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Journal of The Bar of Ireland

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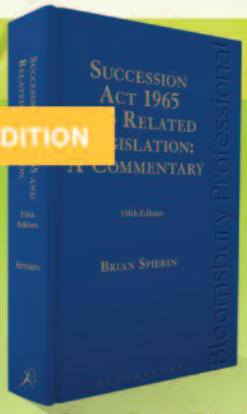

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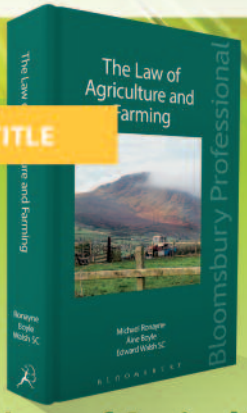

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Consultations and conferences

The Council of the Bar of Ireland is involved in a number of engagements with and on behalf of members.

Judicial appointments

The manner in which judges are appointed has again been the subject of public discussion. As indicated in the last edition of *The Bar Review*, the Council made a submission on proposals that emerged in December from the Department of Justice. At the time of writing, no bill has yet been published. The scheme of the original proposals raised serious issues, upon which further detailed submissions will require to be made. These include the need for (and cost of) a substantial new quango, the make-up of any new body, and the role of the Government in relation to appointments. In this edition, Michael Collins SC identifies issues that require to be considered in any debate about those proposals.

LSRA consultation on legal partnerships

The Council of The Bar of Ireland made a detailed submission to the Legal Services Regulatory Authority in response to an invitation for submissions in relation to the regulation, monitoring and operation of legal partnerships. The submission is available on our website.

The LSRA intends to embark on two further consultations in the coming weeks as provided in sections 119 and 120 of the Legal Services Regulation Act, 2015: the establishment, regulation, monitoring, operation and impact of multidisciplinary practices (MDPs) in the State; and, consultation on certain issues relating to barristers, client monies restriction and retention, or removal of restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor.

Engagement with members on Circuit

The Circuit Liaison Committee recently undertook a survey of members who primarily practise on Circuit. Some 47% of members responded to the survey, which has provided invaluable feedback and will be incorporated into a plan of action to better serve the needs of members on Circuit. The next step is to share the feedback received with members and a series of forums is being arranged over the coming weeks to meet with members on Circuit.

New requirements for professional indemnity insurance

Members will have received notices about a significant change in the manner of checking members' compliance with the rules relating to professional indemnity insurance (PII). As a result of data protection issues, one group scheme insurer has indicated that it can no longer provide the Council with details of members who hold PII from May 1, 2017. This means that all members are required to furnish details of cover to the administration staff no later than May 1, 2017. Compliance details are contained in the various notices circulated.

Upcoming events

On April 20 and 21 next, the Bar will host a conference in conjunction with the New York State Bar Association (NYSBA). The event is likely to attract a large number of lawyers from the US and Europe who are affiliated with the NYSBA.

On May 6 and 7, the Four Jurisdictions Law Conference will take place at the Distillery Building and King's Inns. This event brings together barristers and judges from Ireland, Northern Ireland, Scotland, England and Wales. The Conference is open to all members of the Bar and Bench alike. This year the Young Bar Committee will also participate in the organisation of the Conference and would like to invite other Young Bar members (one to seven years in practice) to join them at a discounted rate.

In addition, the Australian Bar Association will visit Dublin in early July for its biennial conference. The Bar will also collaborate in the organisation of the annual conference of the Bar of England and Wales in November 2017. Further details of these events will be circulated to members.

John Philpot Curran

2017 is the bicentenary of the death of John Philpot Curran. Partly because of the explosion of published material in the early 19th century and the international interest in legal figures, there is a large volume of material available about Curran. As a member of the Irish Bar, he espoused values that we hold to today: integrity, probity, and a willingness to take on difficult cases. A number of events will be held during the summer and autumn to honour this outstanding historical figure.

Paul McGarry SC
Chairman,
Council of The Bar of Ireland

Expert opinion

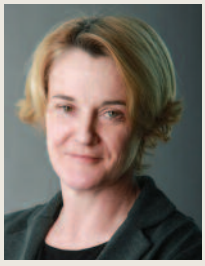
In this edition, our thoughts run to experts and how they can best assist in litigation.

New conduct of trial rules include two novel features for the giving of expert evidence. These are the use of a single joint expert and the procedure for a debate among experts, and we look overseas to see how similar provisions operate in other jurisdictions.

Lawyers involved in litigation regarding sexual abuse in schools will need to be familiar with the implications of the recent Supreme Court decision of *Hickey v McGowan*. The judgment explores how liability is to be apportioned between the school manager and the religious order running the school. It also appears that the damages awarded in that case represent a significant decrease from previous awards for sexual abuse.

The Supreme Court has also confirmed that Article 40 proceedings can be deployed in childcare cases. We analyse the judgments, which make it clear that this is a jurisdiction that will be used sparingly and only in the most exceptional cases.

And finally, who is to judge the appointment of our judges? In our closing argument, we insist that merit is the only proper basis for the appointment of those who uphold the rule of law and who act as the third pillar of our constitutional democracy. We analyse some of the provisions in the present Scheme of a Judicial Appointments Commission Bill and question whether it is in the best interests of justice that the Government and non-lawyers should dominate the selection process.



Eilis Brennan BL
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Celebrating women in law

In celebration of International Women's Day 2017, the Women at the Bar Working Group of The Bar of Ireland hosted the second annual dinner at the King's Inns to celebrate women in law on Thursday March 9, 2017.

An esteemed audience of barristers, judges and solicitors gathered to celebrate their female colleagues and were warmly welcomed by Chair of the Women at the Bar Working Group, Grainne Larkin BL.

After dinner, guests were treated to a heartfelt speech by our wonderful guest speaker Marion McKeon, who has enjoyed a varied career as broadcaster, documentary maker, and features editor and foreign editor for *The Sunday Business Post*, including a brief detour to the Law Library for three years. Now based in the US and working as US correspondent for *The Sunday Business Post*, Marion gave a fascinating insight into some of her work and shared some inspirational words of wisdom for women forging their legal careers.

At the Women in Law dinner at the King's Inns were (from left): Keynote speaker Marion McKeon; Chair of the Women at the Bar Working Group Grainne Larkin BL; and, Tánaiste and Minister for Justice Frances Fitzgerald.

Time to get running

This year's Calcutta Run will take place on Saturday, May 20. The run is Ireland's legal fundraiser and the money will go to two very worthwhile charities – GOAL and the Peter McVerry Trust.

The organisers said: "We are giving you plenty of notice and abundant time to dust off those runners and enjoy those healthy jogs in the park, along the canal or during lunch near your office".

The target for this year is to raise €200,000, so be sure to get as many people involved as you can. Further information will be posted to the Calcutta Run Facebook and Twitter pages.

Innocence Scholarships launch

On Wednesday, February 1, Dean Strang, the US attorney from the Netflix documentary *Making a Murderer*, launched The Bar of Ireland's 2017 Innocence Scholarships. Addressing a gathering of barristers in the Law Library on the subject of 'How can you defend those people?', he spoke about his experience of miscarriages of justice and emphasised the important role played by Innocence organisations and the legal professionals who participate in them. The Bar of Ireland provides Innocence Scholarships on an annual basis and this year four barristers will be sponsored to travel to the USA to assist Innocence organisations. After a competitive interview process held in March, the successful recipients have been selected and will travel to Cincinnati, Wisconsin and Florida at the end of May, and to Washington at the beginning of August.

At the launch of The Bar of Ireland Innocence Scholarships 2017 were (from left): Roger Cross BL; Mark Curran BL; Dean Strang; and, Chairman, Council of The Bar of Ireland, Paul McGarry SC.

New online service from Bloomsbury

Bloomsbury Professional has released a new online service called 'Intellectual Property and IT Law'. This follows a detailed review by the company of the requirements for solicitors practising IT and intellectual property law.

Provided as an online subscription, Bloomsbury states that the service is complementary to its existing portfolio of online services such as: 'Property Law'; 'Company Law'; 'Employment Law'; 'Litigation'; 'Tax Law'; 'Criminal Law'; and, 'Wills and Probate'.

Intellectual property and IT law is a rapidly developing area of law, often with serious penalties involved for infringement, and Bloomsbury hopes this service will help practitioners to keep up to date on changes and best practice, share insight easily, and provide accurate and up-to-date counsel in this space.

Specifically, the 'Intellectual Property and IT Law' service will cover Irish and UK titles around subject areas such as patents, copyright, trademark and data protection law. The service will also contain a monthly update, written by David Cullen, Partner, William Fry solicitors.

According to Sean O'Neill, Account Director for Bloomsbury Professional Ireland: "Legal counsels today are facing a complex environment when it comes to the ever-changing landscape of IT and intellectual property law. The internet has created an environment where issues such as privacy and data protection are increasingly contentious and important for leading organisations and private individuals alike. The legal professional plays a key role in this where answers are expected as fast as a Google search. The Bloomsbury 'Intellectual Property and IT Law' service online equips barristers to respond with surety while increasing their variety of work, to draft documents easily and to quickly search an excellent range of commentary". As new Bloomsbury Professional titles and editions are published, they will be added to the site at no extra cost.

Look Into Law

The annual Look into Law Transition Year programme run by The Bar of Ireland took place in early February 2017. Over five days the packed programme enthralled the 100 TY students, 28 of whom were from DEIS schools. Every morning they shadowed a barrister in a small group and in the afternoons in larger groups, they toured the Four Courts, the CCJ and King's Inns, and had talks from a sitting judge, a court Garda and a legal affairs correspondent. On the final day, the highlight for many, they took part as witnesses, registrar and jury members in a series of mock trials in the historic setting of Green Street courthouse. Feedback from students was overwhelmingly positive with many wanting to return to do the programme all over again! We are very grateful to all of our volunteer barristers, judges, Garda, journalists, library and King's Inns staff, and the Chief Justice, who gave so willingly of their time and ensured that the week was such a success.

TY students enjoyed taking part in a mock trial at Green Street courthouse.

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Claimants may avail of the ADR Process if:

- Proceedings have issued
- The index surgery of the ASR product took place in Ireland
- Revision surgery took place in Ireland not earlier than 180 days and not later than 10 years after the index surgery
- Injuries Board authorisation has been obtained
- The claim is not statute barred
- Revision surgery was not exclusively due to dislocation; trauma; infection; fracture of the femoral head; or any issue related to the femoral stem

For further information, or to discuss settlement of any eligible claim, please contact McCann FitzGerald (DFH/RJB) on 01 829 0000 or email *hipadr@mccannfitzgerald.com*

Denham Fellowship launched

The Bar of Ireland in association with The Honorable Society of King's Inns is delighted to announce The Denham Fellowship, a five-year programme of educational, professional and financial support to two aspiring barristers from socioeconomically disadvantaged backgrounds.

The Bar of Ireland believes that it is in the best interest of the public we serve that the make-up of the legal profession reflects the diversity of the society it serves. We want to encourage students from all backgrounds to consider a career at the Bar. As with many professions, becoming a barrister can be a daunting prospect for students if they don't have the necessary support and we hope to rectify that through the supports offered in this fellowship.

Full details of the Fellowship, which includes an annual €6,000 stipend, remission of King's Inns and Law Library fees and a mentoring programme, can be found on our website – www.lawlibrary.ie.

Pictured at the launch of the Denham Fellowship: Back row (from left): Chairman, Council of The Bar of Ireland, Paul McGarry SC; Dr Eimear Brown, Dean of the School of Law at King's Inns; Shauna Lynch, Breifne College, Co. Cavan; and, Liam Grant, St Joseph's Secondary School, Co. Dublin. Front row (from left): Cian O'Mahoney, Tullamore College, Co. Offaly; Aleksandra Roszkowska, St Brendan's College, Co. Mayo; and, Chief Justice Mrs Susan Denham.

Bar welcomes colleagues to Dublin

NYSBA International Section

The New York State Bar Association (NYSBA) International Section will hold its Spring Meeting 2017 in Dublin, in association with The Bar of Ireland, on April 20 and 21. The conference chairs will be Paul McGarry SC, Edward K. Lenci and Neil A. Quantaro. The Meeting begins with a lunch and executive committee meeting in the Distillery Building, followed by the official opening by Chief Justice Mrs Susan Denham, Paul McGarry, Neil A Quantaro and Claire Gutekunst, President of the NYSBA. There will be two plenary sessions, and attendees will hear views on judging from two top members of the bench on either side of the Atlantic: Loretta A. Preska, former Chief judge of the US District Court for the Southern District of New York; and, Mr Justice Frank Clarke of the Irish Supreme Court.

The second day will involve panel discussions covering topics such as the impact of Brexit on attorneys, and European and US perspectives on human rights challenges.

NYSBA and Bar of Ireland members are eligible for discounted rates.

Four Jurisdictions

The Four Jurisdictions Conference (for members of the Bars and judiciaries of Ireland, Northern Ireland, Scotland, and England and Wales) will also be held in Ireland this year from May 5-7. Topics will include the question of whether free movement between the four jurisdictions can be maintained post Brexit, as well as a lecture from Mr Justice Donal O'Donnell on the legal stories surrounding the *Asgard* and the 1914 Howth Gun Running.

The fee to attend the entire Conference is €260, while junior members (years 1-7) can avail of a reduced price of €210. You can opt to only attend parts of the Conference and prices for the different sections range from €35-€170 (€35-€110 for junior members). Anyone wishing to attend can register online at https://ti.to/bar-of-ireland/four-jurisdictions-conference-2017-dublin.

Queries on either conference should be directed to Rose Fisher at events@lawlibrary.ie or 01-817 5166.

Notice to suspend

The Honorable Society Of King's Inns Notice of Decision of Benchers to Suspend Mr Paul McLoughlin, Barrister-At-Law.

Pursuant to Rule 37(4) of the Society, notice is hereby given that the Bar Council made the following complaints to the Disciplinary Committee of the Society in relation to Mr Paul McLoughlin (described in the complaints as the Respondent).

1. The Respondent was convicted in the Dublin Circuit Criminal Court of the criminal offence of harassment, contrary to section 10 of the Non-Fatal Offences Against the Person Act, 1997 on June 8, 2012. The Respondent failed to inform the Bar Council of the conviction. The Respondent was thereby in breach of Rule 2.13 of the Code of Conduct of The Bar of Ireland in that he did not forthwith or at all report to the Bar Council the fact that he had been convicted of a criminal offence which might bring the profession into disrepute.

2. The Respondent engaged in conduct which brought the barristers' profession into disrepute by engaging in conduct which led to his conviction for the offence of harassment contrary to section 10 of the Non-Fatal Offences Against the Person Act, 1997. The conviction was in respect of offending behaviour which occurred between 1st day of May 2006 and 14th day of May 2010. The Respondent was thereby in breach of Rule 1.2{b) of the Code of Conduct of The Bar of Ireland in that he engaged in conduct which may bring the barristers' profession into disrepute.

3. The criminal offence in respect of which the Respondent was convicted related to the harassment of a colleague between 1st day of May 2006 and 14th day of May 2010. By so doing, the Respondent did not act in an ethical manner. The Respondent was thereby in breach of Rule 1.2{c) of the Code of Conduct of the Bar of Ireland in that he failed to observe the ethics of the barristers' profession.

4. The Respondent's harassment of a colleague over a significant period of time from 1st day of May 2006 to the 14th day of May 2010 and subsequent conviction for the offence of harassment contrary to section 10 of the Non-Fatal Offences Against the Person Act, 1997 amounted to serious breach of respect for a colleague. The Respondent was thereby in breach of Rule 7.1 of the Code of Conduct of the Bar of Ireland in that he did not treat a colleague with civility and respect.

5. The Respondent by his harassment of a colleague over a significant period of time from 1st day of May 2006 to the 14th day of May 2010 and subsequent conviction therein fell below the standards expected of a member of the barristers' profession. The Respondent was thereby in breach of Rule 2.4 of the Code of Conduct of The Bar of Ireland in that he did not uphold the standards set out in the Code of Conduct, and the dignity and high standing of the profession of barrister and his own standing as a member of the profession.

6. The Respondent by his behaviour aforesaid has not upheld the standards set out in the Code of Conduct of The Bar of Ireland. The Respondent is thereby in breach of Rule 1.1 of the Code of Conduct of The Bar of Ireland.

The Benchers of the Honorable Society of King's Inns at its meeting of January 11, 2017 confirmed the report of the Disciplinary Committee in which it upheld the complaints made on the basis of an acceptance by Mr McLoughlin that the complaints made by the Bar Council in the Complaint document were made out. The Benchers confirmed the sanction recommended by the Disciplinary Committee and resolved that Mr Paul McLoughlin be suspended from practice as a Barrister-at-Law to include all rights and privileges as a Barrister, including rights of audience for a period from the making of the final decision of the Benchers until December 11, 2028. In addition, the Committee deemed it appropriate that the aforementioned disciplinary measure should be the subject of publication/registration in accordance with Rule 37 of the General Rules of the Honorable Society of King's Inns.

Mr Paul McLoughlin is therefore suspended from practice as aforesaid until December 11, 2028.

Young Bar news and events

A round-up of activities of the Young Bar Committee and upcoming events.

Claire Hogan BL

Recent conferences and events

Community Law and Mediation evening

On March 7 last, members of Community Law and Mediation (CLM), based in Coolock and Limerick, addressed members on the value of working at their clinics. Michael Cush SC and Jane McGowan BL spoke about their experiences doing *pro bono* work, and about housing law in particular. CLM was happy to confirm that it recruited barristers for its clinics as a result of this information evening. If anyone wishes to volunteer or receive further information they can contact Roslyn Palmer of CLM at rozpalmer@gmail.com.

AIJA digital single market conference

The Young Bar Committee sponsored four junior members to attend the AIJA (International Association of Young Lawyers) conference in Dublin from March 30 to April 1 last. The conference was entitled: 'The European Digital Single Market – Breaking Down Digital Barriers, Click by Click'. Kate Conneely BL, Theo Donnelly BL, Jennifer M. Good BL and Liam O'Connell BL were selected to attend, and enjoyed a packed scientific and social programme with a group of young lawyers from all over the world.

Calendar dates to note

Four Jurisdictions Conference

The Four jurisdictions Conference will be held in Dublin from May 5-7, 2017. This conference is for members of the four Bars: The Bar of Northern Ireland, The Scottish Bar, The Bar of England and Wales, and The Bar of Ireland and their judiciary to meet and exchange ideas. A special rate is available for members in years 1-7 and all are encouraged to attend.

Bar of Northern Ireland Conference and black tie dinner

On May 19, 2017, members from The Bar of Ireland are invited to the Inn of Court in Belfast attend their Young Bar Association conference on the theme: 'Brexit – Legal Impact and Opportunities'. Our colleague John Kerr BL will be speaking about cross-border civil claims. A black tie dinner will be held afterwards at the Hilton Hotel. Further details are available on the Young Bar Hub.

Young Bar Hub blog posts

We have developed an online hub in the members' section of the Law Library website, which provides resources such as 'Events and Opportunities', 'Nationwide Court Information' and 'Legal Blog Posts'. Any future blog posts, notices or other content can be sent to youngbar@lawlibrary.ie.

Junior counsel research panel

There was a significant response to the development of a research panel. Members have provided their details for the production of a list, which will be published and promoted at the beginning of Easter Term.

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Defender at heart

Dean Strang is recognised all over the world for his role as one of the defence team in the Netflix series *Making a Murderer*. On a recent visit to Dublin, Dean spoke to *The Bar Review* about the show, the issues it raises, and its impact on his own career.

Ann-Marie Hardiman
Managing Editor at Think Media Ltd

Dean Strang didn't want to be a lawyer. His first choice of career was the somewhat unlikely one of political cartoonist. However, he realised that like many creative endeavours, as much as he loved it, it wouldn't be a lasting career: "I didn't have a back-up idea at that point but my Dad suggested I might be a good lawyer".

He also had no intention of pursuing a career in criminal law, preferring the area of employee benefits: "There again, it was serendipity, much like going to law school in the first place. I got a job with a large firm in Wisconsin [where he is from, and where the events depicted in *Making a Murderer* take place], and they needed someone in litigation. As a brand new associate, I didn't have much choice. I did litigation involving employee health and welfare and pension plans for over two years. Around that time, I began to socialise with a group of young public defenders, and I decided what they did was pretty interesting and important, so I decided to explore criminal law".

His first foray into criminal law was on the other side of the courtroom, as it were, as a federal prosecutor, but he felt this was a poor fit: "I wasn't cut out to be a prosecutor. I did like criminal law; I just thought I was on the wrong side".

A vacancy arose in one of Wisconsin's top criminal defence firms, and that might be said to be the point where Dean's career began in earnest. This time he stayed for years, before leaving to spend five years as the state's first federal public defender. It would be natural to assume that a public defender would have a strong social conscience, but throughout our interview Dean is resistant to the idea that his career choices are a reflection of a particular political or ideological view: "I wish I could say that social conscience had been an earlier or stronger development; I wish I could say it was stronger today. I think just as a matter of character I tend to side with the underdog".

Fate steps in

Dean finally made the decision to go back into private practice in 2005, and at this point things took an extraordinary turn. He had been back in private practice for just six months when he got a call from the Avery family to ask if he would consider defending Steven Avery (see panel), who had been charged with the murder of a young photographer, Teresa Halbach. For Dean, it was an opportunity to build the profile of his new practice: "I knew of the case, because it was receiving publicity from the outset, and thought it would be a good time for me to take it. It might not be lucrative, but would be good for the visibility of my practice".

At that stage Dean was not aware that the Avery family had agreed to let filmmakers Laura Ricciardi and Moira Demos make a documentary about the case, and he readily admits that he and fellow defence attorney Jerry Buting took a little convincing: "I was leery, and Jerry shared my concerns, but the filmmakers had won the trust of the Averys, and a film was going to be made whether we

Making a Murderer

Making a Murderer follows the trials and conviction of Steven Avery and his nephew Brendan Dassey for murder. Avery had previously been incarcerated for 18 years for rape, a conviction that was overturned with the help of the Innocence Project, when DNA evidence not available at the time of his conviction exonerated him. After his release in 2003, Avery filed a civil lawsuit against Manitowoc County in Wisconsin, and against officials associated with his arrest and conviction. Two years later he was arrested and charged with the murder of Teresa Halbach. His nephew, Brendan Dassey, was also arrested and charged in connection with the case, having confessed under interrogation. Avery maintains his innocence of this second crime, and claims that he was framed in order to discredit his civil case. The series explores accusations of evidence tampering and other issues that cast doubt on the prosecution's case against him. It also focuses in some detail on Dassey's case, where issues around his treatment by the police, and by his own legal representatives, led to his conviction being overturned in 2016. Despite this, both men remain incarcerated and a second series of *Making a Murderer* will follow the developments in their cases.

participated in it or not. So we talked with the filmmakers and agreed that we would co-operate on condition that there was no invasion of lawyer/client privilege, and that nothing whatsoever should be made public until after both cases [of Avery and his nephew Brendan Dassey, who was also charged in connection with the murder] had gone to trial and the trial was completed".

Laura Ricciardi's own background was in law, and Dean says she and Demos readily agreed to the conditions. It was a slow process of trust building at first – the fascinating scenes where Dean and Jerry are seen sitting in an apartment discussing the details of the case were not filmed until almost a year into the process. Over time, however, he came to see that the two women were interested in broader elements of criminal justice, and were using the stories to pose bigger questions to viewers. He says the process became a reciprocal one, as his and Jerry's approach to the case was affected by the filmmaking: "Those were questions that appealed to Jerry and me, issues that we'd thought were important for a long time as well, so in the end we had a really very good relationship with the filmmakers".

Life changing

For us as viewers, *Making a Murderer* is a relatively recent phenomenon as it was first broadcast in late 2015. The events featured, however, took place a decade before, in the period from 2006 to 2007, so there was quite a lengthy period during which life went back to normal for Dean: "Years went by and we went on with our lives. The cases had garnered massive publicity in the state but not too much outside it, so I didn't know if the film would ever be sold, and I sort of forgot about it".

In fact, Dean didn't find out that the film had been sold to Netflix until just a couple of months before broadcast. Then, in late 2015, everything went crazy: "The week before it came out we had a conference call with Netflix and they said: 'You might get some media calls…'"

Having dealt with considerable media attention during the trial, Dean and Jerry felt it wouldn't be anything they couldn't handle, but even Netflix didn't fully anticipate the reaction to the series, in particular the public's interest in the two lawyers. For Dean, the impact was immediate: "The film came out on December 18, 2015, and by 6.00pm that evening I had my first email from a gentleman in South Carolina who had just watched all 10 hours".

By the middle of the following week, Dean was receiving an average of 150 emails a day, from the media and the public, "a deluge of unexpected attention", almost all of which, he says, was polite and positive: "The attitude of most people has been friendly and remarkably thoughtful – people had clearly taken time to think through what they wanted to say, what *Making a Murderer* meant to them, how it connected to their lives in some way. I can probably count on 10 fingers the number of angry, hostile or insulting messages I received".

It might come as a surprise in this era of internet trolling and 'comment culture' to hear that people can still react sensitively to the complex issues of truth and justice that the Avery and Dassey cases present, but Dean says that both online and in person (he and Jerry Buting did a tour of theatres where they discussed the case and the wider issues around it), questions and comments were often sceptical and tough, but almost always thoughtful and fair. It's hard to escape the conclusion that this has more than a little to do with Dean and Jerry's own innate decency, which is clear throughout the show, from their sensitive teasing out of the issues in those filmed case conferences, to their clear commitment to Steven Avery, to getting him the fairest possible trial, and treating him with dignity throughout.

The bigger picture

The Avery and Dassey cases were seen as raising a number of issues about the US justice system. In the case of Brendan Dassey, there was a perception that practices around the interviewing of and obtaining a confession from an underage young man of below average intellectual development were at the very least highly questionable. The programme was seen as raising wider issues too, for example the fact that the system seems to be more about pursuit of a conviction at all costs than pursuit of the truth or of 'justice'. Dean agrees with this assessment, and says it is reflected in the correspondence he's received: "Of the people who've selected themselves to write to me, about two-thirds have spoken about their reaction to

Defending the guilty

Dean Strang visited Dublin to launch The Bar of Ireland's Innocence scholarships, which fund young barristers to work with Innocence projects in the US each year. At the launch, he spoke eloquently on the topic of how lawyers deal with the ethical question: "How do we defend the guilty?" He spoke of the need to be aware of the assumptions both legal professionals and the general public can have about "those people" – the idea of the accused as "the other", and the dangers inherent in these assumptions. He felt strongly that if we can break down those assumptions, and realise that there is really no 'us' and 'them', then the question becomes: "How can I not defend my people?" It's at this point, he felt, that a lawyer will have found a vocation, even if they never actually defend in court: "If you can do that, you're a defender at heart".

what they perceive as an injustice, or a miscarriage of justice, or in some cases a perception that Steven Avery in particular might well be guilty, but that the system shouldn't work that way".

Interestingly, but perhaps unsurprisingly, the correspondence varied according to country: "Writers from some countries say it reminded them of a period in their history, or of problems they have today. Writers from other countries are shocked and dismayed that this can happen in the United States because it wouldn't happen in their country. It's a very interesting difference anecdotally, to see what level of confidence people have that their own nation's criminal justice system would or would not be capable of some of the mistakes or shortcomings they see in the film".

He mentions in particular the response from these islands: "I received more emails per capita from Ireland and the UK than from any country outside the US, and the Irish very often say this reminded them of a time in the 1970s and the 1980s. And some of them think things are much better now and some of them say that not all is rosy still. That's been a very common Irish reaction, that it touches a chord with a shared historical if not personal experience, with which the Irish are familiar".

With characteristic thoughtfulness, Dean is pleased that people are thinking about these issues and wanting something to be done, but he knows it's not that simple: "Legislators shouldn't be expected to react to any one movie. Nonetheless, I do think that we can credit the filmmakers and Netflix with spawning enough interest that in Illinois, Tennessee, and other states, legislators are looking at the interview of juveniles while they're in police custody and there has been some effort, especially in Illinois, to improve the protections of juveniles when they're subjected to custodial police interview".

He also sees *Making a Murderer* in its wider context as one of several 'true crime' documentaries, and sees this in turn as a reflection of wider social issues, particularly in the States: "We had *Serial*, the podcast that preceded *Making a Murderer*. We've had *The Jinx* on HBO, and I think you'll see others. We go through cycles of rising and falling interest in true crime stories in the United States but we're in a period of rising interest and that has been coupled with a broader public discussion about criminal justice, magnified I think by social media and also, I think, the related discussion Americans are having about police agencies and how they serve their communities. The spate of shootings of unarmed people, often people of colour, captured very frequently on smartphones, the Black Lives Matter movement, and the Blue Lives Matter counter-movement are all part of this. That discussion had its own genesis but I think has been a catalyst in some ways to expanding discussion to include not just the front end of the criminal justice system, which is to say the police investigation role, but the middle, the judicial function. I hope eventually the discussion spreads to the back end of the system, which is corrections and prisons".

When we conducted our interview, the legal system and judiciary in the US were under particular scrutiny in the wake of responses to President Donald Trump's efforts to restrict access to the US from certain countries. Dean refuses to be drawn on his personal views of the current administration, but in characteristic fashion, feels that the overarching philosophical issues raised are timely and important:

"Events of the last several years, certainly including the November election, have reminded Americans that democracy is not a passive project. It often requires active engagement, raising your voice, collective assembly. The country is divided in its viewpoints, which isn't a bad thing in itself – a diversity of viewpoints is a healthy thing in democracy, as is protest. My hope is that as we engage energetically in that active project, we don't lose altogether the ability to converse with one another, that civic protest and even civil disobedience don't replace civility and simply listening to one another. It's an exciting time – and that's not to say that it's not also a perilous time".

Returning to the quiet life

Dean is no longer directly involved in the Avery case, and as life slowly returns to normal, he has returned to his practice, and to his other main interest, legal history. Having published his first book, *Worse than the Devil: Anarchists, Clarence Darrow, and Justice in a Time of Terror*, which recounted the story of a 1917 American miscarriage of justice, he's now in the process of completing another: "It's a more ambitious research and storytelling project for me. It's the story of the largest mass trial in US civilian court history, and in many ways it's the story of the emergence of the US Department of Justice in its modern form. The Department of Justice took it upon itself to try to combat the Industrial Workers of the World, a labour union at the time, who were seen as the most organised radical opposition to America's entry to World War I. It's a fascinating story".

Apart from that, his life now is about getting back to normal: "I'd like to try to restore my law practice from a 50% caseload, where it's been for the last year, to closer to a full caseload. I'm also looking forward to spending more time with my wife and my dog, jogging more regularly, and enjoying Madison, Wisconsin, which is really a lovely place to be".

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

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AGRICULTURE

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O'Brien v Governor of Cork Prison

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DPP v Murphy

Conviction – Murder – Evidence – (Birmingham J., Mahon J., Edwards J. – 30/01/2017) – [2017] IECA 32
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DPP v Doyle

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DPP v Heffernan

Proceeds of crime – Property – Constitutional rights – Applied *In Re Greendale Developments Ltd (No 3)* [2000] 2 IR 514, Applied *Murphy v Attorney General* [1982] IR 241, Applied *State (Byrne) v Frawley* [1978] IR 326 – (Denham C.J., Dunne J., McKechnie J., MacMenamin J., Laffoy J. – 01/02/2017) – [2017] IESC 3
Murphy v Gilligan

Sentencing – Aggravated burglary – Manifestly excessive sentence – (Sheehan J., Birmingham J., Mahon J. – 23/01/2017) – [2017] IECA 35
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DPP v Tobin

Sentencing – Dangerous driving causing death or serious bodily harm – Severity of sentence – Referred to *DPP v Keith Jervis and anor* [2014] IECCA 14, Referred to *DPP v Stronge* [2011] IECCA 79 – (Mahon J., Birmingham J., Edwards J. – 17/02/2017) – [2017] IECA 34
DPP v Handley

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McCann v J.M. and Y.W.

Sentencing – Fraud – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – (Birmingham J., Mahon J., Edwards J. – 23/01/2017) – [2017] IECA 2
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DPP v Walsh

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European Union (restrictive measures concerning Yemen) (no. 2) regulations 2016 – SI 617/2016
European Communities (carriage of dangerous goods by road and use of transportable pressure equipment) (amendment) regulations 2017 – SI 5/2017
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(amendment) regulations 2016 – SI 550/2016
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Minimum Custodial Periods upon Conviction for Murder Bill 2017 – Bill 21/2017 [pmb] – Senator Marie-Louise O'Donnell, Senator Gerard P. Craughwell and Senator Kevin Humphreys
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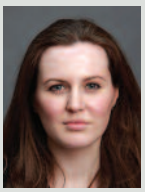
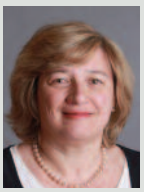
Hickey v McGowan: recent developments in classroom sexual abuse cases

The recent Supreme Court decision of *Hickey v McGowan and Cosgrove* [2017] IESC is an important case that has significant practical consequences for litigation involving sexual abuse in schools run by a religious order.

Líosa Beechinor BL
Sara Moorhead SC

Introduction

The *Hickey v McGowan and Cosgrove* judgment explores how liability is to be apportioned between the manager of the school and the religious order, and underlines the importance of suing all of the appropriate defendants in the action. The principles to be applied when suing unincorporated associations are analysed in detail and the decision underscores the need for precision in pleadings. The damages award also appears to represent a significant decrease from previous awards for sexual abuse.

Background

In this case, the plaintiff attended a national school in Sligo for four years. For the final three years at the school he was taught by the second named defendant, who was then a Marist Brother. The High Court found that, during

the period in which he was taught by the second named defendant, he had been sexually abused by him in the classroom during class time. That finding was not appealed. The national school in question was run according to the prevailing legal regime for the governance of schools at that time (as discussed in the judgments of the Supreme Court in *O'Keeffe v Hickey* [2009] 2 IR 302) in that it had a board of management which was headed by a school manager. The administrator of the parish, on behalf of the Bishop (who was the patron), was the school manager. It was this manager who discharged the function of legally appointing teachers to the school, including the principal of the school. Those teachers, including the principal, were supplied by the Marist Order. The congregation of the Marist Order was divided into provinces, each province having at its head a provincial. The Marist Brothers were directed to take up their positions as teachers by the provincial of the Marist Order in Ireland. The first named defendant is the current Provincial of the Marist Order in Ireland.

It is worth noting that in these proceedings there was no allegation that the Marist Order knew or ought to have known of the activities of the second named defendant. Nor was there any claim that the Marist Order failed to take appropriate steps to deal with the actions of the second named defendant.

The administrator of the parish, on behalf of the Bishop (who was the patron), was the school manager. It was this manager who discharged the function of legally appointing teachers to the school, including the principal of the school. Those teachers, including the principal, were supplied by the Marist Order.

High Court

It is against this backdrop that the High Court assessed general damages against the second named defendant at €350,000, comprising €250,000 to date and €100,000 for future. However, the plaintiff had pleaded that the first named defendant was responsible for the wrongdoing perpetrated by the second named defendant, who was a member of the Order. Thus, the High Court came to consider whether the first named defendant, and the Marist Order, were vicariously liable for the acts of the second named defendant. In this regard, in its defence, the first named defendant had pleaded that:

"The Plaintiff discloses no cause of action against the first named defendant on the basis, *inter alia*, that the religious order described as the Marist Brothers is an unincorporated association, whose members are not liable in law, either directly or vicariously, for any act or default of each other. Further, and without prejudice to the foregoing, the current members of the Order are not liable directly or vicariously for any act or default of any member of the Order committed prior to their becoming members thereof".

In determining that the Marist Order was vicariously liable for the actions of the second named defendant, the High Court considered that the Marist congregation was exclusively responsible for the day-to-day control of the activity of a teacher. Initially, any issues arising in respect of a teacher would be addressed between the teacher and the principal of the school and, where the issues could not be resolved within that relationship, they were resolved within the hierarchal structure of the Marist Order. Borrowing from the analysis of the UK Supreme Court in *Catholic Child Welfare Society and ors v Various Claimants (FC) and ors* [2012] UKSC 56, the High Court proceeded to treat the Marist Order as if it were a body corporate and held that the first named defendant was sued as a representative of that body, which was vicariously liable for the acts of the second named defendant.

The High Court then turned to the plea made by the first named defendant pursuant to s.35(1) of the Civil Liability Act, 1961 to the effect that since the plaintiff had not sued the manager of the school (a concurrent wrongdoer), and that claim was now statute barred, the plaintiff should be deemed responsible for the liability of the manager. The Court acknowledged that the manager was the person legally responsible for employing the second named defendant and therefore was vicariously responsible for his activities. However, the High Court concluded that, in light of the regime operated by the school, and that the Marist Order consequently had effective control of the school, the manager was only 10% responsible for the wrongdoing perpetrated by the second named defendant, and accordingly damages were reduced by €35,000 to €315,000.

Supreme Court

The first named defendant appealed to the Supreme Court. In giving the majority judgment, O'Donnell J. overturned the finding of the High Court that an unincorporated association could be sued as though it were a body corporate. However, the Supreme Court did find that a religious order, as an unincorporated association, could be vicariously liable for the acts of its members. It noted that while, in theory, all members of the Marist Order were vicariously liable for the acts of their fellow member, only the first named defendant had been sued. As such, it was only the first named defendant, the Provincial, who was found vicariously liable for the wrongdoing of the second named defendant. The Court proceeded to reduce the damages awarded to €150,000 and assessed the liability of the school manager at 50%. Therefore, the final award made against the first named defendant was €75,000.

There are a number of matters highlighted by this decision that should be borne in mind by practitioners, including the obligation to ascertain the correct defendants to an action, the need for precision in pleadings, the consequences of failing to sue a concurrent wrongdoer, and the attitude of the courts to the assessment of damages for sexual abuse.

Obligation to ascertain correct defendants

In his judgment, O'Donnell J. warns that: "questions as to whether the correct defendant has been sued are major traps for plaintiffs and their advisors". Here, the plaintiff's solicitors sought agreement from the first named defendant's solicitors that the first named defendant could be treated as a representative of the Marist Order. That request was refused and it seems that no further steps were taken by the plaintiff's solicitors to achieve a result whereby the first named defendant would be treated as a representative of

the Order. As such, the first named defendant was sued as an individual who was a member of the Marist Order.

While it appears that a plenary summons had been prepared naming the Attorney General, Ireland and the Minister for Education as parties to the proceedings, ultimately, in light of the decision in *O'Keeffe v Hickey* [2009] 2 I.R. 302, it seems that the plaintiff decided not to proceed with his claim against the State parties. As such, the only parties sued were the perpetrator of the sexual abuse and a fellow member of the Marist Order. The legal employer of the second named defendant was not named and, according to O'Donnell J., "no sufficient attempt was made here to endorse the plenary summons with a claim that the [first named] defendant was sued in a representative capacity, or to identify the persons alleged to be represented". He proceeded to advise that:

"[T]he appropriate course in such a case is to write to the order or provincial threatening to sue all individual members of the order unless a defendant is nominated. If that course is not taken, then all members who can be identified can be joined as defendants. If, however, any judgment is obtained against those defendants, the judgments are individual and whether or not such judgments will be met by insurance, or from assets which may be held for the benefit of the order more generally, may depend on the terms of the insurance, and indeed the terms upon which such assets are held, and perhaps the willingness and ability of the order to make funds available to satisfy any judgment against an individual".

In his dissenting judgment, Charleton J. agreed with O'Donnell J. insofar as he also considered that there was nothing to support a finding that this action was a representative action. It was an action against the named defendants. He noted that, if the plaintiff wished to take a representative action, Order 15 Rule 9 of the Rules of the Superior Courts provided that in a case where there were "numerous persons having the same interest in one cause" then by order of the High Court, one of them could take an action "or be authorised by the court to defend" for the benefit of or "on behalf…. of all persons concerned". In addition, Order 4 Rule 9 provides that where an action is taken or defended in a representative capacity, the indorsement shall identify the capacity in which the plaintiff or defendant sues or is sued. However, in the premises, no such application was made. The upshot of the failure to identify the correct defendants in this case was that, pursuant to s.35(1)(i) of the Civil Liability Act, 1961 the plaintiff was fixed with the liability of the manager whom he ought to have sued but who was now protected by the limitations of statute.

The first named defendant appealed to the Supreme Court. In giving the majority judgment, O'Donnell J. overturned the finding of the High Court that an unincorporated association could be sued as though it were a body corporate.

Concurrent wrongdoers

The Supreme Court endorsed the close-connection test enunciated by Fennelly J. in *O'Keeffe v Hickey* as the operative test for determining vicarious liability in this jurisdiction, and noted that the test was satisfied in this case in circumstances where the abuse took place during the very act of teaching in the classroom. As such, the Court considered that there was a close and sufficient connection between the teaching being carried out by the second named defendant and the abuse perpetrated by him. O'Donnell J. noted that the case had effectively proceeded on the assumption that the manager employer was vicariously liable for the abuse. However, the manager had not been sued and so it fell to the Court to determine how s.35(1)(i) of the Civil Liability Act, 1961 should be invoked. In analysing the operation of that section, O'Donnell J. considered that s.35(1)(i) was a deeming provision, which deemed the liability of a statute-barred concurrent wrongdoer a form of contributory negligence, which could then be pleaded against the plaintiff in the reduction of the plaintiff's award. He went on to observe that:

"A…. difficulty arises because s.35(1)(i) is triggered merely by the failure to sue a party against whom a claim is statute barred and may take no account of the capacity of such a party to meet an award of damages. In such a case, although the plaintiff might not have recovered damages against the concurrent wrongdoer, the failure to sue the wrongdoer may result in a reduction in the plaintiff's award".

While the Court applied s.35(1)(i) in respect of the plaintiff's failure to sue the manager of the school, it did not apply it in respect of the plaintiff's failure to sue all members of the Marist Order. Since the plaintiff had not taken sufficient steps to sue the first named defendant as a representative of the Marist Order, it would seem that he ought to have sued all members of the Order. However, the Court was unwilling to permit the first named defendant "to rely on the failure of the plaintiff to sue other members of the religious order when knowledge as to the identity of such members was something much more clearly within the power and control of the first named defendant rather than the plaintiff". It seems that issue was not raised on the pleadings and accordingly the Court considered that it was "neither necessary, nor appropriate, to address the question of the potential liability of other members of the Marist Order for the purposes of s.35(1)(i)".

The Supreme Court continued its analysis of s.35(1)(i) by observing that it had the capacity to operate harshly in various circumstances. In the first instance, it observed that where there were a large number of defendants who might be concurrent wrongdoers on the grounds of vicarious liability, and who the plaintiff lacked the capacity to identify, it might be unfair to reduce the plaintiff's award for his failure to join all potential defendants. However, the Court noted that no provision was made in the Act "for the possibility of lack of knowledge on the part of the plaintiff of the existence of a concurrent wrongdoer when proceedings are commenced, and indeed when a claim came to be statute-barred". Secondly, the Court noted that:

"The symmetry between the provisions of s.35(1)(i) and the general provisions on contribution, while close, is not perfect. The limitation period for the initial claim by the plaintiff against the wrongdoers is not identical to the limitation period for a claim for contribution. Thus the fact that a plaintiff's claim against

the concurrent wrongdoer has become statute barred does not necessarily preclude a claim for contribution by any other concurrent wrongdoer who has been sued. In such circumstances, which may of course be unusual, a defendant may have the option of either relying on the provisions of s.35(1)(i) or joining the concurrent wrongdoer as a third party".

There is no doubt, O'Donnell J. observed, that this matter will be revisited in other cases. This interpretation of these sections gives rise to real and significant difficulties for practitioners.

One of the most interesting and problematic parts of this judgment is the analysis by O'Donnell J. that the failure of the plaintiff to add the manager as a co-defendant represented 50% contributory negligence. In the High Court, O'Neill J. who, in determining liability, found 90% against the defendant and 10% against the plaintiff, did an analysis of the evidence as to why the manager was far less culpable because of his more limited involvement and concluded that the Marist Order was much more substantially in control of the teaching than the manager of the school. In the Supreme Court judgment, there is little analysis of the question of the potential liability of the defendant who was not added. O'Donnell J. held that, since vicarious liability was liability without fault, it was difficult to see that there could be different degrees of fault as contemplated by s.34 of the Civil Liability Act, 1961. There is no evidential basis in the judgment as to why s.34(1)(a) applied and liability should be apportioned equally between the parties. There is no doubt, O'Donnell J. observed, that this matter will be revisited in other cases.

This interpretation of these sections gives rise to real and significant difficulties for practitioners. Practically, it would seem that where practitioners are unsure who the correct defendants are, they can advise that an O'Byrne letter should be sent to all potential defendants calling on them to admit liability and, failing the identification of the party responsible by that procedure, they should ensure that all potential defendants are sued, thereby protecting their clients from being prejudiced by the operation of s.35(1)(i) of the Act. Even if the recovery of damages against one concurrent wrongdoer is unlikely, securing judgment against all will generally enable the plaintiff to avail of s.12 of the Civil Liability Act, 1961, which provides that concurrent wrongdoers are each liable in respect of the whole of the damage.

Unincorporated associations

Having noted that the common law treated a religious order, such as the Marist Order, as an unincorporated association, O'Donnell J. considered that it was essential to the very nature of an unincorporated association that it was not a body corporate and, therefore, could not be treated as if it were that which it was not. Consequently, as noted above, it appears that, in the absence of agreement or a court order that the first named defendant could be sued as a representative of the Marist Order, all members of the Order should have been sued. In its analysis on the liability of unincorporated associations, the Court agreed with the first named defendant's plea that current members of an unincorporated association were only liable for acts committed during the period of their membership and were not liable for acts of a member prior to their becoming a member of the association. However, it noted that if that plea, which was articulated in the first named defendant's defence, was meant to imply that the first named defendant was not a member of the Marist Order when the acts of sexual abuse were perpetrated, that was not explicitly pleaded and was not addressed in evidence. Consequently, the Court was of the view that the plaintiff had established that he was abused by the second named defendant, who was a member of the Marist Order, and he had pleaded that the first named defendant was a member of the Marist Order and that was not denied. As such, the first named defendant was vicariously liable for the acts of the second named defendant.

Quantum

While not wishing to undermine the significance of the effects of the assaults on the plaintiff's psyche, O'Donnell J. considered that there was a spectrum of cases on which any case must be located. In the instant case, he felt that there had been "even more severe and traumatising cases of abuse" and, as such, this was not a case that should be located at the most extreme end of that spectrum. Consequently, the Court substituted an award of €150,000 for the sum of €350,000 awarded by the High Court, which it then reduced by 50% pursuant to s.34 and s.35 of the Civil Liability Act, 1961. Curiously, in reducing the award, O'Donnell J. did not refer to previous cases, including that of *M.N. v S.N.* [2005] IESC 30, in which Denham J. used similar language to that of O'Donnell J. to find that a plaintiff who had been subjected to sexual abuse over a period of five years, which culminated in rape, should be awarded €350,000.

O'Donnell J. proceeded to call for a correlation between the figures awarded for psychological injuries resulting from sexual abuse and general damages awarded for catastrophic injuries. This was the approach taken by Denham J. in *M.N. v S.N.* However, their views of quantum in cases of sexual abuse appear to be significantly different and he made no reference to the latter case. O'Neill J. awarded the plaintiff the sum of €350,000 in line with the decision in *M.N. v S.N.* In reducing the damages to €150,000 (before deducting 50% for the failure to name the manager as a co-defendant), O'Donnell J. did not address the issue of how the trial judge had erred in awarding €350,000 and reduced the quantum by reference to the overall assessment of general damages in the context of catastrophic injuries cases. There is no reference in the judgment to the manner in which the trial judge erred. The award (even before the reduction) under s.35(1)(i) of the Civil Liability Act, 1961 represents a significant reduction in the value of an award for sexual abuse.

Conclusion

It seems that, irrespective of whether the decision of the majority in *Hickey v McGowan and Cosgrove* might be open to criticism, there are important practical consequences for practitioners, including the consequences of failing to name the correct defendants to an action, the need for care when suing unincorporated associations, the need for precise pleading, and the difficulty in advising on the apportionment of liability of concurrent wrongdoers. The case also represents a significant development in the approach of the Supreme Court to the assessment of damages for sexual abuse.

Expert evidence: lessons from abroad

International experience of new procedures for the giving of expert evidence indicates that they have the potential to be a positive addition to the Irish courts system.[1]

Aoife Beirne BL

Introduction

The amendments to the Rules of the Superior Courts introduced by the Rules of the Superior Courts (Conduct of Trials) 2016[2] include the addition of two novel features for the giving of expert evidence: the use of a single joint expert and the procedure for a debate among experts. This article looks at how similar provisions have operated in other jurisdictions to see what guidance can be gleaned.

Single joint expert

Order 31, rule 58 makes provision for the use of a single joint expert in all High Court trials. Where two or more parties wish to offer expert evidence on a particular issue, the judge has a power to direct that the evidence can be given by a single joint expert. The single joint expert can either be agreed between the parties or, when they disagree, the court can select the expert from a list prepared by the parties, or direct that the expert be selected in "such other manner" as the court directs. The phrase "such other manner" is identical to the phrasing adopted in similar rules in England and Wales. This means that the court has a large measure of discretion as to how the expert will be appointed, and leaves open the possibility that the court can appoint its own expert. There is also no guidance regarding the circumstances a court can consider when deciding whether expert evidence should be given by a single joint expert. Of course, there was already provision for a court-appointed expert in personal injuries proceedings under section 20 of the Civil Liability and Courts Act 2004, but this was rarely used.

On the recommendation of the Woolf Interim Report,[3] Rule 35 of the Civil Procedure Rules (CPRs) in England and Wales provides for the appointment of a single joint expert. Initially, Lord Woolf was clearly of the opinion that single joint experts should be the norm and stated, in a curial context in *P v Mid Kent Area Healthcare NHS Trust*,[4] that the starting point should be that, unless there is a reason not to have a single joint expert, then there should only be a single expert.[5] He was also of the opinion that there was no need for the single joint expert's report to be tested by cross-examination. However, the experience in England and Wales suggests that it is certainly not the practice of the courts there to impose a single joint expert in every case where

the expert opinion covers a substantially-established area of knowledge.[6] A Practice Direction[7] sets out the circumstances in which a joint expert may be appropriate.

It has been held in *Daniels v Walker*[8] that the appointment of a single joint expert does not prevent parties from instructing their own experts. There, the defendant was dissatisfied with the joint expert's report and wished to appoint another expert. It was held by the Court of Appeal that the trial judge should have allowed the defendant to call their own expert. It is also clear from the English jurisprudence that a party will be permitted to appoint their own expert where there might be different schools of thought on an issue, such as in *Oxley v Penwarden*.[9] This concerned an alleged failure on the part of the defendant to diagnose a vascular condition. The Court of Appeal recognised that if a single joint expert were appointed, there was a danger that the court would effectively be required to decide on the issue of causation without challenge. There was some initial uncertainty in England and Wales as to whether a judge was obliged to accept the evidence of the single joint expert without question, the difficulty being that there was no alternative expert opinion to which a judge could compare the single joint expert's opinion. Despite some initial authority, which suggested that the evidence of the single joint expert should only be disregarded in very rare circumstances,[10] the Court of Appeal in *Armstrong v First York Ltd*[11] upheld the decision on the part of the trial judge to prefer the evidence of fact of the claimants to the evidence of the single joint expert engineer as to how an accident had occurred, which was in direct conflict with their version of events.

Single joint experts are described as being "the norm" in England and Wales in cases allocated to the small claims track and the fast track.[12] The authorities there suggest that a court is more likely to permit a party to appoint its own expert in a case where the expert evidence is primarily opinion evidence and relates to liability or causation, as opposed to quantum.

The single joint expert undoubtedly represents a more attractive option to Irish litigants than section 20 of the Civil Liability and Courts Act 2004, as there is provision for the parties to agree a single joint expert as opposed to having it imposed by the Court. This means that the procedure may be employed with more frequency. However, in line with the English experience, it is likely to be used for questions of quantum, rather than issues of liability and causation where there could be divergent views.

Debate among experts

It appears from Order 36, rule 61 that the 'debate among experts' procedure can be directed in situations where the experts' evidence contradicts each other, and after they have met and composed a joint report.

A similar practice, known as 'concurrent evidence', developed in what is now the Australian Competition Tribunal. It was subsequently adopted in the Federal Court and the Administrative Appeals Tribunal (AAT), and in the Supreme Court of New South Wales.[13] Concurrent evidence has also been a feature of international commercial arbitration for a number of years.[14] In 1998, the Australian Federal Court Rules were amended to provide for concurrent evidence,[15] but the procedure is not mandatory. There is no universal practice

regarding concurrent evidence in Australia, and judges are afforded a significant degree of discretion. There is no restriction in Australia on the types of cases in which concurrent evidence can be given, and it appears to be used in a wide variety of cases.

In Australia, there are two distinct stages to the actual concurrent evidence session.[16] The first stage is presided over by the trial judge. The course of the evidence generally follows the list of issues which has been provided to the experts and which has formed the basis of the joint report. This stage is primarily judge led, and it is common at this stage for the judge to suggest topics and to ask lots of questions. The second stage of the concurrent evidence procedure more closely represents an adversarial trial and involves the lawyers posing questions to the experts.

The limited empirical evidence in Australia suggests that the reaction to concurrent evidence is generally favourable. A study carried out of the practice in the AAT in New South Wales[17] provided support for the continued use of concurrent evidence in that forum. The findings suggested that the procedure improved the quality of the expert evidence presented, made evidence comparison easier and enhanced the decision-making process. The study also revealed that the concurrent evidence process led either to time savings or was neutral in approximately 80% of cases. It was noted, however, that individual experts tended to spend longer giving evidence, which can impact on costs for the parties.[18] The AAT has also published guidelines for the use of concurrent evidence.[19]

However, outside the AAT, there does not appear to be any real consensus on the procedure to be applied. Delany[20] refers to an Australian study that highlighted the different ways in which concurrent evidence was used in 12 different cases across eight different Australian jurisdictions. The concurrent evidence session generally lasted between one and eight days. In most, but not all, of the cases counsel cross-examined the experts. In addition, the experts were questioned by the judge in most cases. However, only in some cases did the experts give an opening statement. In addition, experts were given very limited guidance on the operation of the concurrent evidence procedure.

In Australia, the courts have not been hesitant to restrict the number of experts taking part in a concurrent evidence session, where there was a risk of repetition and no utility to a party other than "safety in numbers".[21] However, in *Strong Wise Ltd v Esso Australia Resources Ltd*,[22] eight experts were used. It has also been established in Australia that "counsel are not passengers" and can and should seek to raise material issues and put material questions to witnesses.[23]

Pilot study

In England and Wales, a two-year voluntary pilot study was conducted in Manchester from 2010 to 2012,[24] on the recommendation of Lord Jackson.[25] Concurrent expert evidence orders were made in a wide range of cases, although most later settled. The experts involved in the pilot included valuers, surveyors, accountants, engineers, and handwriting experts. The issues addressed included valuation of land, shares in private companies, pension rights and property developments, tax, defects in and/or value of building works, dilapidations, defective products and disputed signatures.[26]

The general consensus from the pilot was that concurrent evidence was more efficient, on the basis that it was easier to present the evidence and to assess it. In addition, the focus on the issues and areas of disagreement prior to trial meant that time was saved at trial and it was easier for the court to compare contrasting evidence. It was generally agreed that the procedure had saved time and costs without compromising the expert's independence. However, it was acknowledged that sufficient reading time had to be afforded to the judge, otherwise the process of structured dialogue would be affected.[27]

Subsequently, provision for concurrent evidence was made in the form of a Practice Direction.[28] It provides that the court can direct, "at any stage in the proceedings", that expert evidence be given concurrently.[29] The normal practice in England and Wales is that, where expert evidence is required, the court will generally direct that the experts participate in a formal "meeting of experts", and then prepare a joint statement,[30] which is provided to the court for information.

Like the Australian procedure, the English court has discretion in relation to the process and there have been variations in the form of concurrent evidence adopted. For example, *Re N*[31] involved a hybrid type of concurrent evidence where counsel and not the judge led the evidence. However, the experts were permitted to ask questions of each other during the session.

Unusually, in contrast to the Irish rules, it is expressly stated in the Practice Direction that, in general, a full cross-examination or re-examination is neither necessary nor appropriate.[32] However, this has not tended to be the practice in England and Wales, in that it has been found that in many cases counsel tend to conduct either a full cross-examination or to at least re-examine their own experts again.[33]

Wide application

Despite initial predictions that concurrent evidence would solely be used in construction disputes in England and Wales, it has traversed a number of areas of litigation including: wardship proceedings;[34] property and succession disputes;[35] motor vehicle accidents;[36] construction and building disputes;[37] and, medical negligence.[38] It has also been suggested in England and Wales that concurrent evidence may be appropriate in judicial review.[39]

Concurrent evidence was used in a competition law case for the first time in *Streetmap EU Ltd v Google Inc and ors*[40] for economic experts. Roth J. was of the opinion that this led to a constructive exchange and considerably shortened the time taken to deal with the expert evidence at trial.[41] He did acknowledge that the procedure involves considerable preparation by the trial judge and effectively requires a transcript since the judge is unable to keep a proper note while leading the questioning.[42] Additionally, in that case at least, the concurrent evidence procedure did not encourage the experts to narrow the areas of disagreement between them, as Roth J. noted a "sharp clash" between the experts, with each one adamant that the other's approach was incorrect.[43] While not expressly stated in the judgment, there may be the danger of 'showboating' on the part of experts.

In *Re N*,[44] Hayden J. felt that the concurrent evidence was helpful, time-saving, and he was also satisfied that it helped foster true and objective consensus and discouraged posturing. In England and Wales, a working group[45] was set up to examine the procedure relating to concurrent evidence. The group issued a survey to judges, experts and lawyers aimed at eliciting experience and views of the technique. However, given the small range of responses received, one should be cautious about relying on its outcomes. In most of the cases surveyed, concurrent evidence had been directed by agreement.

Out of the judges, legal representatives and experts surveyed most, if not all, were in agreement that concurrent evidence assisted the court, improved the quality of the evidence and saved hearing time. However, the majority of those

surveyed did not feel that concurrent evidence resulted in a cost saving. Lord Neuberger remarked extrajudicially that the concurrent evidence procedure tends not to be used,[46] due to a fear on the part of lawyers of losing control and on the part of judges that it would involve greater preparation and an earlier understanding of the issues involved in the case. However, the general consensus appears to be that it has resulted in greater comprehension of expert evidence in that jurisdiction.

There is some consensus, between both the proponents and opponents of concurrent evidence, that it renders trials shorter and less expensive.[47] One would hope that a reduction in time would lead to a consequent reduction in cost. However, on the basis of the admittedly limited empirical evidence available to date in Australia and England and Wales, this appears not to have been consistently the case. It is widely agreed that the judge-led concurrent evidence procedure will simply not work unless judges have prepared adequately before trial.[48] It is clear that much will depend on judicial resources and on the personality of the particular judge. As against this, it could be said that an understanding of the issues and comprehension of the expert opinions is required in any event to decide the outcome of the case.

Conclusion

It can be concluded from this comparative analysis that the single joint expert is likely to be more appropriate where there is no substantial area of disagreement between the experts, with concurrent evidence being the preferable option where there is.

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No single bright line rule

The outcome of a recent appeal to the Supreme Court has bearing on whether Article 40 of the Constitution can and should be used in childcare proceedings.

Natalie McDonnell BL

In *Child and Family Agency v S MacG and J.C.*,[1] the Supreme Court recently considered an appeal from a decision of the High Court ordering the release (in the end, on a phased basis) of two children in respect of whom the District Court had made interim care orders pursuant to Section 17 of the Child Care Act 1991, as amended. The Child and Family Agency (hereafter "the CFA") appealed the decision to the Supreme Court arguing, *inter alia*, that the Article 40 procedure was inappropriate in childcare proceedings for a number of reasons.

MacMenamin J. held, in dismissing the appeal, that the hearing in the District Court was flawed and resulted in the denial of the parents' constitutional rights to fair procedures and, that being so, Article 40.4. was appropriate, in the exceptional circumstances of the case. Concurring judgments were delivered by O'Donnell J. and Dunne J. Charleton J. dissented on the basis that the applicants had not proven that there had been a failure of jurisdiction by the District Court due to the procedural error.

Inadequate time to prepare

The High Court had considered an application pursuant to Article 40.4.2 for an inquiry into the lawfulness of the detention of two children, aged 14 years and five years, respectively, in respect of whom interim care orders had been made pursuant to Section 17 of the Child Care Act 1991, as amended, taking them into the interim care of the CFA.

Counsel on behalf of the mother (later supported by counsel on behalf of the father) complained that the hearing in the District Court had been conducted in the absence of fundamental fair procedures in circumstances where the District Court judge had refused an application – on consent – for an adjournment in order to permit the parents of the children to engage with the proceedings.

This was in circumstances where the mother and her legal team had had a very limited time to prepare for the hearing and the father, who was unrepresented and was functionally illiterate, faced particular barriers in preparing for the hearing. Both parents were experiencing drug-dependency issues.

At the outset of the hearing in the High Court, the CFA made a preliminary objection as to the appropriateness and/or availability of Article 40.4.2 in childcare cases. Baker J. noted that there was a long line of case law in which inquiries pursuant to Article 40 relating to custody of children had been permitted. As MacMenamin J. recites in his judgment,[2] Baker J. "referred to that line of authority, including *In re Tilson, Infants* [1951] I.R.1, *The State (D & D) v Groarke* [1990] 1 I.R. 305, [1990] ILRM 10, 130 and more recently, *N v The Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374.

Baker J. also pointed to the use of Article 40, albeit in the context of an adult with a disability, in *FX v Clinical Director of the Central Mental Hospital*,[3] and to the fact that the Supreme Court did not express any concern as to the use of the procedure in that case, or indeed, in *N v The Health Service Executive*,[4] decided in 2006.

This was in circumstances where the mother and her legal team had had a very limited time to prepare for the hearing and the father, who was unrepresented and was functionally illiterate, faced particular barriers in preparing for the hearing.

Baker J. ultimately concluded that the parents' rights to constitutional fair procedures had not been fully respected and, relying on *KA v Health Service Executive*,[5] notes "that there was a continuity in childcare proceedings, and that a fundamental flaw at an early stage in such procedure could have a detrimental effect on the process as a whole".[6]

Baker J. concluded that there had been a failure by the District Court to afford the parents an opportunity to fully engage with the evidence and made an order of release from custody in respect of both children pursuant to Article 40.4.2. The children were not returned to the care of their parents in the aftermath of the decision of the High Court, as there were negotiations between the parties, which resulted in an order providing for the phased return of the children.

Leave to appeal

The CFA obtained leave to appeal the order of the High Court to the Supreme Court on a number of grounds, including the following as set out in the judgment of Charleton J.:[7]

1. Where children are made subject to an interim care order under section 17 of the Child Care Act 1991 requiring that the child named in the order be placed or maintained in the care of the applicant Child and Family Agency, are such children ever subject to a habeas corpus remedy under Article 40.4.2 of the Constitution as being "unlawfully detained"?

3. Whether the availability of other remedies besides habeas corpus under Article 40.4.2, such as an appeal, and in the context of such provisions in the Child Care Act 1991 as sections 21 to 23, or such as judicial review, are such as to remove such cases from the jurisdiction of Article 40.4.2?

3. As a matter of principle, is the habeas corpus remedy under Article 40.4.2 of the Constitution appropriate for childcare issues?

MacMenamin J. noted that the application arose in exceptional circumstances. The Judge observed, in relation to *N v The Health Service Executive*[8] and *FX v Clinical Director of the Central Mental Hospital*[9] that a phased approach to the implementation of an Article 40 order was considered appropriate, and indeed

necessary, where the court concluded, in light of its constitutional duty, that this is in the welfare interests of the child or person concerned. MacMenamin J. indicated that this will only be on an exceptional basis.

The Judge also noted that the Supreme Court has, in *Ryan v The Governor of Midlands Prison*[10] and *Roche (also known as Dumbrell) v Governor of Cloverhill Prison*[11] expressed disapproval of the use of Article 40 in situations other than where there is a defect on the face of the order which goes to jurisdiction, but also noted the exception to this rule, namely, where there has been some fundamental "denial of justice". MacMenamin J. stated as follows:

"I would hold that what occurred in the District Court was a fundamental denial of justice, and of the constitutionally implied right to fair procedures. Fair procedures, especially in the circumstances, required that both parents be legally represented, and time given to take instructions, and comply with other procedural steps necessary (see, too, *McMichael v. U.K.* [1995] EHRR 205, at par. 87). The effective representation of parents is not only a vindication of their own rights, but of the children's rights".[12]

The Judge points to the judgment of the Supreme Court in *McDonagh v Frawley*[13] in which O'Higgins C.J. indicated that the Article 40 procedure was "appropriate in the event that there was such a default in the fundamental requirements of justice that the detention might be said to be 'wanting in due course of law'".[14]

MacMenamin distinguished the cases of *W v HSE*[15] and *Courier v The Health Service Executive*[16] in which Peart J. and Birmingham J., respectively, deprecated the use of Article 40 in childcare proceedings, on the basis that neither case concerned such a fundamental denial of fair proceedings "as to render the proceedings effectively a nullity".[17]

The judge considered the submissions made by the appellant to the effect that the placing of a child in care does not constitute detention for the purposes of Article 40 and ultimately holds that due to the denial of constitutional rights in the District Court "the children were, in the words of Article 40, not being detained in accordance with the law, or put in another way, without legal mandate".[18] In so holding, the judge distinguishes the case of *MF v Superintendent, Ballymun Garda Station*[19] on the basis that in that case there was no question of "the critical antecedent question of deprivation of fair procedures".[20]

The best interests of the child

Section 23 of the Child Care Act 1991 gives to the Court which finds or declares in any proceedings that a care order for whatever reason is invalid, jurisdiction to refuse to exercise a power to order the delivery of the child to the parent if the court is of the opinion that such delivery or return would not be in the best interests of the child. MacMenamin J. expressed the view that there is nothing to suggest that the section only applies to judicial review proceedings and that the phrase "in any proceedings" should be read to include Article 40 proceedings. He also points out that a constitutional interpretation of section 23 requires a sequencing that begins with a finding as to the invalidity of the care order and an order for release and thereafter an order pursuant to section 23 of the 1991 Act for orders protecting the welfare of the child. Finally, on the question of mootness, MacMenamin J. did not accept that the appeal was moot on the grounds that the order had been made for a short period and that the President of the District Court had since made interim orders, on evidence. The judge, pointing to *KA v HSE*, said that "a procedural flaw of a fundamental nature, at the outset of a custody case, may have ongoing effects, which necessarily have continuity"[21] and that the Court should determine the appeal in the interests of the administration of justice. O'Donnell J. delivered a concurring judgment. He indicated that an Article 40 inquiry should rarely be used in respect of the care and custody of children. Noting that the one area of difference between MacMenamin J. and Charleton J. (dissenting) related to the nature and effect of the breach of fair procedures in the District Court, O'Donnell J. indicated his agreement with MacMenamin J. "that the breach of fair procedures in the District Court hearing on the 29th of October 2015, even if the product of concern as to the safety of the children, and frustration with the difficulty in providing legal aid, was nevertheless a fundamental departure from the requirements of a fair hearing".[22] O'Donnell J. also agreed that what was required was "that the clock should be reset to zero and proceedings should recommence in circumstances where both parents were fully and properly represented, and did not in any way suffer from the fact that there had been a determination made on the application on the 29th October 2015".[23]

The judge considered the submissions made by the appellant to the effect that the placing of a child in care does not constitute detention for the purposes of Article 40 and ultimately holds ... "the children were, in the words of Article 40, not being detained in accordance with the law, or put in another way, without legal mandate".

Personal liberty and a free society

Both O'Donnell J. and MacMenamin J. agreed with the remarks of the late Mr Justice Hardiman in *N v HSE*,[24] that an Article 40 inquiry is "one of the great bulwarks of personal liberty and of a free society".

O'Donnell J. stated that "in cases concerning children, particularly since the coming into force of Article 42A, it should be possible to say that the inquiry under Article 40.4 is also exercised with particular delicacy, and the formidable remedy granted only where it is not merely appropriate but demanded".[25] While the judge accepts that the breach of fair procedures in the instant case was "fundamental and moreover clear-cut",[26] he also notes that the claim could have been brought by way of judicial review. He considered that Article 40 is ill suited to quashing the original order and placing the proceedings on a sound footing. O'Donnell J. does not disagree with the broad outcome of the case as outlined by MacMenamin J. (that being the conducting of an Article 40 inquiry leading to an order for release and the subsequent making of such orders pursuant to section 23 of the 1991 Act as are required in the welfare of the children), but he does set out what he describes as "a slightly different route" to getting to that outcome. Noting that the issue as to whether section 23 can only be utilised in judicial review proceedings was not debated in any detail before the Supreme Court, and thereby reserving his position, he does indicate that this would not be a reason not to invoke the Court's jurisdiction pursuant to Article 40 but rather to treat the case as an application for judicial review. The judge also points to the flexibility of that jurisdiction of which section 23 is an

example and the preference for clarity in respect of the availability of the section. O'Donnell J. is mindful of the possibility of diluting the potency of the remedy provided for by Article 40 and urges caution in respect of its use and does "not consider that the route adopted here could necessarily be replicated in other fields".[27] He ultimately concludes that "this case should be treated as arising from the very specific history of the application of the writ of habeas corpus in the field of custody of young persons, and the present day application under Article 40 in the context of a Constitution which guarantees the rights of children".[28]

Further judgment

Dunne J. delivered a short judgment in which she concurs with MacMenamin J. and O'Donnell J., and adds some brief observations of her own, primarily revolving around the availability of Section 13 of the Child Care Act 1991, which provides for the making of emergency care orders on an ex parte basis and which may have provided an opportunity in this case for the District Court judge to have balanced the requirements of fair procedures with the presenting concerns in respect of the children who were the subject of the application. Charleton J. delivered a dissenting judgment, at least in respect of the effect of the procedural defects in the hearing in the District Court, which he did not accept deprived that Court of jurisdiction. In relation to the role of the High Court, he indicates his view that that Court had jurisdiction and should have exercised an independent judgment, having determined that the care order was invalid, as to what was in the best interests of the child in terms of care and control. However, the question as to whether any form of habeas corpus order was "available within the delicate context of a dispute over the care and welfare of children" and whether "children who are the subject of a care order can truly be said to be in some form deprived of their liberty"[29] were, he observed, also relevant questions. Surveying the case law, Charleton J. noted that the view may be taken, given the wording and import of Article 40.4, that "to permit a 'controlled' or 'phased' release seems at variance with the plain text of Article 40.4" and that "the stricture of immediate release must also inform the applicability of the remedy to childcare cases in a context where the paramount principle is the welfare of the child".[30] He noted the doubts expressed by judges of the High Court as to the use of the remedy in childcare cases. Ultimately, however, he seems to accept that there are circumstances in which it can be used. Charleton J. did not dissent on the applicable principles as set out by MacMenamin J. but on the question of whether the applicants had proven that there had been a complete denial of justice that nullified the District Court order. He was not satisfied that they had. He stated as follows:

"What is complained of here is an error as to procedure. Nothing worse than that was proved. Hence, the dissent in this section is not on principle but on proof. There was a hearing. No doubt, even though the reports had not been read by the start of the case, people can catch up. It is an unknown factor as to what danger the children were in. The District Court took a strong view. Perhaps that was wrong. The burden of proving a complete casting off of jurisdiction is on the applicant who seeks to obtain habeas corpus notwithstanding an ostensibly valid court order".[31]

In relation to the question as to whether childcare orders can amount to detention, Charleton J., having considered the nature of parental authority in Articles 41 and 42 of the Constitution, viewed as unavoidable two conclusions: firstly that parents are entitled to nurture their children; and, that taking a child away from "the embrace of its family" is only possible where real parental failure has been established. He concluded that while not every care order made in respect of a child amounts to detention, "when the State removed children from the natural order of family life, such a removal may, depending on the circumstances, amount to detention".[32]

Conclusion

It can be seen that the majority decision of the Supreme Court (to use the phrasing of O'Donnell J.) did not provide a single bright line rule in respect of the suitability of Article 40 proceedings in childcare cases. However, it is clear that the Court has sounded a note of caution about the use of the procedure in cases other than those which exceptionally fall within the test set out by the Supreme Court in this and related cases.

References

1. [2017] 2 JIC 2301; [2017] IESC 9.
2. At para 14.
3. [2014] IESC 1, [2014] 1 I.R. 280.
4. [2006] 4 I.R. 374.
5. [2012] 1 I.R. 794.
6. At para. 51.
7. At para. 2.
8. [2006] IESC 60, [2006] 4 I.R. 374.
9. [2014] IESC 1, [2014] 1 I.R. 280.
10. [2014] IESC 54 (Supreme Court, Judgment of the Court (*ex tempore*) delivered on the 22nd day of August 2014, Denham C.J.).
11. [2014] IESC 53.
12. At para. 17.
13. [1978] I.R. 131.
14. At page 136 of the Report.
15. [2014] IEHC 8.
16. (Unreported, High Court, November 8, 2013).
17. At para. 20.
18. At para. 23.
19. [1991] I.R. 189.
20. At para. 23.
21. At para. 35.
22. At para. 1.
23. Ibid.
24. At p. 534.
25. At para. 7.
26. Ibid.
27. At para. 15.
28. Ibid.
29. At para. 13.
30. At para. 25.
31. At para. 32.
32. At para. 35.

Proposals to overhaul the judicial appointments system introduce further bureaucracy and do nothing to address the flaws in the current system.

Choosing judges carefully

Michael M. Collins SC

Independent judges are the constitutional heroes of our democratic system. They stand between the citizens and the State, protecting them from abuses of power in a myriad of ways. Choosing our judges carefully on merit and safeguarding their independence are therefore critically important issues.

The problem lies in the fact that under the Constitution, judges are appointed by the President who, however, does so "on the advice of the Government". The track record of the independence of the Irish judiciary since the foundation of the State is outstanding by any standards. And yet, there is a perceived problem with an untramelled process of political appointment without any fixed criteria beyond a minimum period of practice as a lawyer.

No merit-based criteria

The Judicial Appointments Advisory Board (JAAB) is obliged to recommend to the Minister at least seven persons for appointment to a particular judicial office but the Government is not in any way bound by this. There are no express merit-based criteria that constrain the Government in judicial appointments. This means that the system fails at least two cardinal principles of ensuring as far as possible that appointments are purely merit based and avoid any potential abuse of Government power. Although Ireland has, over the decades, been extraordinarily well served by a judiciary of exemplary independence, one cannot take it simply on trust that a flawed system will continue to produce good results. In response to concerns about the JAAB process, the Government in 2016 published the Scheme of a Judicial Appointments Commission Bill ('the Scheme'). A detailed discussion of its terms is beyond the scope of this brief note but three points may be made.

First, although it is to be welcomed that the number of candidates to be recommended by the Commission to the Minister is reduced to three, there is no ranking order of preference and the Government remains free to advise the President to appoint persons who have not been recommended by the Commission save that the Government shall "firstly consider" those persons. There does not seem any reason inherent in the Government's constitutional function of recommending to the President who should be appointed to judicial office that such function should not be informed and regulated by only appointing persons who have been approved by the Commission. Accordingly, the Scheme leaves in place one of the fundamental concerns that prompted the proposed revision of the appointment process in the first place.

Secondly, extremely elaborate provisions are made in the Scheme for the Commission (through the establishment of a committee to be known as the Judicial Appointments Procedures Committee) to draw up "draft codes of practice" in relation to a variety of matters such as the effectiveness and application of eligibility criteria, procedures for developing diversity among candidates for judicial appointments, and so forth. Critically, any such draft codes of practice have to be submitted to the Minister for approval, thus further undermining the attempt to put some water between politics and judicial appointments. The criteria for choosing good judges are not difficult to identify. Merit should be the sole criterion, albeit various factors can feed into the merit of a candidate for a particular judicial office. A very useful set of guidelines on such factors has been set out in the UK by the Judicial Appointments Commission, which recommends a single candidate, solely on the basis of merit, to the Lord Chancellor. The guidelines on merit are elaborated upon under headings such as intellectual capacity, personal qualities, ability to understand and deal fairly, authority, and communication skills and efficiency.

Lay majority

Thirdly, and bizarrely, the Scheme provides that the Commission will be made up of a majority of lay members (defined in such a way so as to even exclude retired judges, whose experience and availability would be an invaluable resource to such a process) and where the chairperson of the Commission is to be a lay member, appointed, like all the other lay members, by the Minister subject to the approval of both Houses of the Oireachtas following an open competition conducted by the Public Appointments Service. There seems more emphasis and bureaucracy in the Scheme surrounding the appointment of the members of the Commission than there is around the critical choice of the judges themselves. No rationale for having a majority of lay people choosing judges is set out in the commentary to the Heads of the Scheme. One is reminded of the *New Yorker* cartoon where a passenger on a plane is standing with his hand raised addressing the rest of the passengers saying: "Those smug pilots have lost touch with regular passengers like us. Who thinks I should fly the plane?"

The fact that the Chief Justice is a member of the Commission but not its chairperson is not merely insensitive. It is telling in that it betrays a lack of understanding that those best placed to assess candidates for judicial office are the very people who have professionally assessed those candidates at work in courts over years or decades. A well-crafted CV is no substitute for the ability of an applicant's professional colleagues and the judges before whom that applicant may have appeared for many years to judge the merit and temperament of the candidate for the job. As one of the greatest of all American legal scholars, John Hart Ely, said in relation to Chief Justice Earl Warren, you don't need many heroes if you choose carefully.

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