https://www.lawlibrary.ie/News/reports-and-submissions.aspx*.

Section 26 of the Child Care Act 1991 provides that Guardians ad Litem *are appointed in child care cases to represent the wishes, feelings and interests of the child.*

Introduction

At the heart of these issues is the question of whether a Guardian *ad Litem* is necessary in all cases and whether, in a case in which a Guardian *ad Litem* is necessary, there is an entitlement to legal representation if the Guardian wishes. Significant issues arise in respect of the proper administration of justice in the context of these proposals, as well as considerations as to their compliance with the constitutional, European Convention and international human rights of the child. It is submitted from the outset that there are significant risks that the envisaged measures will breach constitutional and administrative legal principles. In this regard, extreme caution is urged upon the Department of Children and Youth Affairs in proceeding with these measures for the reasons outlined herein.

Legal principles that necessitate an effective Guardian *ad Litem* system

The right of children to participate in and be heard in proceedings that involve their welfare has long been a feature of international law, which has been recognised in Ireland for some time. The insertion of Article 42A into the Constitution strengthened and underscored the rights of children. There is now a constitutional imperative that the best interests of the child shall be the paramount consideration and where a child is capable of forming his or her own views, these views shall be ascertained and given due weight having regard to the age and maturity of the child. It is arguable that these rights will be breached by diminishing the status of the Guardian *ad Litem* and inhibiting their right to legal representation. If there is any question that the Guardian *ad litem*, and thus the child they are representing, is to be deprived of legal representation, the child's access to justice and their rights as enshrined in Article 42A are breached. This is a breach that will occur *simpliciter*; any attempt to define categories of cases that should or should not engage legal representation immediately offends the principles established in Article 42A.[1]

At the heart of these issues is the question of whether a Guardian ad Litem *is necessary in all cases and whether, in a case in which a Guardian* ad Litem *is necessary, there is an entitlement to legal representation if the Guardian wishes.*

Article 12[2] of the United Nations Convention on the Rights of the Child effectively establishes that not only does a child have a right to express views freely, either directly or through a representative or an appropriate body, but also that these views should be heard and given due weight. It is difficult to see how this can be achieved other than by the appointment of a Guardian *ad Litem.* In this paper, we propose to set out how this means that it is necessary that Guardians *ad litem* are appointed in all but exceptional cases, and that where they are necessary, they have an automatic right to legal representation, except perhaps in exceptional circumstances. Alistair MacDonald QC states[3] that the implementation of Article 12 requires more than paying lip service to the principles enshrined in the Convention on the Rights of the Child. The Committee on the Rights of the Child observes that:

"…appearing to listen to children is relatively unchallenging; giving due weight to their views requires real change. Listening to children should not be seen as an end in itself, but rather as a means by which states make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights."[4]

The UNCRC makes clear that children are to be viewed as active individuals in a position to have as full an input as possible into matters affecting them.[5] Article 12 of the UNCRC provides that the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them and that due weight should be given to those views in accordance with the age and maturity of the child. Article 12(2) provides that, in particular, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

There is now a constitutional imperative that the best interests of the child shall be the paramount consideration and where a child is capable of forming his or her own views, these views shall be ascertained and given due weight having regard to the age and maturity of the child.

The party status of a Guardian *ad Litem* and legal representation

There is no superior court case law on the status of the Guardian *ad Litem* in child care proceedings before the District Court. It is by no means clear that they do not currently enjoy party status. There is some authority in the District Court for suggesting that the Guardian *ad Litem* is not a party to proceedings; however, the extent to which this is binding or has created a precedent of any sort is questionable.

The proposal envisages the Guardian *ad Litem* having a status of a court-appointed adviser to the Court in relation to certain matters and provides that the Guardian *ad Litem* will be able to access legal representation in exceptional circumstances. This effectively will mean that the Guardian *ad Litem* is not a party to the proceedings and would not have *locus standi* to take the full range of applications in the welfare of the child that it may be appropriate to take, nor to appeal any decisions of the Court. It would also deprive the Guardian *ad Litem* of the *locus standi* to take certain other applications under the Child Care Act 1991, as amended, including those under Section 27, which provides for applications for the procurement of reports on children. It would therefore significantly weaken the participation and representation of the child in proceedings that centrally affect them.

There is a specific reference, on page 10 of the consultation paper, to figures relating to public expenditure on Guardians *ad Litem,* and it is noted

that "currently no statutory or generally applicable criteria exist to underpin the necessity, value for money or accountability in regard to the engagement of legal services by individual Guardians *ad Litem*".
As noted above, the consultation paper envisages that a Guardian *ad Litem* would have to make an application to the Court in order to obtain legal advice/representation and, having considered any such application, the Court may, if it thinks fit, appoint a solicitor to advise and/or represent the Guardian *ad Litem* in relation to some or all of the issues identified. In addition, the document provides that the Court may give directions as to the performance of the solicitor's duties and, if necessary in the view of the Court, directions in relation to the instruction of counsel. This proposal fetters the Guardian's role in respect of whether to obtain legal advice/representation and their choice of representation. It is also highly unusual and, arguably, an interference with the relationship between solicitor and counsel, in that the solicitor is directed by the Court as to which applications/submissions may be made, and as to the briefing of counsel. This proposal risks turning the Court into the client as well as the arbiter of the case.

Guardian *ad Litem* system in Ireland

It is important to note that the focus, as a result of international human rights standards, has been on *representing* the child's interests as opposed to merely reporting them to the Court. This clearly implies a full and unfettered ability to act on those interests, where appropriate, by way of legal submission and advocacy and the taking of certain application. It also implies party status in the context of proceedings in the same way as the representation of the interests of the Child and Family Agency or the parents/legal guardians in the proceedings. To adopt any other approach is to immediately create an inequality of arms and to fetter the role of the Guardian *ad Litem* to represent the interests of the child.
Some guidance on the role of the Guardian *ad Litem* was given in the judgment of MacMenamin J., in the case of *Health Service Executive v D.K. (a minor)*, unreported, July 18, 2007, a case involving a young person for whom an application for special care had been made, but who died before the order could be implemented. In giving this guidance, MacMenamin J. also implicitly emphasised the central and necessary role played by Guardians *ad Litem*. MacMenamin J. stated that "only suitably qualified Guardians *ad Litem* should be used in High Court proceedings on the minor list" (unless in exceptional circumstances) and sets out that the qualifications of the Guardian should be laid before the Court and details on Garda vetting should also be supplied. MacMenamin J. further noted that:
"The function of the Guardian should be twofold; firstly to place the views of the child before the Court, and secondly to give the Guardian's views as to what is in the best interests of the child".

Additionally, the judgment addressed the issue of information exchange between the Guardian *ad Litem* and the Health Service Executive, particularly in relation to circumstances where the child is considered to be at risk. Attention is given specifically to the issue of the Guardian communicating any such information to "other care professionals engaged with the minor", but as Carr notes "however, the judgment does not specifically address the issue of reciprocity in this regard, i.e., information on 'adverse risk', which should be communicated to the Guardian". The judgment set out in detail the role and function of the Guardian in High Court proceedings.
There is nothing in the *DK* judgment to support the weakening of the role or status of the Guardian *ad Litem* or to suggest that the Guardian *ad Litem* has not or should not have party status. Indeed, the judgment points to the opposite, especially in terms of the role of the Guardian *ad Litem* in ensuring compliance with the constitutional rights of the minor.
The introduction of Article 42A has focused minds on the concept of the voice of the child in child and family law proceedings, and has resulted in commentary on the mechanisms by which this concept can be realised. As stated above, the amendment requires that laws be enacted for securing, in the case of a child who is capable of forming his or her own views, the views of the child and putting them before the Court. Due weight is to be afforded those views, having regard to the age and maturity of the child. There is a constitutional obligation on the legislature to introduce legislation to give effect to this provision, and to provide for participation and representation in line with international human rights standards.[6] The right to fair procedures and the right to natural and constitutional justice apply equally to children as to adults. This was clear prior to the coming into effect of Article 42A of the Constitution and can only have been strengthened as a result of that Article taking effect.[7] Children enjoy the same personal rights as adults and their procedural rights should be promoted and protected.
These rights clearly include the right to participate in proceedings affecting their welfare so fundamentally and to have representation, including legal representation, so that they can have access to documents, the right to cross examine witnesses, and to take applications as appropriate.

It is important to note that the focus, as a result of international human rights standards, has been on representing the child's interests as opposed to merely reporting them to the Court.

Legal representation and party status: engaging Article 6 and equality of arms

Does the Guardian *ad litem* have an entitlement to legal representation by reason of their role in vindicating the rights of the child? If a child is the subject of proceedings concerning his or her welfare, it is established that they enjoy a right to participate, a right to be heard and that their best interests shall be the paramount consideration. There is no doubt whatsoever that if a Guardian *ad Litem* is party to the proceedings, he or she is entitled to legal representation of his or her choosing.
If a child, via their Guardian *ad Litem,* does not have equal standing in the case to other parties, it is difficult to envisage how their rights can be protected. This engages the principle of Article 6 rights to a fair hearing and equality of arms.

In *R, E, J, K v Cafcass* [2012] EWCA Civ 853, Mc Farlane J. (at Para. 87) notes the following in relation to Article 6 of the European Convention on Human Rights:

"ECHR, Art 6(1) confers a right to a fair hearing within a reasonable time by an independent and impartial tribunal. The right includes a right to participate effectively in the proceedings and to have fair and effective access to the Court. It was conceded on behalf of the appellants, and is well established by the case law (see, e.g., Edwards v United Kingdom (1992) 15 EHRR 417 paras 31-39), that the evaluation of fairness involves looking at the proceedings as a whole, rather than piecemeal".

The rights of parties to be heard and to be represented are undoubtedly established. These rights cannot be abrogated for the sole aim of reducing costs. It is the view of The Bar of Ireland that the rights of the child mean that even if a Guardian *ad Litem* is not to be seen as a party to the proceedings, there is still a requirement that the Guardian *ad Litem* be legally represented, if he or she wishes. This must flow from the requirement that the child's best interests and voice be fully and effectively heard by the courts.

Conclusion

Serious caution is urged against depriving Guardians *ad Litem* of party status or legal representation. This will offend the fundamental principles of a child's right to participate in proceedings, to be heard, and to have their best interests considered as the paramount consideration. It cannot be the case that a child would, in theory, be forced to choose between having access to a Guardian *ad Litem* and potentially be deprived of legal representation, and access to the full gamut of legislative provisions that parties avail of, or if they seek to be a party to a case with the rights that accrue, they must do so without a Guardian *ad Litem* and risk breach of their protections under Article 42A. It would be absurd if the very function that Guardians *ad Litem* are appointed to perform, and the rights that they are entrusted with protecting, could be negated and breached by their very presence in a case.

Furthermore, the contention that Guardians *ad Litem* will continue to be appointed and avail of legal representation in secure care cases creates an unnecessary discrimination between secure care cases and other cases involving children. It cannot be the case that children's constitutional rights enshrined in Article 42A are protected only in the High Court and not in the District Court. Only a profound misunderstanding of the potential for complexities that can arise in cases involving children could give rise to such a distinction. There can be a very fine line between a case involving secure care and a child not in secure care. The consultation paper states that "no statutory or generally applicable criteria exist to underpin necessity, value for money or accountability in regard to the engagement of legal services by individual Guardians *ad Litem*". It is submitted, on the contrary, that there are ample applicable international and constitutional legal principles, which underpin the necessity for legal services for Guardians *ad Litem*.
Council of The Bar of Ireland recognises that issues of resources and public expenditure arise and will engage further with the Department of Children and Youth Affairs on this matter, if required. However, it is utterly wrong to select a child's fundamental right to a Guardian *ad Litem* and legal representation as an issue that can be reduced to its monetary value or cost. On November 10, 2012, the Irish people voted to enshrine children's rights in the Constitution, in order to strengthen the role of children in law and enhance their protections in line with international provisions. It was a strong statement and endorsement of an Irish vision for how children should be treated and safeguarded. The proposals contained in the consultation paper regarding the status of a Guardian *ad Litem* and their entitlement to legal representation essentially constitutes a step backwards from the progress made in 2012, to the point where there must be serious concerns as to whether the proposal complies with constitutional and international standards. Council of The Bar of Ireland recognises that for any legal system to operate at its optimum level, access must be enjoyed by all stakeholders at all levels of society. Children are among the most vulnerable of those stakeholders; their access to the legal system must be supported and protected in the highest possible way.

References

1. Article 42A provides, *inter alia*:
   Provision shall be made by law that in the resolution of all proceedings –
   1 i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
   ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.
   2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.
   2. 1. States that parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.
3. *The Rights of the Child – Law and Practice* (Jordan Publishing, 2011) at 6.14.
4. Committee on the Rights of the Child General Comment No 5 *General Measures of Implementation of the Convention on the Rights of the Child* HRI/GEN/1Rev. p.391.
5. *Ibid*.
6. See, in particular, General Comment No. 12 of the UNCRC in which the Committee states that "All States should develop administrative procedures in legislation which reflect the requirements of article 12 and ensure the right to be heard along with other procedural rights, including the rights to disclosure of pertinent records, notice of hearing and representation by parents or others".
7. See, *FN and EB v CO, HO and EK* [2004] 4 IR 311.

Certifiable liability

What are the implications of the new Building Regulations for design and construction professionals?

Mark Sanfey SC

Introduction

In recent years, a programme for building control reform has evolved under the aegis of the Department of the Environment, Community and Local Government ("the Department"). Events such as the Priory Hall debacle and the damage caused by excessive levels of pyrite to thousands of properties have led to a perception of an urgent need to improve building control, and to promote competence and accountability among industry professionals by ensuring compliance with the Building Regulations. This programme has culminated in the Building Control (Amendment) Regulations 2014[1] ("the 2014 Regulations"), which seek in particular to achieve these aims by placing a particular onus on professionals involved in the building process in relation to certifying compliance with the Building Regulations.

The purpose of this paper is not to embark upon a treatise on the 2014 Regulations, but simply to discuss some of the issues that may arise in a dispute resolution context.

The 2014 Regulations have proved particularly controversial. A key concern is that the Regulations may impose potential liabilities on construction professionals, which are onerous and unprecedented, and in respect of which they may find it difficult to get professional indemnity insurance. In particular, a concern has been expressed that the certificate may impose on certain professionals a duty to certify or stand over work done by other professionals, which they have had no opportunity to inspect or examine meaningfully. The purpose of this paper is not to embark upon a treatise on the 2014 Regulations, but simply to discuss some of the issues that may arise in a dispute resolution context, and in particular:

- **whether the 2014 Regulations do indeed impose extra and onerous duties on the construction professionals involved; and,**
- **what are the implications for a construction professional who may find him or herself exposed to a legal liability resulting from those extra duties.**

…the requirement to submit "plans" would appear to have the effect of imposing on the owner and the designer "an obligation to ensure that the plans for the works concerned, as extant at the date of filing of the Commencement Notice, are sufficiently detailed from the outset to ensure that all of the relevant requirements of the Building Regulations can be shown to have been … taken into account by the Designer in the preparation of the design of the building. …

Building Control Acts 1990-2007

By way of providing context to the 2014 Regulations, it is helpful to refer briefly to the statutory framework under which the Regulations are enacted.[2] The Building Control Act 1990 ("the 1990 Act"), as amended by the Building Control Act 2007 ("the 2007 Act"), provides for the establishment of Building Control Authorities (essentially local authorities) and the making of Building Regulations. Section 3 empowered the Minister for the Environment to make Building Regulations in relation to the design and construction of buildings for the purpose, *inter alia*, of ensuring the safety and welfare of persons in or about the building, and making provision for the encouragement of good building practice. Section 6(2) makes provision for "certificates of compliance" to be provided at various stages of the construction project to show compliance with the Building Regulations. Section 21 of the 1990 Act is of particular significance in that it provides that a breach of the Building Regulations or the Building Control Act, in and of itself, does not give a right to a person to bring civil proceedings.

Building Control Regulations 1991 to 2013

Building Control Regulations were originally enacted in 1991 but were replaced by the Building Control Regulations 1997 (SI No. 496/1997).

After a lengthy consultation process, the 2014 Regulations were introduced in January 2014 as SI 9/2014. The 2014 Regulations operate by way of amendment to the 1997 Regulations, which up to then were the main instrument of regulation.

Mention should also be made of the Code of Practice published by the Minster in February 2014, which provides guidance with respect to inspecting and certifying works so as to indicate compliance with the relevant requirements of the Building Control Regulations.

Certificates under the 2014 Regulations

Section 6(2)(a)(i) of the 1990 Act provides that Building Control Regulations may make provisions requiring that "certificates of compliance" be submitted to building control authorities at various stages during and after the completion of works to which such Building Regulations apply.

In accordance with this section, the 2014 Regulations provide for a number of new forms and certificates. Articles 7 and 10 of the 2014 Regulations provide for a "form of Commencement Notice" and "7-day notice" in relation to compliance with the Second and Third Schedules to the Building Regulations, respectively. Each of these notices is required to be accompanied by a wide range of documentation and certificates showing how the proposed works or buildings will comply with the requirements of the Building Regulations.

A number of issues arise from these notices. As Trainor points out,[3] the requirement to submit "plans" would appear to have the effect of imposing on the owner and the designer "an obligation to ensure that the plans for the works concerned, as extant at the date of filing of the Commencement Notice, are sufficiently detailed from the outset to ensure that all of the relevant requirements of the Building Regulations can be shown to have been … taken into account by the Designer in the preparation of the design of the building. …[The 2014 Regulations] may accordingly take effect as imposing on, in particular, the Designer an obligation to carefully review all drawings, plans, etc., for the works in advance of the filing of the Commencement Notice for compliance with the Building Regulations".

A preliminary inspection plan must be prepared by the Assigned Certifier,[4] who undertakes to implement that plan during the course of the works. The requirements in relation to the amended "form of Commencement Notice" in terms of filing documentation apply to the design and construction of a new dwelling, an extension to a dwelling involving a total floor area greater than 40 square metres, or works for which a fire safety certificate is required.[5]

The wording of the certificates

Article 5(4) of the Principal Regulations is amended[6] to provide that a "Certificate of compliance" means a certificate of compliance provided for under Section 6(2)(a)(i) of the Act of 1990, and includes certificates with regard to design, the undertaking by the Assigned Certifier and by the builder, as well as certificates of compliance on completion.

The overriding concern of professionals who may be in the position of certifying compliance with the Building Regulations in these certificates is that they may be deemed to be certifying compliance with the Building Regulations of works carried out by others, and that this may expose them to a liability in the event that such works were found to be non-compliant.[7]

It was acknowledged in the explanatory note to the 2014 Regulations that one of the "key changes" from the position as set out in earlier 2013 Regulations (SI 80 of 2013) included "changes to the wording of the Statutory Certificates in the interests of the insurability of persons giving the certificates…".

The only significant difference from the 2013 Regulations in this undertaking is that the "work of others" to be co-ordinated is "the inspection work", rather than "work" generally.

The nature of the change to which the explanatory note refers may be seen by a comparison between the obligations imposed on the Assigned Certifier in the Certificate of Compliance on Completion under the 2013 and 2014 Regulations.

The certificate signed by the Assigned Certifier as part of the Certificate on Completion under the 2013 Regulations, in as far as relevant, was as follows:[8]

"5. **I confirm that I am the Assigned Certifier assigned by the owner to inspect and certify the works concerned.**

6. **I now certify that the inspection plan drawn up in accordance with the Code of Practice for Inspecting and Certifying Building Works, or equivalent, has been fulfilled by the undersigned and other individuals nominated therein, having exercised reasonable skill, care and diligence and that the building or works is in compliance with the requirements of the Second Schedule of the Building Regulations insofar as they apply to the building works concerned".**

The equivalent sections of the 2014 Certificate of Compliance on Completion are set out in Regulation 16 of the 2014 Regulations. The effect of Regulation 16 would appear to be as follows:

The Assigned Certifier now:

- **confirms that the inspection plan has been "undertaken" by him or her having exercised reasonable skill, care and diligence;**
- **confirms in clause 7 that the inspection plan has been undertaken "by others nominated" [in the inspection plan] on the basis that they have all exercised reasonable skill, care and diligence in certifying their work in the ancillary certificates; and,**
- **is no longer certifying that the inspection plan has been "fulfilled", not only by him or her, but also by "other individuals having exercised reasonable skill, care and diligence…".**

These changes, if taken alone, would certainly appear to improve the certifier's position. However, the Assigned Certifier is then required in clause 8 to "certify" that the building or works is in compliance with the Building Regulations. This certification is qualified by the phrase "relying on the ancillary certificates scheduled…".

The change in clause 7 does seem to be significant. The Assigned Certifier is not confirming – as he or she does in respect of him or herself – that the "others nominated" have **actually** exercised reasonable skill, care and diligence; rather, that they undertook their duties in the inspection plan **on this basis.**[9]

The question is whether the certification that he or she is obliged by clause 8 of the certificate to give ties him or her in to any default by the ancillary certifiers. The Assigned Certifier:

- **must certify that the building or works is in compliance with the requirements of the Second Schedule to the Building Regulations;**
- **must exercise reasonable skill, care and diligence in such certification; and,**
- **is, however, entitled to rely on the ancillary certificates scheduled.**

The Assigned Certifier is also obliged to execute an undertaking,[10] and this is one of the forms that has to be submitted with the Commencement Notice. The undertaking is in the following terms:

… "I undertake to use reasonable skill, care and diligence, to inspect the building or works and to coordinate the inspection work of others and to certify, following the implementation of the inspection plan by myself and others, for compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building or works to which the accompanying Commencement Notice together with the plans, calculations, specifications, ancillary certificates, and particulars listed in the schedule thereto refer".

The only significant difference from the 2013 Regulations in this undertaking is that the "work of others" to be co-ordinated is "the inspection work", rather than "work" generally. The undertaking suggests that the obligation to use "reasonable skill, care and diligence" relates to the inspection and co-ordination of inspection work undertaken by the Assigned Certifier, rather than the duty specified in the undertaking to certify compliance with the Building Regulations. Indeed, the duty to certify in this undertaking is not qualified, and it is not clear whether it imposes more onerous obligations on the certifier than those contained in the Assigned Certifier's

certificate analysed above. However, it may be that, as long as the Assigned Certifier executes his or her Certificate of compliance in accordance with its terms, he or she would be able to rely on those terms and not be saddled with the seemingly unqualified undertaking to certify as set out in the "Undertaking by Assigned Certifier". Nonetheless, any certifier should be aware of the inconsistency between the Certificate of Compliance and the Undertaking.

While the terms "certify" or "certificate" usually connote that the certifier is warranting as correct the fact that he certifies, it is certainly at least arguable that the certification in clause 8 cannot be regarded as absolute, given the implicit reference to clause 7 and the explicit reference to reliance on the ancillary certificates.

This inconsistency is illustrative of a lack of clarity in delineating the legal relationships inherent in the Regulations. The Building Regulations do not specifically state that a Designer or Assigned Certifier must be appointed. They merely require the submission of the forms, which must be executed by a Designer or Assigned Certifier. The duties and relationships between the various parties or entities must be inferred from the terms of the documents themselves. For instance, the format of the undertaking by the Assigned Certifier suggests that the undertaking is given to the Building Control Authority with whom it must be lodged, whereas the Certificate of Compliance appears to enure to the benefit of the public in general, and in particular purchasers and incumbrancers. Also, does the giving of an undertaking to the Building Control Authority expose the Assigned Certifier to liability to that entity in the event of non-compliance with Building Regulations? If so, how is that liability to be identified or quantified? These are issues that are left unanswered by the Regulations, and which may well have to be teased out in litigation.

What, then, is the position of an Assigned Certifier who has exercised reasonable skill, care and diligence in certifying compliance, relying on ancillary certificates for specialist designers, electricians, etc., only to find that the negligence of one of those ancillary certifiers has caused non-compliance and damage to the owner, lessee, mortgagee, etc.?

While clause 8 of the Certificate of Compliance on Completion requires the Assigned Certifier to "certify" the compliance of the works with the Building Regulations, the certification is qualified by the terms of clause 7 and the phrase "relying on the ancillary certificates scheduled…". While the terms "certify" or "certificate" usually connote that the certifier is warranting as correct the fact that he certifies, it is certainly at least arguable that the certification in clause 8 cannot be regarded as absolute, given the implicit reference to clause 7 and the explicit reference to reliance on the ancillary certificates. On the other hand, it will be argued that the purpose of having the Assigned Certifier **certify** compliance with the Building Regulations is to ensure that the individual who is charged under the Regulations with responsibility for inspection and co-ordination of inspection with others, and for liaising with the Building Control Authority in this regard, should be liable if there is in fact non-compliance with the Regulations. It may be argued that, in conceding his or her right to rely on the ancillary certificates, the Regulations do no more than acknowledge his or her right to seek contribution from ancillary certifiers in the event that he or she is found to be liable in respect of an inspection for which he or she was in no way at fault.

The Design Certificate

The Design Certificate under the 2014 Regulations contains the following paragraphs:

"4. **I confirm that the plans, calculations, specifications, ancillary certificates and particulars included in the schedule to the Commencement Notice to which this certificate is relevant, and which have been prepared exercising reasonable skill, care and diligence by me, and by other members of the design team and specialist designers whose design activities I have coordinated, have been prepared to demonstrate compliance with […the Building Regulations].**

5. **I certify, having exercised reasonable skill, care and diligence, that, having regard to the plans, calculations, specifications and particulars which have been prepared by me and others and having relied on ancillary certificates and particulars referred to at 4 above, the proposed design for the building or works is in compliance with the […the Building Regulations]".**

The only significant variation from the terms of the Design Certificate in the 2013 Regulations is the introduction in paragraph 5 above of the phrase "having exercised reasonable skill, care and diligence…". Paragraph 4 remains essentially the same. It appears clear from paragraph 4 that the certifier is expected to confirm that the "plans, calculations, specifications, ancillary certificates and particulars included in the schedule to the Commencement Notice …" were prepared, not only by him or her, but also by "other members of the design team and specialist designers whose design activities I have coordinated" with reasonable skill, care and diligence. Paragraph 4, taken on its own, may be read as a confirmation and thereby a warranty by the certifier of the "reasonable skill, care and diligence" of the design team and specialist designers.

Paragraph 5 obliges the certifier to exercise reasonable skill, care and diligence, and also suggests that he or she

is entitled to rely "on ancillary certificates and particulars referred to at 4 above…". However, he or she has already in paragraph 4 effectively warranted that reasonable skill, care and diligence has been exercised by the ancillary certifiers. Read as a whole, it seems that there is a significant risk that the certificate would be interpreted as the designer assuming responsibility for the reasonable skill, care and diligence exercised by his or her design team.

Implications for liability of certifiers

As with the Assigned Certifier certificate, it may be that it was intended that the certifier, on whom the onus to ensure that the design is correct in as far as possible is placed, has primary responsibility to those to whom a design duty is owed for any design that transpires not to be in compliance with the Building Regulations and causes damage, subject perhaps to a right to obtain contribution from the party who has caused the problem. This would be consistent with the views expressed by the Minister for the Environment, Community and Local Government, Phil Hogan TD, on the coming into force of the 2013 Regulations. In relation to mandatory certificates, he said that they would be "clear, unambiguous statements on statutory forms stating that each of the key parties to a project certifies that the works comply with the Building Regulations and that they accept legal responsibility for their work". He accepted that this might likely add to the overall cost of building projects, but stressed that the benefit will ultimately be for the consumer.[11]

It may be that, in this way, the system envisages a "point person" taking legal responsibility, with that person being entitled to seek recourse from other parties on whose work they have relied. However:

1. **To the extent that it may be possible for a certifier to "rely on ancillary certificates", he or she must ensure that all such ancillary certificates are in place. This may not always be possible. Alternatively, the necessity to obtain ancillary certificates from all persons or entities with an input into the design or build may be particularly costly and time-consuming.**

2. **If there is any doubt about the extent of the designer's or Assigned Certifier's duty, in particular as to whether there may be an obligation on them to take responsibility for the work of others in certifying compliance with the Building Regulations, one may assume that the professional indemnity insurers of such professionals will insist on cover that reflects the extent of the risk. Thus, professional indemnity insurance costs may well increase sharply, particularly in projects where reliance is placed on a number of ancillary certifiers.**

3. **Although the builder is also obliged by the 2014 Regulations to give an undertaking in respect of compliance with the Building Regulations, the extent of that undertaking is limited. It appears from the terms of that undertaking that the builder is under an obligation to build in accordance with the documents and designs given to him or her, and as long as he or she does so, he or she does not have liability for any non-compliance with the Building Regulations.**

The Department's response

On April 2, 2015, Paudie Coffey TD, Minister of State at the Department of the Environment, Community and Local Government, together with Minister Alan Kelly TD, announced a review of the 2014 Regulations and published a suite of documents to inform the review, including "Information Document No. 3 – Professional Liability in the context of the Statute of Limitations and the Building Control Act 1990".[12] If the purpose of the information note was to assuage the concerns of professionals who may feel that they are exposed to greater liabilities and expense as a result of the 2014 Regulations, it is likely to have failed in this regard. The note recognises the complaint of professionals that, due to the provisions of the Civil Liability Act and the principles governing concurrent wrongdoers, "the person who is financially strongest may become the target for any claim and this, by virtue of their PII cover, is often likely to be the construction professional". However, the note states that this is an issue relating to the general legal system and that its operation is beyond the remit of the Department.

The note then purports to give some assurance by stating that those giving a statutory certificate may rely on a statutory certificate given by other parties, thereby enabling a clear identification of where liability for a particular eventuality properly rests.

The note goes on to make the point that all professionals who enter into a contract may be held liable for loss or damage caused by their failure to undertake their work properly. However, if the effect of certifying in accordance with the Regulations is that the certifier acquires a tortious liability to someone with whom he or she has no contractual relationship, as a result of negligent work on the part of someone on whom he has been obliged to rely, this is a new development over and above the usual rules governing liability, and is a matter of legitimate concern for the professionals involved.[13]

The note then purports to give some assurance by stating that those giving a statutory certificate may rely on a statutory certificate given by other parties, thereby enabling a clear identification of where liability for a particular eventuality properly rests. The note further states that the certs are framed around the signatory having exercised reasonable skill, care and diligence, which allows an appropriate defence against unreasonable claims. While this statement may appear to give some comfort to prospective certifiers, it is not at all clear, for the reasons set out above, that the certificates themselves bear this interpretation, or that a court would interpret them in this way.[14]

Liability under the certificates

A further point made in the information note above is that section 21 of the Building Control Act 1990, outlined above, places a general limitation on civil proceedings brought under the Act by reason only of the contravention of any provision of the Act or Regulations. While it may be that section 21 cannot

support a cause of action in itself, as every construction lawyer knows, cases are never framed in this way. They are invariably framed as actions for breach of contract, negligence, negligent misrepresentation, etc. Any contract between a building owner and his or her builder or designer may well include an express term that the development be built or designed in compliance with the Building Regulations. If the contractual relationship includes the obligation to certify the compliance of the build or design pursuant to the 2014 Regulations, one may assume that it will be at least an implied term of such a contract that the certificates are correct and may be relied upon by the owner or any subsequent purchaser or mortgagee. In the event that the certificates are not correct, this may well be regarded as a breach of contract, which would entitle the owner to sue. Outside the contractual relationship, an issue arises as to the status of the certificate and who may rely upon it. The law in relation to negligent misstatement generally requires that there is an "assumption of responsibility" by the representor to ensure that its representations may be relied upon: … "at a minimum, the existence of a special circumstance which should lead the representor to believe that the third party would rely on the representation contained in the completion certificate that the works, as built and designed, will comply with the Building Regulations…".[15]

It is clear from the statutory framework of certification by specific professionals in the construction process, and the fact that those certificates may be accessed by the public, that the certificates are intended to be documents that will be procured and relied upon by any subsequent title holder. In this way, professionals may expect that their liability on foot of the certificates will extend far beyond any contractual relationship that they may have in relation to the works, with all the implications for their professional indemnity insurance that that may have.

Conclusion

The information note referred to above makes it clear that "the need to ensure redress for consumers has been seen as outweighing concerns regarding the relevant liability of the negligent parties". Nonetheless, the 2014 Regulations did introduce certain limited amendments to the wording of statutory certificates … "in the interest of the insurability of persons giving the certificates …".

It is submitted that the present wording of the certificates cannot be said to be such as to make it clear that potential liability for the work of others is not assumed by certifiers.

While arguments may be made – and will be made in the context of litigation or arbitration to come – that go either way, it is the uncertainty that makes it likely that insurers would be reluctant to issue policies other than on the basis that they cover the risk of assuming such liability. Whether insurers are prepared to issue such policies at all, or whether such polices are affordable, is another matter.

Only time will tell what implications there are for professionals and the industry at large. A serious reluctance by professionals to take on the role of Assigned Certifier or Designer may result in delay or inability to get projects off the ground. Increased costs that would squeeze the margins of development projects would adversely affect the industry at a time when there is a current urgent need for new housing stock and commercial property. It may be that it is the impact ultimately on the consumer of a slowdown in building projects that persuades the stakeholders that the shortcomings in the statutory certification system must be addressed.

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1. SI 9 of 2014.
2. For a thorough and insightful review of the Building Control Acts and the Building Control Regulations up to 2013, see "The 2013 Building Control (Amendment) Regulations: Transforming the Regulatory Landscape", by John Trainor SC. This paper was delivered to the CBA open conference in November 2013 and many be accessed at www.cba-ireland.com. The paper is cited hereafter as "Trainor".
3. At para. 3.5 (see footnote 12).
4. The role of the Assigned Certifier is set out at paragraph 3.5 of the Code. An Assigned Certifier will … "undertake to inspect, and to co-ordinate the inspection activities of others, to certify the building or works on completion", and detailed obligations are set out in that paragraph.
5. However, note the provisions of the Building Control (Amendment)(No. 2) Regulations 2015 (SI 365 of 2015), which give the owner of works the facility to opt out of the requirement to obtain a statutory certificate of compliance.
6. See para. 4(b) of the 2014 Regulations.
7. On May 13, 2015, Eoin O'Cofaigh FRIAI published a critique of Information Document No. 3 (referred to later in this article) and attached to it three Opinions by Denis McDonald SC. The opinions may be accessed at www.bregsforum.com/2015/06/23/bcar-si-9-submission-series-no-eoin-o-cofaigh-friai/ and are referred to herein as "McDonald". For a further view see "The Liability of Architects in Inspection – Time for Review", by Denis Cronin BL, which may be accessed on www.cba-ireland.com.
8. For the full text of this certificate, see the 2013 Regulations (SI 80/2013), Reg. 13.
9. For an alternative view, more pessimistic from the Assigned Certifier's point of view, see McDonald, March 3, 2015, para. 12 (Footnote 7).
10. See the Second Schedule to the 1997 Regulations as set out at Regulation 15 of the 2014 Regulations.
11. April 4, 2013. See http://www.environ.ie/en/DevelopmentHousing/BuildingStandards/News/MainBody,32735,en.htm.
12. Available on the Department website and also on www.bregsforum.com.
13. A detailed examination of the implications that the Regulations may have for professional indemnity insurance is to be found in the RIAI submission "Strengthening the Building Control System, RIAI, May 2012 at pp 17-25.
14. See the critique of this information note by Eoin O'Cofaigh referred to at Footnote 9.
15. Trainor, para. 6.8.

This article is an edited version of a detailed paper given by Mark Sanfey SC to the Construction Bar Association on July 7, 2015, which is available on the Members' Section of The Bar of Ireland website and at www.cba-ireland.com.

Patrick Pearse in King's Bench

Patrick Pearse's early forays in court as a young BL might be seen as providing a foretaste of his future interests.

Colum Kenny BL

In May 1905 Patrick Pearse, barrister-at-law, rose to address the King's Bench in Dublin. Called to the bar just four years earlier, he now faced Chief Justice Baron Peter O'Brien of Kilfenora, William Andrews and John Gibson (brother of Lord Ashbourne). Andrews J. remarked that: "The importance of the case is great".[1]

The case

Ball speaks highly of O'Brien but omits to mention his common nickname, "Peter the Packer".[2] A Catholic himself, O'Brien's reputation for excluding Catholics from juries in sensitive cases when he was a crown prosecutor had ensured that "he entered not merely political debate but popular folklore as the symbol of legal injustice".[3] O'Brien treated Pearse cordially. The few observers in court included two barristers – future chief justice Hugh Kennedy and future professor of law at UCD Arthur Clery[4] – as well as a journalist, and future Dáil deputy, Piaras Béaslaí.[5]

The Summary Jurisdiction (Ireland) Act 1851, s. 12, required the owner of "any cart, car, dray, or other such carriage used for the conveyance

of goods, who shall use or allow the same to be used on any public road or street" to have his name and residence "painted upon some conspicuous part of the right or off side of such carriage, in legible letters not less than one inch in height…."

Niall MacGiolla Bhrighde of "Fiodh-mór", Co. Donegal, was one such owner and he had conspicuously painted his name and place of residence on his vehicle. But he did so in the Irish language and in Gaelic lettering, a variant of the Roman alphabet. The RIC prosecuted him on the grounds that such letters were not "legible" in accordance with the Act.

The court accepted that the case stated was from a district where three-quarters of the population spoke Irish, and "a considerable number spoke Irish exclusively".

The prosecuting counsel was Cecil Atkinson, "who was an extreme Tory" wrote Clery: "He made a bitterly inflamed speech against the new forces which he felt to be growing in Ireland. He demanded that everyone should take the English form of his name in Irish, thus delivering himself into Pearse's hands".

Pearse had made a relevant argument against the narrow interpretation of a colonial instrument, but it was an argument unlikely to sway such judges as he faced. Had his clients won, it might have spurred him on to stay at the bar to fight for the rights of his people there, rather than in the GPO in 1916.

Strong argument

Pearse argued a broad point, "in some ways a strong case", thought Clery. Patrick Walsh, the older junior, was more specific. Pearse told the court: "The statute is one applying to a bilingual country, and, therefore, there is no presumption that it is intended that the name must be in English characters".[6] A striking aspect of the case is that the redoubtable Tim Healy was listed as King's Counsel for MacGiolla Bhrighde but did not appear.

Walsh, later chief justice of the Seychelles, had opened for their client by claiming simply that the Gaelic characters used by MacGiolla Bhrighde were in fact "legible characters", which could be read by anybody, even a person who had no knowledge of Irish. "In proof of this," recalled Béaslaí later, Walsh produced a poster that was then prominently displayed all over Dublin. It advertised a bazaar at Ballsbridge. The words were English but the letters were Gaelic. The advertisement was intended for the general public of Dublin, most of whom knew no Irish, said Walsh.

Like many junior counsel down the years, Pearse was also involved in journalism. An Irish language enthusiast, by May 1905 he was editor of

the Gaelic League's *An Claidheamh Soluis*. Béaslaí writes that during the case Pearse emphasised the slender consonants of his client's Irish name. "Would you repeat that Mr Pearse?" asked O'Brien. Pearse did so. "I must say," remarked the Chief Justice, "that you pronounce the Irish name more correctly than Dr Walsh does." Pearse responded, "Dr Walsh is a Northerner, my Lord," a response that Béaslaí thought "did not seem exactly the *mot juste* to retrieve the situation".

In 1906, Pearse appeared in a similar case with Tim Healy KC and James O'Connor BL (author of legal texts and later a Lord Justice of appeal). This client's name and address, although spelt in their Irish versions, were painted in "English" letters. It made no difference.[7]

A man of ability

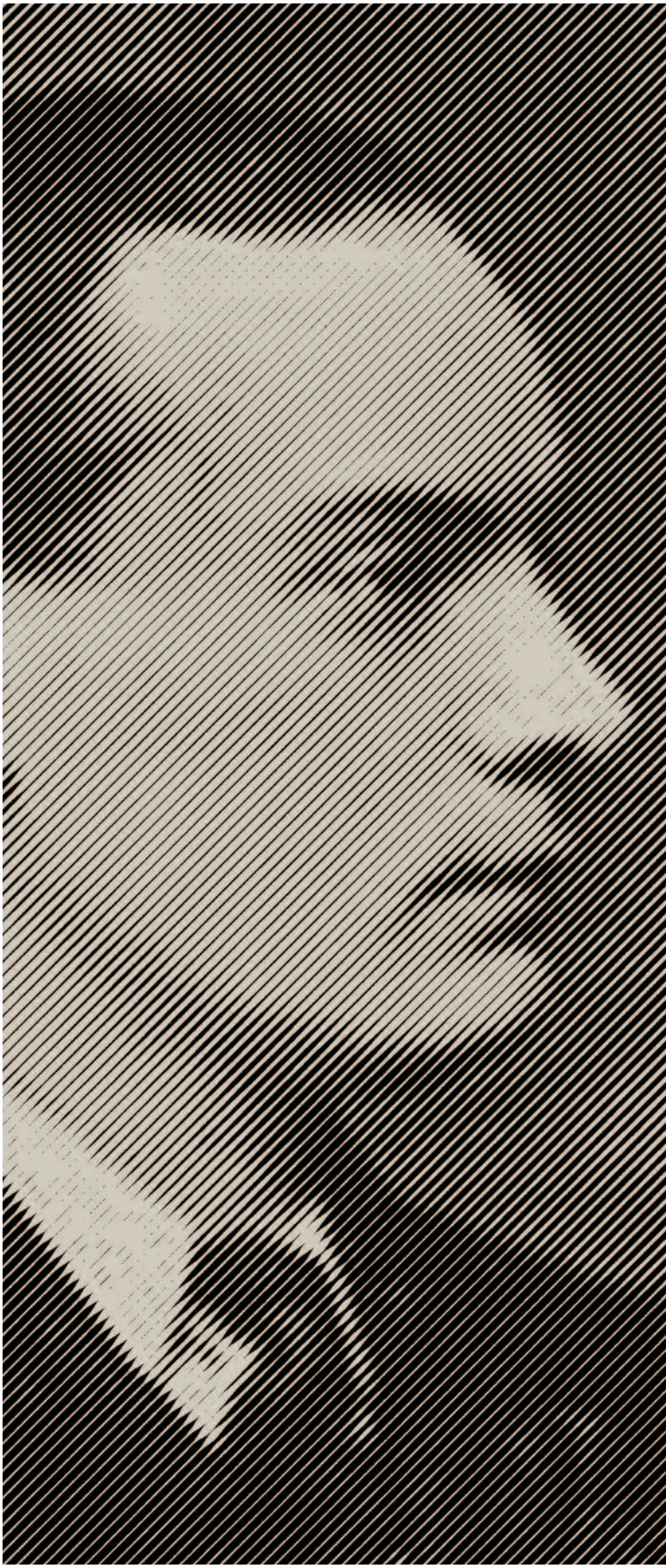
In the event, MacGiolla Bhrighde (and Pearse) lost. The court held the type of letters to be crucial, finding that these must be in the usual Roman or "English" form to comply with the law. Gibson J. ("a genial cynic" in Clery's view) remarked provocatively that: "The statute refers not to prehistoric or obsolete shapes of letters, but to living symbols". All three judges knew that the language movement was gaining support nationally. Perhaps for this very reason they spent more time rebutting Pearse's argument than they did that of his older colleague. In 1906, Pearse appeared in a similar case with Tim Healy KC and James O'Connor BL (author of legal texts and later a Lord Justice of appeal). This client's name and address, although spelt in their Irish versions, were painted in "English" letters. It made no difference.[7]

When Pearse finished pleading in the MacGiolla Bhrighde case, recalls Béaslaí, the Chief Justice remarked, "A very good argument, Mr Pearse," and the other two judges repeated "Very good" and "Very good, Mr Pearse". Douglas Hyde, founder of the Gaelic League and a future President of Ireland, thought that "Pearse was quite pleased with the compliment the judges paid him," but Béaslaí wrote: "I do not think that there was anything more in these remarks than the usual perfunctory courtesy to a young counsel who was evidently a man of ability and might be heard of later".

"A patriot rather than a lawyer"

Béaslaí, like Hyde, disapproved of Pearse's assertive line of argument, which he termed a "speech". He thought that Pearse had thrown over the simpler case made by his colleague in favour of an oratorical display, and that Pearse "distinguished himself as a patriot rather than as a lawyer". Another future President of Ireland, Seán T. O'Kelly, was among those who approved of Pearse's assertiveness.

Pearse had made a relevant argument against the narrow interpretation of a colonial instrument, but it was an argument unlikely to sway such



judges as he faced. Had his clients won, it might have spurred him on to stay at the bar to fight for the rights of his people there, rather than in the GPO in 1916. For, "no one could be prouder of his degree than the young Pearse," wrote one of his biographers, Ruth Dudley Edwards, and it seems that he even considered joining the Connacht circuit.[8] However, by the time that he spoke at the grave of Wolfe Tone in 1913 there was for him no turning back. He pointedly referred there to Tone's "glorious failure at the bar, his healthy contempt for what he called 'a foolish wig and gown'".[9]

That same year he compared lawyers to dragonflies who "will fight until nothing remains but two heads" and referred to legal practice as "the most ignoble" and "most wicked" of all professions".[10] But it should be said that he did so in a series of articles written "with the deliberate intention, by argument, invective, and satire, of goading those who shared my political views to commit themselves definitely to an armed movement". One finds no such harsh sideswipes at the legal profession in his other published political works and speeches.[11]

Dudley Edwards and others have mistakenly stated that Pearse appeared only once in court. For his part, Béaslaí thought that these two reported cases were the sole occasions on which Pearse "pleaded in a British [*sic*] law-court".

It is not known if he was an unreported junior in other cases or if he represented defendants in the lower courts, which any struggling junior might have done. Like so many such juniors he ultimately left the bar to pursue other interests.

"any cart, car, dray, or other such carriage used for the conveyance of goods, who shall use or allow the same to be used on any public road or street" to have his name and residence "painted upon some conspicuous part of the right or off side of such carriage, in legible letters not less than one inch in height…."

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6. [1906] IR, ii, p. 184; *An Claidheamh Soluis*, 20 May 1905, p. 8.
7. *Buckley v. Finnegan* [1906] 40 I.L.T.R. 76. The Buckley here prosecuted later became governor general of the Irish Free State (Ó Súilleabháin, A. *Domhnall ua Buachalla: Rebellious Nationalist, Reluctant Governor* (Sallins, 1915), pp. 1-2, 29-35).
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Stephen McCann BL (1969-2015)

The esteem in which Stephen McCann was held in legal, media and political worlds was encapsulated by Dearbhail McDonald in the *Independent* on the morning of his funeral.

Dearbhail recorded warm and dignified tributes to Stephen from Seamus Mallon, the former SDLP deputy leader and Deputy First Minister of Northern Ireland, from David Barniville SC, Chairman of Council of The Bar of Ireland, from James MacGuill, former President of the Law Society, and from Michael O'Higgins SC. Similar extensive tributes were made via social media from friends and colleagues, with Séamus Dooley of the National Union of Journalists describing, for all of us, the deep affection and admiration felt for Stephen.

Of course, the fact that such eminent individuals spoke so highly of Stephen is merely a reflection of the extent of his friendship and the fact that this gentle, funny, kind and intelligent man touched so many of our lives.

Accomplished

Stephen was born in Armagh on St Patrick's Day 1969 and attended school in Armagh, firstly at the Christian Brothers Primary School and then, from 1980 to 1987, at the adjacent Christian Brothers Grammar School at Greenpark. He spent a further year completing two additional A-Levels (in politics and history of art) at St Catherine's Sacred Heart Convent in Armagh. Stephen was a gifted musician (piano and French horn) and an accomplished actor. While at school, he participated in plays performed through Irish and English.

From 1988 to 1992, Stephen studied law at the University of Dublin, Trinity College, and after graduating with LLB (Hons), he completed the (then) two-year Barrister-at-Law degree course at the Honourable Society of King's Inns and took the call to the Bar in Trinity 1994.

Stephen devilled initially with Peter Charleton and when Peter took silk during his devilling year, Stephen completed his apprenticeship with Felix McEnroy. Stephen's natural intelligence, sophistication and love of the arts (in particular film and music) forged a close relationship between Peter and Felix, which went beyond the learning curve of the devilling year.

Varied practice

Exceptionally (though not surprisingly), Stephen's legal career took off immediately. His practice was as varied as it was bourgeoning.

For example, Stephen was junior counsel for the defence, led by Garrett Cooney SC and instructed by George Gill, solicitor, in the famous Rocca v. Ryan case, which was heard before a jury over two memorable weeks in early February 1997 and presided over by Mr Justice Michael Moriarty.

Similarly, just over a year later, in Adams v. Mitchell & Others, Stephen, led by Adrian Hardiman SC and instructed by James McGuill, solicitor, represented the Sinn Féin delegates who sought to prevent Senator George Mitchell, General John De Chastelain, Prime Minister Harri Holkeri and Dr Mo Mowlam MP, then Secretary of State for Northern Ireland, from taking further steps to exclude the Sinn Féin delegation from attending the negotiations chaired by Senator Mitchell at Dublin Castle in February 1998. Such was the nature of this legally complex and potentially ground-breaking case and the clever arguments made over a number of days before the then President of the High Court, Mr Justice Frederick Morris, that when the talks process moved to Northern Ireland, the proceedings could be withdrawn.

Stephen had the skills and natural ability to practise at the highest level in civil and criminal law. He was part of a select team of barristers who regularly represented the Health Service Executive (and previously the Health Boards) in a number of challenging cases involving vulnerable children, and which continued over many years. At one point, three High Court judges were assigned lists to deal with these cases.

In addition to the difficult facts presented by such cases, they also provided the backdrop to an important constitutional debate on justiciability and the separation of powers.

At the same time Stephen was building a reputation as the junior counsel of choice in defamation cases, and leading silks would recommend his immediate involvement in such cases. Stephen reflected the best traditions of the independent Bar and notwithstanding his involvement in these high-profile cases, his easy nature and outgoing personality meant that he enjoyed a fabulous relationship with the media, whom he hugely respected and valued as an essential cornerstone in our democracy.

Defending the marginalised

In the latter years of his career, he was to spend less time on his civil practice and more time in practice at the Courts of Criminal Justice, acting for both prosecution and defence. Indeed, it is fair to say that when faced with the choice of an easier and more lucrative civil practice, Stephen preferred (as James MacGuill observed in his tribute recorded in the *Independent*) to use his legal skills to help the vulnerable and the marginalised.

A consequence of providing modern, state-of the-art facilities for dealing with the expeditious hearing of criminal trials has been the physical dislocation of the Criminal Bar from the Four Courts. However, this has never impacted on the best traditions of accessibility and collegiality, which we value. Stephen encapsulated this in his life. The widespread reaction from The Bar, the solicitor's profession, politicians, the media and the judiciary to Stephen's passing was heartfelt. It was manifested in the large attendance at his funeral mass in St Patrick's Cathedral, Armagh, and in the recent gathering of friends and family in the Distillery Building, so kindly facilitated by The Bar.

Stephen epitomised George Bernard Shaw's description of a gentleman as 'one who puts more into the world than he takes out'. We can only thank his family, to whom he was devoted, for allowing us to share and be part of his life.

CB

Patrick Connolly SC (1927-2016)

The death of Patrick Connolly SC, on January 7, 2016, brings to a close the career of one of the most remarkable Irish advocates of the second half of the twentieth century.

Patrick was born in Oldtown, County Dublin, in 1927 and educated at Garbally Park College in Ballinasloe, University College Dublin (where he served as Auditor of the Literary Historical Society), and King's Inns. Both of his parents were national school teachers. After a distinguished academic career, he was called to the Bar in 1949 and devilled with Noel Hartnett, who was one of the co-founders with Seán McBride of Clann Na Poblachta.

As a junior he developed a large, broadly based practice on the Dublin Circuit, and was recognised for the carefulness and precision of his advocacy and for his prodigious memory. His specialisms included the Liquor Licensing Code, Landlord and Tenant Law, and the Law of Consumer Finance. In the pre-digital age, he was known for his compendious knowledge of the old textbooks then available in the Law Library. In the Arms Trial in 1970, he acted as junior counsel on the defence team of Charles Haughey, who had been a friend and contemporary of his in University College Dublin.

He took silk in October 1971, and in time became the counsel of choice for a number of large insurance companies, dealing with personal injury claims, insurance law and marine accidents.

Attorney General

He was appointed Attorney General in the Haughey government in 1982 but later that year, entirely innocently, he afforded accommodation to an acquaintance who, it transpired, had committed murder. The furore that ensued when the murder suspect was arrested in the Attorney General's apartment forced him to resign. This put paid to his prospects of appointment to the Bench, depriving the Supreme Court of the services of one of the finest legal minds of his generation. The events leading to his resignation were traumatic for someone who valued their privacy highly, but he was welcomed back to the Bar and his practice resumed as if it had never been interrupted. He acted in the Whiddy Inquiry on behalf of the owners of the *Betelgeuse*, a vessel that blew up in Bantry Bay in 1979 causing the deaths of almost 50 people.

Encyclopaedic

Paddy was widely read and had a broad range of cultural interests. He could speak with authority on Italian opera, the music of Wagner, classical Japanese cinema, the battles of the Napoleonic wars, the wines of Bordeaux, Latin aphorisms and Greek poetry, as well as the best restaurants to be found in many capital cities of the world. He retained an affection for, and competence in, the Irish language throughout his life. Well into his seventies, he was still able to recite tracts (questions and answers) from the Maynooth catechism, which he had learned as a boy. In response to a wager in a public house on one occasion in the 1970s, he wrote out (on beer mats) the names of 100 Italian arias, without drawing breath.

He had an encyclopaedic knowledge of Gaelic football and hurling, and was a passionate supporter of the Dublin teams, but would occasionally admit to a grudging regard for a player from another county ('The Gunner' Brady of Cavan, Mick Lyons of Meath, Teddy McCarthy of Cork). Even in the 1980s, occasionally, at consultations in Cork and Limerick, a witness's name would strike a chord of recollection and he would politely enquire as to whether in fact the witness had played corner forward on the Cork team in the 1963 Munster Championship, and then confirmed his recollection that the player had been brought on as a sub in the semi-final. In 1995, he sponsored (and lent his name to) a perpetual trophy, which is competed for annually between the Bar and solicitors in Gaelic football, and was well pleased when the inaugural match was won by the Bar team, which included Dermot Flanagan and Jim O'Callaghan (then a temporary convert from Leinster rugby). His sporting interests were not narrow; he attended all home Irish rugby internationals and was a particular fan of cricket, a legacy of his north County Dublin childhood. He could flawlessly recite the roll of heavyweight champions of the world, as well as Olympic champions in a number of disciplines.

He was in truth a Mastermind champion *avant la lettre* and his specialist subjects were not just one or two but 20, 30, or perhaps 50.

One of a kind

He was a wry and astute observer of the idiosyncrasies of his colleagues in the Law Library, with a sense of humour in the Myles na gCopaleen mode. He devised an imaginary Western, in which various stock characters were played by named colleagues at the Bar: the gun-toting braggart, the hired assassin, the broken down drifter, and the slick-tongued gent who sold dubious patent medicines from the back of a wagon. On the occasion of some significant advance in space exploration, he opined that if, perchance, a named colleague was recruited as an astronaut, NASA would have to ensure that he was strapped in an upright position throughout his mission, to enable him to radio his customary message back to earth each afternoon at 4.15pm: "I have been on my feet all day".

He devised an ingenious series of imaginary statutes to which he would make cryptic reference on social occasions: an invitation to go for "a drink" would be met by the categoric statement that under "the Act" (never specified), " a drink" was defined as "not less than two".

He was a lifelong Fianna Fáil supporter, but had had an early brush with Clann Na Poblachta, the only vestige of which was an uncanny capacity to impersonate the very distinctive speaking voice and accent of its founder, Seán McBride.

He was unfailingly generous with his time and erudition and, whenever news of financial hardship striking a colleague came to hand, he was the first to put his name to a list of subscribers.

At the time of his death, he was the Senior Bencher of King's Inns. He died peacefully at home in the company of his nephew and three nieces, his closest surviving relatives.

His like will not be seen again.

DG

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A woman's place is in the law

At the King's Inns, just as in the Law Society, women are entering the profession in large numbers and often outnumber their male colleagues in the first years of the profession. Yet it remains the case that women are under-represented at the senior levels of both professions.

Mary Rose Gearty SC

Only 16% of our senior Bar are women. Of those barristers who take a devil, fewer than 20% are women. While there have been laudable efforts to correct the gender imbalance in the judiciary recently, it is noticeable that when these senior women are removed from practice in order to take their places on the bench, they leave the senior female robing room a lonely place.

Seeing the signs

Would it be different if we could somehow devise a way for men to grow wombs? If we could, would they use them? An even more sophisticated analysis of this phenomenon takes in the cultural and societal pressures and expectations that inform us from the earliest age, and not just the biological facts of life. One of the first signs that all was not equal in my world was the phenomenon of French and Saunders. They signalled to me in the mid-1980s that it was most unusual for a woman to be a comedian.

The very fact of their success suddenly made me realise that all the comedians I could think of were male. This was despite the fact that many of my female friends were as funny as any man I knew. I even had ambitions in that direction myself. This eye-opener was followed by learning of the Bechdel test: a work of fiction passes the test when it features at least two female characters who have a conversation with each other about anything, other than a man. Once I was alerted to the fact that most films or programmes only featured women (if women featured at all) as an addendum to the main, male characters, it became obvious that this was the cultural norm for anyone growing up in a Western democracy.

In Ireland, even in 2014, a study published by DCU in November 2015 showed that only 28% of the voices we hear on radio are women. A clear majority of experts and guests across all programmes and stations are male. Women are not only fewer in number on our airwaves, they also get less airtime across all stations. The exception to this rule was health matters – but only on RTÉ! During any discussions on health on RTÉ radio, a majority of contributors were female. The male majority remained on Newstalk and Today FM.

Despite growing awareness of inequality in all fields, little is done to correct the impression created by the media that women are not equal to men, that what they have to say is not as important and, when they do talk, it is likely to be about caring or housekeeping. It has been noted in international studies across different businesses and trades that no matter what the job, men tend to be paid more. There is no need for any shampoo manufacturer to tell them what they already know: they are worth it.

Women & Law

Against this background, Council of The Bar of Ireland initiated a pilot programme to encourage mentoring of women in the legal profession. The Irish Women Lawyers Association and the Law Society have been partners in the project, which launched in January.

The project was first conceived when a senior barrister in Belfast mentioned to me that she was being mentored. The scheme in Northern Ireland had been devised by a coach who, it transpired, consulted a

Dublin-based woman – Helen Stanton of Vantagepoint. Helen Stanton has run a series of successful mentoring schemes for women in a number of large corporations and bodies, including DCU and Microsoft. Meanwhile, Chairman of Council of The Bar of Ireland, David Barniville SC, had been in correspondence with the Law Society about what the two professions could do to further the cause of equality in the legal profession. A committee of women and men from the Bar and the solicitors' profession met to consider how best to implement plans for a similar project, with the assistance of Helen Stanton, who helped to design and offer a structured pilot programme to women in law, called *'Law & Women, Promoting Equality'*.

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Mentoring is traditionally a spontaneous arrangement. Because, traditionally, women did not work outside the home, it was an arrangement created by and for men. Part of the naturally occurring phenomenon of mentoring was that men recognised something of themselves in the pupil or apprentice and fostered him, so to speak. This kind of connection is less likely to occur when the apprentice is a woman, although (as many women will confirm) it can of course happen. Helen advised us on the kind of scheme that works and remains sustainable. It is highly structured and limited to a finite number of meetings in one year. It does not last beyond that time. The pilot programme is very small and, if the feedback is positive, we hope to expand it next year.

An invitation to get involved

We invited judges, senior women in State departments and solicitors' firms, in-house lawyers, and senior and junior counsel to join a panel of mentors. We then advertised in the *Bar Review*, the *Law Society Gazette* and *In Brief* throughout December, asking for applicants to apply to become "mentees" on the pilot programme.

We were seeking women who, ideally, had no connection with the legal profession before they qualified, i.e., who had no natural or family mentors. We wanted to represent the whole profession so that more senior members would apply to be mentees so as to advance further in their careers, and the mentees would not just comprise those starting out in their careers. We had four times the number of applicants as we had places.

Training for the mentors took place in early January and the feedback was excellent. I attended one training session for mentors and was struck by the simple psychological reasoning behind many of the exercises. There are grounds for hope that, as more women and men are trained as mentors, there will be greater awareness of how valuable it is to support each other in our professional lives.

Even if not assigned as a formal mentor, it may be that more senior women and men will respond positively to a request for assistance, or will simply be more open to facilitating a junior colleague as she works out a solution to a professional problem.

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