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REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
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April 2018

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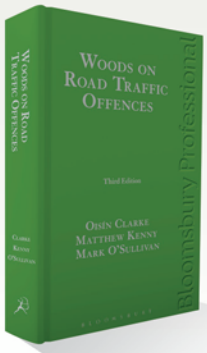


NEW EDITION

Pub Date: May-18

Price €195

ISBN: 9781784512057

Residential Tenancies

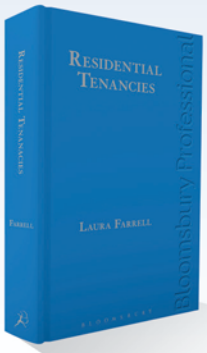
Laura Farrell, Consultant Editor: JCW Wylie

Residential Tenancies provides a clear and comprehensive statement of the law regulating private and social leases of dwellings in Ireland and explains the dispute resolution mechanisms of the Residential Tenancies Board, appeals, and enforcement.

This book considers the difficult issue of Rental Accommodation Scheme tenancies, which although envisioned by the Housing (Miscellaneous Provisions) Act 2009, and entered into regularly by public authorities, are not yet on a firm statutory footing as the legislative provisions have not all been commenced. It also provides a comprehensive appendix, which includes a sample residential letting agreement, a range of sample notices of termination (to deal with all permitted reasons for termination), and a sample rent review notice.

Table of Contents

1. Application of the Residential Tenancies Act 2004 (as amended)
2. Tenancy obligations of Landlords
3. Tenancy obligations of Tenants
4. Rent and Rent Reviews
5. Security of Tenure
6. Tenancy Terminations
7. Approved Housing Bodies
8. Dispute Resolution
9. Appendix



FIRST EDITION

Pub Date: Jun 18

Price €195

ISBN: 9781784517410

Partnership Law

Michael Twomey, Editor: Maedhbh Clancy

Comprehensive and highly detailed, *Partnership Law 2nd Ed*, includes practitioner-focused chapters on disputes between partners, litigation by and against partnerships and a commentary on each of the clauses of a typical partnership agreement.

Table of Contents

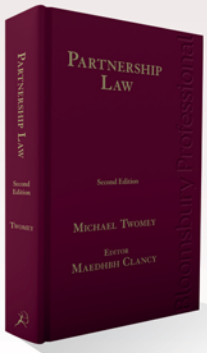
Nature of a Partnership: Introduction; Definition and Existence of a Partnership; Characteristics of a Partnership; Capacity to be a Partner; Evidentiary Requirements of Partnership; Types of Partners; Partner by Holding Out; Types of Partnership; Illegal Partnerships

Relations Between Partners and Third Parties: Liability of a Partner for the Acts of his Co-partners; Nature and Duration of Liability; Litigation by and against Partners

Relations between Partners Inter Se: Management Rights of Partners; Financial Rights of Partners; Fiduciary Duties of Partners; Partnership Property; Partnership Capital; The Goodwill of a Partnership; Shares in a Partnership; Litigation between Partners; The Terms of the Partnership Agreement; Anti-Competitive Provisions

Dissolution of Partnerships: Causes of Dissolution; Death of a Partner; Dissolution by the Court; Post-Dissolution and Winding Up of a Partnership; Bankruptcy

Limited Partnerships: Limited Partnerships; Limited Liability Partnerships; Investment Limited Partnerships



NEW EDITION

Pub Date: Jun 18

Price €245

ISBN: 9781526504852

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

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

PUBLISHERS

Published on behalf of The Bar of Ireland by Think Media Ltd

Editorial: Ann-Marie Hardiman
Paul O'Grady
Colm Quinn
Design: Tony Byrne
Tom Cullen
Niamh Short
Advertising: Paul O'Grady

Commercial matters and news items relating to *The Bar Review* should be addressed to:
Paul O'Grady
The Bar Review
Think Media Ltd
The Malthouse,
537 NCR, Dublin DO1 R5X8
Tel: +353 (0)1 856 1166
Fax: +353 (0)1 856 1169
Email: paul@thinkmedia.ie
Web: www.thinkmedia.ie

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

Dedications, criticisms and events

The Bar has been celebrating its female members, the EU Commission is not in favour of the new judicial appointments bill and our Conference takes place in Spain in May.

During the course of each legal term, The Bar of Ireland is invited to make submissions on a range of matters and does so through the assistance of our members, who generously volunteer their time to research, draft and make submissions on behalf of the Bar. Copies of all submissions are available on our website. Some of the recent submissions made in response to consultations include:

- Submission to the Commission on the Future of Policing in Ireland;
- Submission to the Review Group on the Administration of Civil Justice; and,
- Submission in respect of the proposed draft rules to deal with the introduction of periodic payments pursuant to the Civil Liability (Amendment) Act 2017.

Official opening of Church Street seating

The Library Committee hosted a reception in mid March to mark the official opening and naming of the two new seating areas in Church Street, which have provided 47 additional seats for members. In recognition of two eminent female members of our profession, it was felt appropriate to have the rooms named in their honour: the Averil Deverell Room and the Mella Carroll Room. Averil Deverell, a native of Greystones in Co. Wicklow, was the first woman to practise as a barrister in Ireland. Upon her call to the Bar, she engrained herself into a substantial chancery practice and vigorously campaigned on behalf of her female colleagues until her retirement over forty years later. Mella Carroll was called to the Bar in 1957, and took silk in 1977. In 1979, she was elected to chair the Bar Council and a year later she became the first woman appointed to the High Court.

Celebrating International Women's Day

Now in its third year, the Women at the Bar working group organised a sell-out evening in the King's Inns on March 8 to mark International Women's Day. Former Ambassador Anne Anderson delivered a very well-received address to attendees, which received a standing ovation. I am delighted that *The Bar Review* has decided to publish an edited version of her speech in this edition (page 37). While 38% of our members are female, the profession still falls short at the senior levels of the Bar, with only 16% female membership of the Inner Bar.

EU critical of judicial appointments bill

In its recent country report on Ireland, which was published in March, the European Commission drew attention to the envisaged composition of a new body for proposing judicial appointments and raised concerns regarding the level of participation of the judiciary in that body. The report stated: "The proposed composition of the Judicial Appointments Commission, which would comprise only three judges over 13 (including a lay chairperson accountable to the Oireachtas) would not be in line with European standards (Paragraph 47 of Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010), and was opposed by the Association of Judges in Ireland".

In summary, the proposed legislation does not conform to standards that Ireland signed up to in 2010. This concern raised by the Commission supports the position expressed by The Bar of Ireland in its submissions to Government on the composition of the new body.

Focus on wellness at the Bar

The Performance and Resilience Committee continues to explore a range of matters that can affect the well-being of our members. Mental health is a key concern for the Bar, as studies have shown that depression and other psychological issues are comparatively high among the legal profession. Lawyers consistently rate in the top two occupations with the highest prevalence of mental health problems. The establishment of the Performance and Resilience Committee is an indication of how seriously The Bar of Ireland views this issue. While it may not be a concern for every individual member, we are a collegiate profession and must look out for each other and make every effort to put in place supports for colleagues who may be experiencing challenges in their mental well-being.

Bar Conference in Málaga

Finally, as we enter the Easter Term, I would like to take this opportunity to remind members of the forthcoming Conference taking place from May 25-26 in Málaga – Defamation Nation. The speaker line-up is very impressive and the theme of defamation is very current. As places are limited, I would urge members to register for the event as soon as possible. More information is on page 39.

Paul McGarry SC
Chairman,
Council of The Bar of Ireland

Online lives

As more and more social interaction is conducted online, the Internet has now become the primary source of information for a considerable percentage of the population.

A person's character and reputation can be enhanced or demolished with a few keystrokes. The children of today will live their lives online. As our laws play constant catch-up with the all-pervasive nature of social media, we focus in this edition of *The Bar Review* on the recent developments in the law relating to data hosts. Our contributors conclude that the law, as it now stands, may not sufficiently protect the rights of citizens to control incorrect information about themselves. Further, it appears that there is a need to impose more stringent obligations on data hosts to ensure that defamatory material is removed, when a genuine complaint is made about the content of such material.

In a fascinating interview about the dangers of the Internet, Dr Mary Aiken, a world expert in cyberpsychology, sets out her views on the adverse effects of technology on human behaviour.

The recent International Women's Day dinner at the King's Inns was a resounding success with an inspiring keynote speech from former diplomat Anne Anderson. Her enthusiasm and vision were an inspiration to all present and we are delighted to share her thoughts in this edition.

Eilis Brennan BL
Editor
ebrennan@lawlibrary.ie

Pioneering women

The Averil Deverell Room and the Mella Carroll Room, named after two pioneering female giants of the legal profession in Ireland, were officially opened as new seating areas in the Church St building last month. It is hoped that by naming the rooms in their honour, their memory will continue to inspire those who follow in their footsteps.

Lawyers against homelessness

Back row (from left): Gerry Gallen, Beauchamps Solicitors; Ronnie A. M. Robins SC, Father of the Bar; and, Liam Reidy SC. Front row (from left): Clifford Healy, solicitor; Fr Seán of the Capuchin Day Centre; Constance Cassidy SC; and, Mr Justice Seán Ryan, President, Court of Appeal.

The recent Lawyers Against Homelessness CPD event at the Capuchin Day Centre made €21,200 to assist Brother Kevin in his work. Brother Kevin welcomed (among others) the following speakers to the event: Mr Justice Seán Ryan, President of the Court of Appeal; Mr Justice Paul Gilligan; Michael Quinlan, President of the Law Society; Michael McDowell SC; and, Conor Maguire SC. The organisers thank members of The Bar of Ireland for their incredible support.

Lawyers Against Homelessness is an initiative comprising both branches of the legal professions. Its next event will take place in the Capuchin Day Centre on Thursday, June 14, and will be opened by the Minister for Justice, Charlie Flanagan TD.

From left: Andrew Walsh BL; Paul McGarry SC, Chairman, Council of The Bar of Ireland; Maria Watson BL; guest speaker Paddy Armstrong of the Guildford Four; Grainne Larkin BL; Patrick Crowe BL; Anne Purcell BL; and, Susan Lennox BL.

Innocence personified

Paddy Armstrong of the Guildford Four spoke at the recent launch of The Bar of Ireland Innocence Scholarships.

The Bar of Ireland launched applications for its Innocence Scholarships at an event on February 22 in the Gaffney Room. The Bar of Ireland scheme sponsors five young barristers to travel to the United States to work with the Innocence Projects as they attempt to help prisoners they believe to have been wrongly convicted.

Chairman of the Council of The Bar of Ireland, Paul McGarry SC, said that the scholarships provide very valuable experience to these young barristers, and that the work of the Innocence Project highlights the need for better access to justice for all. He introduced Paddy Armstrong, the main speaker at the event. Along with Carole Richardson, Paul Hill and Gerry Conlon, Paddy was wrongly convicted of the 1974 Guildford and Woolwich bombings, and served 15 years in prison before their convictions were overturned in 1989. Theirs was one of a number of serious miscarriages of justice during that period, including the Birmingham Six and the Maguire family. Paul McGarry welcomed Paddy, saying that the Guildford Four and Birmingham Six had inspired a generation of young people to become interested in the law.

"A life I thought I'd never have"

Paddy Armstrong read excerpts from his autobiography *Life After Life: A Guildford Four Memoir*, which was written with journalist and author Mary-Elaine Tynan. At times harrowing and emotional, he recounted the torture he underwent during his interrogation: "After seven days I barely knew my name". He talked about how he came to sign a false confession after days of being beaten, threatened and intimidated, and about his belief at that time that they could not possibly be found guilty.

A second excerpt recounted his memory of the courtroom on the day of their conviction, which led to the longest life sentences in the history of the British courts. He paid tribute to the people who stood by them throughout their ordeal, including his solicitor Alastair Logan, who campaigned tirelessly for their release and who is still a close friend.

Paddy acknowledged the five young barristers who will be recipients of The Bar of Ireland Innocence Scholarships: "They are going to America to do for others what [people like Alastair Logan] did for us, to give of their time to fight for people like me".

Mary-Elaine Tynan also addressed the launch, talking about working with

Paddy to tell his story, and showing a number of photos from the time, including one of Paddy's 'confession'. She said that working to free innocent people is not glamorous – it involves hours of drudgery and trawling through archives to get to the truth.

Valuable experience

Gráinne Larkin BL, co-ordinator of the Innocence Scholarships, said that while The Bar of Ireland has been involved in the Innocence Projects since 2010, this was the first time that a victim of a miscarriage of justice had spoken at a launch: "We are privileged to have Paddy here to give his very powerful, personal account of his experiences".

Two barristers who were recipients of last year's scholarships spoke about their experiences. Patrick Crowe BL travelled to Florida, and he described his work there, which included deciding what potential applicants would become clients: "You are the first hurdle, a very important role". He also described the system in Florida, where legal aid stops at the appeal stage, making the work of the Innocence Project all the more important. He spoke of the lifelong connection between the lawyers and their clients: "I would encourage people to do this – use your legal knowledge in a meaningful way".

Maria Watson BL worked in Madison, Wisconsin, which has a specialised centre on 'shaken baby' cases. She described the six cases she worked on, including a man on death row accused of killing a baby. Maria spoke of her fascination with the US legal system, the reasons why innocent people plead guilty, and about the horrific conditions she witnessed in the US prison system, in particular solitary confinement. She said that the experience of speaking to people who had been exonerated by the Innocence Project's work was very moving: "It's a privilege as a lawyer, and motivates us to keep working. It has been life changing in many respects. We should be honoured as Irish barristers that we are independent: that is unique and helps you to remain objective".

This sporting life

From left: Paul McGarry SC, Chairman, Council of The Bar of Ireland; Robert McTernaghan BL; Louise Reilly BL; Tim O'Connor BL; Mr Justice David Barniville; and, Dr Ross Tucker, Science and Research Consultant, World Rugby.

The inaugural conference of the Sports Law Bar Association of Ireland was held in Dublin on Friday, February 23, 2018. Special guest Dr Ross Tucker, Science and Research Consultant for World Rugby, joined Tim O'Connor BL and Louise Reilly BL to provide a comprehensive update on changes in sports rules, Irish sport and concussion liability, and anti-doping law.

The conference was attended by over 100 participants from both the legal world and the world of sport, including delegates from World Rugby, the Irish Rugby Football Union, the Football Association of Ireland, Horse Sport Ireland and Triathlon Ireland.

The Association is an all-Ireland association of barristers with specialist sports law knowledge and practices. It aims to increase awareness of sports law and support barristers in providing the most up-to-date advice to sports law clients.

A mountain to climb

Former Ambassador Anne Anderson was the keynote speaker at The Bar of Ireland's third Annual International Women's Day Dinner at the King's Inns. Her wide-ranging address covered the challenges facing women in their personal and professional lives, and the need for serious commitment from employers and governments to address them. Here are some edited excerpts from a much longer speech.

Anne Anderson was a member of the Irish diplomatic service from 1972 until 2017. She served as Ireland's Ambassador to the United States (2013-2017), to the United Nations in New York (2009-2013), to France (2005-2009), to the European Union (2001-2005), and to the United Nations in Geneva (1995-2001).

Born in Clonmel, Co. Tipperary, Anne holds a Bachelor of Arts from UCD (History and Political Science) and a Diploma in Legal Studies from King's Inns. Her numerous awards include honorary doctorates from the National University of Ireland (Doctor of Laws) and from Fordham University, New York (Doctor of Humane Letters). Most recently, she was honoured with a Lifetime Achievement Award by the American Chamber of Commerce, Ireland, and with a Gold Medal for Outstanding Contribution to Public Discourse by Trinity College Historical Society.

I retired about seven months ago after a 45-year career in our foreign service. Since my retirement, I have spoken on a range of topics, and have fairly regularly been asked to address gender issues. And so I have had the opportunity to reflect on my own career, the changes and challenges for women diplomats, the current perspectives. I have found myself, in these talks, vacillating between optimism for the future and impatience about the glacially slow pace of progress to date. The result tends to be an "on the one hand, on the other hand" kind of speech.

Tonight, on International Women's Day, it is tempting to go for the more celebratory version. In such a speech, I would start by drawing the backdrop: late 1972 when I joined the Department of Foreign Affairs, just weeks ahead of Ireland's accession to the then EEC. Emerging from the dark days of the marriage bar, which deprived us of generations of able women. The slow but steady upward ascent for women diplomats, from near invisibility to the current situation where 55% of the entry grade are female and, just last year, we reached 30% female representation at the most senior level.

Then I would go on to note the achievements for women in the legal profession, including the unprecedented numbers of young women qualifying as solicitors and barristers, and the increasing percentages of women judges at every level, right up to the Supreme Court.

All of this would be genuine and heartfelt. But in all honesty, despite the unquestionable progress and my personal sense of privilege, over recent months I have felt less and less inclined to give this celebratory speech. Instead, I find myself wanting to focus more single-mindedly on the road still to be travelled.

Slow progress

Here in Ireland, we are marking one hundred years of women having the vote. But it was still celebrated as a modest victory at the last General Election when the share of women in the Dáil went from 16% to 22%. Wherever one turns – the arts, academia, the media, the civil service, the financial services sector, the prestige

From left: Imogen McGrath BL; Anne Anderson, Former Irish Ambassador to the United States; and, Grainne Larkin BL.

professions – we find women either underrepresented, comparatively underpaid, or clustered in the lower tiers of what remain pyramidical structures.

The causes of this imbalance are the stuff of endless debate. We women have subjected ourselves to microscopic self-analysis. We are well aware that we have issues to address: insufficient self-confidence, a reluctance to take ownership of our ambitions, guilt levels that can be corrosive, and a perfectionism that can be punishing. These are unquestionably real issues that hold us back and we need to work on them. But this isn't even half the story. No matter how brilliant the self-help books, they won't provide all the answers. We have to focus on the social and structural context in which women make the choices we do.

Structural issues

I want to come back to the issue of the pyramidal structure across so many of the professions – the strong representation of women at entry level, compared to the much thinner air, in gender terms, at the top. It is true across most professions, and it is certainly true of diplomacy. I was the first woman in each of my five postings as Ireland's ambassador. More astonishingly, when I became Ambassador to the EU in 2001, I was the first woman from any member state to be accredited as ambassador. And, as all of you will know, this is true of the legal profession also, with only 16% of senior counsels female and persistent under-representation of women at the top levels in law firms.

The more optimistic would probably find reassurance in current patterns, feeling that once women are there in sufficient numbers at entry level, it is just a matter of time before the pipeline takes them to the top. The sceptics would take a somewhat different view. Pipelines haven't proved that reliable to date. They have shown themselves highly prone to developing leaks, and unless there is conscious reinforcement we cannot be confident that these leaks won't continue.

It is instructive to look at where exactly the leaks develop. Typically, across the professions, where we see the funnel narrowing in favour of men tends to be around the late 30s, and early to mid 40s. In career terms, this mid 30 to mid 40 decade can be a make or break one: a decade of high expectations, high performance, high achievement. And for individuals or couples who choose parenthood, it is also likely to be a decade of births, toddlerhood, early schooling. Hugely rewarding, but also hugely demanding.

There are no simple answers to the question of how to accommodate intensive career demands and intensive parenting demands, when both coincide. Robust support systems, affordable crèches, work flexibility, all play their part. But there also needs to be more explicit support and encouragement – at governmental and employer level – for more equal sharing of parental responsibility. Only when that happens will attitudes begin to evolve, and will we begin to see the working parent issue addressed in a far more serious and meaningful way.

Time to be serious

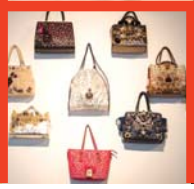
It's time for us to insist that governments, institutions and employers walk the walk of equality. What are the metrics telling us? To what extent is gender equality being prioritised vis à vis other priorities? These are questions that are being pressed by my colleagues in the Department of Foreign Affairs and across other Government departments. And if I may take licence to speak as an outsider, they are also legitimate questions for The Bar of Ireland and for law firms.

> *Astonishingly, when I became Ambassador to the EU in 2001, I was the first woman from any member state to be accredited as ambassador.*

I assume that the Irish Bar must be concerned by the fact of having a cadre of senior counsels that is 84% male. The question is just how meaningfully the issue is being addressed. I don't think anyone can simply assert that this is a profession of self-employed people where everyone, female and male, has to stand on her or his own two feet. Standing unsupported on your own two feet is mostly a myth. If young barristers can't make ends meet for a number of years, then the chances are that parental support is buttressing an elite system. And similarly, if the system is structured in a way that is blind to the demands and responsibilities of parenthood, then – society being what it is – women barristers will disproportionately pay the price. So I hope that some kind of radical thinking is underway, by The Bar of Ireland and across the Irish Bar as a whole, including looking to other jurisdictions and examining whether their approaches offer even partial ways forward.

In wrapping up, I hope no one is too disappointed if this speech has been a little short on celebration, and long on the challenges still to be addressed. In my own case, yes, there is a small jab of pride at some of the firsts in my career: who wouldn't enjoy having a little footnote in history? But I also know that women should have had these opportunities long before, and I eagerly look forward to a future when we won't have to count firsts and calculate percentages because equality will simply be a fact of life. But right now, that situation seems very far away.

There is still a mountain to climb – we may have established a solid base camp, and have the summit firmly in our sights, but it will still require a great deal of effort if we are to successfully scale it.



Defame in Spain…

The Bar of Ireland's conference leaves our cold and wet coasts behind for the Costa Del Sol and the beautiful city of Málaga in Spain from May 25-26.

The theme for the 2018 Conference is 'Defamation Nation', and an array of expert and engaging speakers will delve into this ever-contentious legal area. Along with a day of talks, there will be a social programme to help delegates relax and enjoy a weekend in the sun.

Kicking things off on the Friday, there will be a welcome reception with wine and canapés held in the University of Málaga at 8.00pm.

The city was the birthplace of artist Pablo Picasso, and the main part of the conference will take place in the Picasso Museum. The programme will cover three areas surrounding defamation. The first will look at defamation and privacy in the media and online. This section will be chaired by Mary Rose Gearty SC and will hear first from Eoin McCullough SC, the author of *Defamation Law and Practice*. The second speaker, Vincent Crowley, has been in the thick of these issues for decades, first in different positions within Independent News & Media PLC and currently as Chairman of newspaper representative body, Newsbrands Ireland.

Paul McGarry SC,
Chairman, Council of
The Bar of Ireland

SESSION 1 - CHAIR:
Mary Rose Gearty SC
Vice Chairman, Council
of The Bar of Ireland

Eoin McCullough SC

Vincent Crowley,
Chairman,
Newsbrands Ireland

Mr Justice Robert Jay
Judge of the High
Court of England and
Wales

SESSION 2 - CHAIR:
Gordon Jackson QC
Dean,
Faculty of Advocates,
Scotland

Delegates will then get to hear from judge of the High Court of England and Wales, Mr Justice Robert Jay, who served as counsel on the high-profile Leveson Inquiry, which looked at the culture, practices and ethics of the press following the News International phone hacking scandal.

The second session will be chaired by the Dean of the Scottish Faculty of Advocates, Gordon Jackson QC and will delve into sport cheating allegations and the law. Susan Ahern BL is an arbitrator at the Court of Arbitration for Sport and has had an extensive career in sports law and administration in numerous bodies.

Seán Cottrell is CEO of LawInSport, a website for sport lawyers and others with an interest in the legal issues and cases in the world of sport. He is a visiting lecturer at several universities and has in-depth knowledge of areas such as match fixing, sports governance, doping and equality in sport and law.

Canadian swimming champion, lawyer and first President of the World Anti-Doping Agency (WADA), Richard W. Pound QC, will be the final speaker of the session and will surely have much to say on this topic.

RTÉ's Legal Affairs Correspondent Orla O'Donnell takes the chair for the final session of the day. This will look at the impact of technology on human behaviour and the Bar has secured the world's leading expert in this field, cyberpsychologist Dr Mary Aiken to lead the discussion. Dr Aiken is a professor at UCD and Academic Advisor (Psychology) to the European Cyber Crime Centre at Europol. She was the inspiration for the American TV programme, *CSI: Cyber* and its protagonist. *The Bar Review* interviewed Mary ahead of her presentation at the conference and you can read her interview on pages 41-43.

Following Mary's presentation, a panel discussion will be held with contributors including Liam McCollum QC.

The Conference will be rounded off with a gala dinner at the Museo Automovilístico de Málaga, where delegates can enjoy a four-course meal and admire the classic cars on show, with a DJ afterwards.

The Bar of Ireland would like to extend an invitation to all members to attend and further information is available at www.defamationconference.com.

Susan Ahern BL

Seán Cottrell
CEO, LawInSport

Richard W. Pound
QC, Ad. E

SESSION 3 - CHAIR:
Orla O'Donnell
Legal Affairs Correspondent, RTÉ

Dr Mary Aiken
Cyberpsychologist

Liam McCollum QC
Chairman of the Bar of Northern Ireland

Cyber cipherer

Ahead of her participation in The Bar of Ireland's conference in May, cyberpsychologist Dr Mary Aiken spoke to *The Bar Review* about treating cyberspace as a specific environment, the impact of our relationship with technology on criminal behaviour and the judicial process, and protecting children in the digital age.

Having studied psychology in the 1980s, Mary Aiken was always fascinated by how scientific study could provide insight into the relationships between humans and technology. Two higher degrees (an MSc in Cyberpsychology and a PhD in Forensic Cyberpsychology) later, and after years of research and high-profile contributions to the field, Mary is one of the foremost experts in cyberpsychology globally.

While cyberpsychology is an established field within applied psychology, it is a relatively new concept to many. Mary explains: "Cyberpsychology focuses on the impact of technology on human behaviour. Cyberpsychologists study human behaviour mediated by technology in areas such as Internet psychology, virtual environments, artificial intelligence, gaming, social media, and mobile and networking devices. The past 20 years have seen an explosion in the development of information technology, to the point where people now spend a lot of their time in a space – 'cyberspace' – which did not exist previously".

We're all aware of the pervasive influence of the Internet in our lives, from the online case databases that make barristers' research so much easier, to our omnipresent smartphones, and the trend for sharing personal information and opinions through social media. Increasingly, the more problematic elements of this technology are becoming evident, from cybercrime and Internet trolls to problems with data protection. It's clear that many, if not all, of us behave differently when we're online. Mary says we need to start thinking about what she calls "the interdependent relationship between the virtual and the so-called real world": "There is a need to consider technology in a new way, a need for a paradigm shift to conceptualisation of cyberspace as an environment, as a place. Academic research in the field of environmental psychology supports the impact of environment on human behaviour – we now need to factor in that impact in cyber contexts".

Dr Mary Aiken on the set of CSI: Cyber, *the TV series she inspired.*

No one's in charge

One of the most interesting questions in this context is why so many of us feel freer to break the rules online. Mary cites the "online disinhibition effect," where people may do things in the virtual world that they might not do in the real world, with or without anonymity. She talks about the concept of "minimisation of authority", whereby a person's status (as a teacher or police officer, for example) is not as readily appreciated in an online context as it is offline: "The reason we see 'cyber feral behaviour' online, from cyberbullying to trolling and online harassment, is that in cyberspace there is a perception that no one is in charge, and that is because the reality is that no one is in charge".

Ann-Marie Hardiman
Managing Editor at Think Media Ltd

Mary has a particular interest in the impact of this on young people: "Psychological obsolescence, the disruptive impact of technology on youth development, is likely to produce a cultural shift which may leave present psychological, social and cultural norms behind, including respect for others, property rights, privacy, national security, and the authority of the police. What is the prognosis for a generation displaying increasing levels of narcissism and decreasing levels of empathy, inured by the consumption of illegally downloadable music, videos, software and games? What sort of criminal activities may this generation of 'virtual shoplifters' progress to?"

It's a scary thought, and one that Mary's specialist field of expertise – forensic cyberpsychology – encompasses. Focusing on criminal, deviant and abnormal human behaviour online, forensic cyberpsychology looks at how criminal populations present in cyber environments: "For many years efforts have focused on technology solutions to intrusive behaviour, arguably without consideration of how that behaviour mutates, amplifies or accelerates in cyber domains. I have been involved in a dozen different research silos from cyberstalking to cyberchondria, and the one thing that I have observed is that whenever technology interfaces with a base human disposition, the result is accelerated and amplified".

In the eyes of the law

Mary speaks about two types of cybercrime: crimes that pre-existed, but are aided by, technological advances; and, 'new' crimes that are only possible because of technology: "Technology has facilitated historical crimes such as fraud, and evolving crimes such as ransomware, sextortion and online child-related sex offending. Cybercrime is a growing problem in the modern world, from online insurance fraud to cyber terrorism".

Given the extraordinary pace of change in technology, it's difficult to see how police forces, and indeed legislators, can keep up with cybercrime. Mary argues that theories of crime, which of course were developed pre Internet, may need to be modified, and new theories developed, to apply to cyber environments: "Can theoretical scales or metrics developed and validated offline be empirically employed while investigating criminal behaviour manifested online? One of the most urgent areas requiring research and investigation is the classification of cybercrime; to date there has been a tendency to simply name apparent 2.0 versions by adding the prefix 'cyber'. Are bullying and cyber bullying the same underlying condition? And importantly, is the literature on cyberbullying prior to the advent of the smartphone still relevant?"

She gives as a further example the crime of stalking: "Do real world stalkers and cyber stalkers share the same deviant tendencies? Is cyberstalking simply facilitated by technology, or is it a new and differentiated form of criminal behaviour? In the latter, observed differences include the emergence of more female stalkers, stalking of multiple victims simultaneously, and the ability of the stalker to access more of the victim's personal data".

While criminal justice systems are well aware of elements of cybercrime, from hacking and identity theft to child abuse material, IP theft/software piracy and organised cybercrime, the pace of change means it's vital to try to consider future iterations. For Mary, the key is to accept the concept of cyberspace as an actual environment and act accordingly: "The challenge for technology is perhaps to create an impression that there are consequences for the criminal use of technologies. The challenge for authorities is to replicate some semblance of real world order in cyberspace, on the surface web, and importantly on the criminal dark nets that are flourishing and thriving on the deep web".

Is cyberstalking simply facilitated by technology, or a new and differentiated form of criminal behaviour?

Even if we manage this, crime in cyberspace also creates complications once cases come to the courts, not least for verification of evidence from online sources: "Verification and attribution is highly complex in cyber contexts. We understand the premise of real world staging of a crime scene, the planting or manipulation of evidence. However, it would appear that very little thought from a legal defence perspective has been given to the potential to stage a cybercrime scene. I am very concerned that we live in an era where convictions could potentially be informed by cell phone tower pings or text messages – when we know that cell towers can be hacked, and that text messages can be 'spoofed'".

Technology also has a role in detection, however: "While the barriers to participation in crime are likely to be reduced, at the same time we are fast approaching the point whereby every crime may leave some form of digital trace. In an age of omnipresent technology with cameras on practically every street corner, computers and mobile phones in every household, coupled with the propensity to generate and distribute self-incriminating images and videos, along with texts and posts on social media, it will be increasingly difficult for digital trace evidence to be entirely removed from a crime scene".

Thinking of the children

For those of us ordinary citizens who are not engaged in cybercrime, how our data is used and how we protect ourselves are vital issues, which take on particular importance in the case of children. The 'digital age of consent' refers to the age from which it is legal for data controllers to hold data gathered from minors, and the forthcoming European General Data Protection Regulation (GDPR), which comes into effect in May, will formalise age protective measures

Mary is Adjunct Associate Professor at the Geary Institute for Public Policy in University College Dublin. She is an Academic Advisor (Psychology) to Europol's European Cyber Crime Centre (EC3), a member of the EC3 Academic Advisory Board, and a member of the INTERPOL Specialists Group. In January this year she was awarded a Global Fellowship at the Washington DC Wilson Center, a pre-eminent worldwide institution for in-depth research and dialogue to inform actionable ideas on global policy issues. She lectures in criminology and is a Fellow at the School of Law, Middlesex University, Fellow of the Society for Chartered IT Professionals, and has served as Distinguished Professor of the Practice of Cyber Analytics at AIRS, and Sensemaking Fellow at IBM Network Science Research Center.

She thoroughly enjoys her work, and feels it's an exciting time for the behavioural sciences, with many opportunities to help to inform policy, inform the law, and make a difference: "Relaxing will have to wait".

online. The EU has set the digital age of consent at 16, but each state will be permitted to decide a national age of consent. Ireland has opted for 13, the lowest age of digital consent allowed under the GDPR. Mary has been active in campaigning on this issue, appearing before the Oireachtas Joint Committee on Children and Youth Affairs just last February to provide expert opinion on the implications of cybersecurity for children and young adults. Unsurprisingly, she has strong views on the subject: "When it comes to technology and children, the digital age of consent is both a security and a child protection issue. An arbitrary statement that every child at 13 is capable of consenting to the terms and conditions of online service providers is problematic given the potential risks they face. For example, companies can collect, record and share a child's home and school address, their location, their date of birth, their photos, phone number, their likes and dislikes, who they know, and the content of their conversations, including direct messages sent privately. Not only does this present a security risk to the individual child but, by direct association, it also presents risk to the family".

The Data Protection Bill 2018, which enshrines an Irish digital age of consent of 13, was submitted to the Seanad in February, and is currently under consideration. Mary points out that decisions on digital age of consent must take other legal issues into consideration: "The Irish digital age of consent must be informed by the Law Reform Commission's 2011 report 'Children and the Law: Medical Treatment'. The report recommended that when it came to persons under 16 there should not be a presumption of capacity to consent. The 2011 report involved the application of a 'mature minor' test, which has been applied in a number of states, sometimes in case law and sometimes in legislation, to a wide variety of legal areas involving decision-making capacity of children and young persons. Recent studies provide evidence that the use of certain social media platforms can negatively affect the mental health of young people – if Irish youth under 16 cannot give consent regarding their physical health, then how can they consent to online activity that may have an impact on their mental health?"

The role of parents in supporting and protecting their children in cyberspace is also crucial, and Mary feels that a higher digital age of consent would be helpful here: "Notwithstanding a young person's right to freedom of speech and to access information, the requirement for verifiable parental or guardian consent for those under the digital age of consent seems entirely appropriate and responsible. Parents and guardians know their child best, and are the primary custodians of their security and welfare. As educators we are constantly trying to engage parents in this process – a digital age of consent of 16 would mean that children aged 13, 14 and 15 would need some form of parental permission to engage with online service providers such as social media companies".

She accepts that for legislative purposes, there needs to be a focus on a specific age, but feels the Irish Government has chosen poorly: "An optimum digital age of consent can be informed by best practice in other countries: Germany and the Netherlands have both chosen 16. Ireland should adopt a protective stance, and arguably legislate towards the upper end of the relevant age band – that is, closer to 16 than 13 – in order to protect the children who are less well equipped to deal with the complexities that digital consent presents".

Non-stop

With such a fascinating field, it's not hard to see why Mary is constantly busy, travelling the world to speak on the issues, advising governments and private entities, and all the while carrying out her own research. Current projects include: an academic research proposal with members of the Europol Academic Advisory Group that will further the understanding of cyber juvenile delinquency; research regarding youth sexting behaviour conducted with INTERPOL, the LAPD, the London Met, and the Australian Federal Police; and, perhaps most interesting in light of current scandals, a white paper on algorithmic subliminal voter behavioural manipulation online, specifically in the context of election processes.

She's also still touring to promote her book *The Cyber Effect*, which was published in the US in 2016, and is on sale in over 100 countries. Her next book will focus on the impact of artificial intelligence on human behaviour, but meanwhile there is campaigning to be done: "I will continue to engage in policy debates here at home in Ireland. I was a member of the 2013 Government-appointed Internet Content Governance Advisory Group. I contributed to the 2016 Law Reform Commission's report on 'Harmful Communications and Digital Safety' and for the next few weeks, in my available time, I will be campaigning to get the Government to reconsider its position on the digital age of consent".

CSI: Cyber

Mary was involved in a research project on technology solutions to 'Technology Facilitated Human Trafficking' with the White House and this, in 2013, brought her work to the attention of the entertainment industry: "It all happened quite quickly. I was invited to meet CBS network executives in Los Angeles, a 15-minute interview turned into a two-hour discussion, and this was followed by an invitation to become a producer on a new show".

CSI:Cyber was inspired by Mary's work as a cyberpsychologist, and the lead character of FBI Cyber Crime Special Agent Avery Ryan, played by the Oscar-winning actress Patricia Arquette, was based on Mary. Mary feels the show was an excellent opportunity to inform and educate the public in an entertaining way about the risks inherent in the Internet: "Overall my experience was a very positive one. The show provided an incredible global platform and opportunity to inform and educate regarding cyber safety and security issues, to reach out and to raise awareness, and to do so in an engaging and entertaining manner. As they say in Hollywood, it's 'edutainment'".

Oscar-winning actress Patricia Arquette, left, who plays the character based on Dr Mary Aiken in the TV series.

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

Volume 23 Number 2
April 2018

A directory of legislation, articles and acquisitions received in the Law Library from January 18, 2018, to February 28, 2018.
Judgment information supplied by Justis Publishing Ltd.

Edited by Deirdre Lambe and Vanessa Curley, Law Library, Four Courts.

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Kershaw v Coughlan and anor

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O'Mahony v Director of Public Prosecutions

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Director of Public Prosecutions v O'Brien

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Director of Public Prosecutions v Fitzgerald and O'Driscoll

Sentencing – Rape – Mitigating factors – Appellant seeking to appeal against sentence – Whether sentencing judge failed to have due regard to the mitigating circumstances advanced on behalf of the appellant – [2018] IECA 21 - 29/01/2018
Director of Public Prosecutions v C.Q.

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Director of Public Prosecutions v Gronski

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

Arts (Dignity at Work) (Amendment) Bill 2018 – Bill 15/2018 [pmb] – Deputy Peadar Tóibín and Deputy David Cullinane

Competition and Consumer Protection (Amendment) Bill 2018 – Bill 22/2018 [pmb] – Deputy Niall Collins

Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Bill 2018 – Bill 21/2018 [pmb] – Deputy Michael McGrath

Extreme Weather (Miscellaneous Provisions) Bill 2018 – Bill 16/2018 [pmb] – Deputy Gerry Adams, Deputy David Cullinane and Deputy Imelda Munster

Finance (Office of Tax Simplification) Bill 2018 – Bill 14/2018 [pmb] – Deputy Michael McGrath

Maternity Protection (Members of the Houses of the Oireachtas) Bill 2018 – Bill 23/2018 [pmb] – Deputy Anne Rabbitte and Deputy Niamh Smyth

Petroleum and Other Minerals Development (Amendment) (Climate Emergency Measures) Bill 2018 [pmb] – Deputy Bríd Smith, Deputy Richard Boyd Barrett, Deputy Gino Kenny, Deputy Paul Murphy, Deputy Ruth Coppinger and Deputy Mick Barry

Prohibition of Sulky-Racing Bill 2018 – Bill 12/2018 [pmb] – Deputy Mattie McGrath

Public Health (Availability of Defibrillators) Bill 2018 – Bill 20/2018 [pmb] – Deputy Noel Rock

Radiological Protection (Amendment) Bill 2018 – Bill 19/2018

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Electoral (Amendment) (Voting Rights for Residents) Bill 2017 – Bill 127/2017 [pmb] – Senator Fintan Warfield, Senator Niall Ó Donnghaile and Senator Máire Devine

Health and Safety (Carbon Monoxide) Bill 2017 – Bill 126/2017 [pmb] – Senator Keith Swanick, Senator Díarmuid Wilson, Senator Jennifer Murnane O'Connor and Senator Robbie Gallagher

Health Insurance (Amendment) Bill 2017 – Bill 135/2017

Protection of Employment (Measures to Counter False Self-Employment) Bill 2018 – Bill 17/2018 [pmb] – Senator Gerald Nash, Senator Ivana Bacik, Senator Kevin Humphreys and Senator Aodhan Ó Ríordáin

Public Service Superannuation (Amendment) Bill 2018 – Bill 18/2018

Regional Technical Colleges (Amendment) Bill 2017 – Bill 128/2017 [pmb] – Senator Paddy Burke, Senator Michelle Mulherin and Senator John O'Mahony

Statistics (1926 Census Release) Bill 2017 – Bill 142/2017 [pmb] – Senator Fintan Warfield, Senator Paul Gavan and Senator Niall Ó Donnghaile

Telecommunications Services (Ducting and Cables) Bill 2018 – Bill 13/2018

Vehicle Registration Data (Automated Searching and Exchange) Bill 2018 – Bill 2/2018

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

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

Government Legislation Programme Spring – Summer 2018
http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Supreme Court Determinations - Published on Courts.ie

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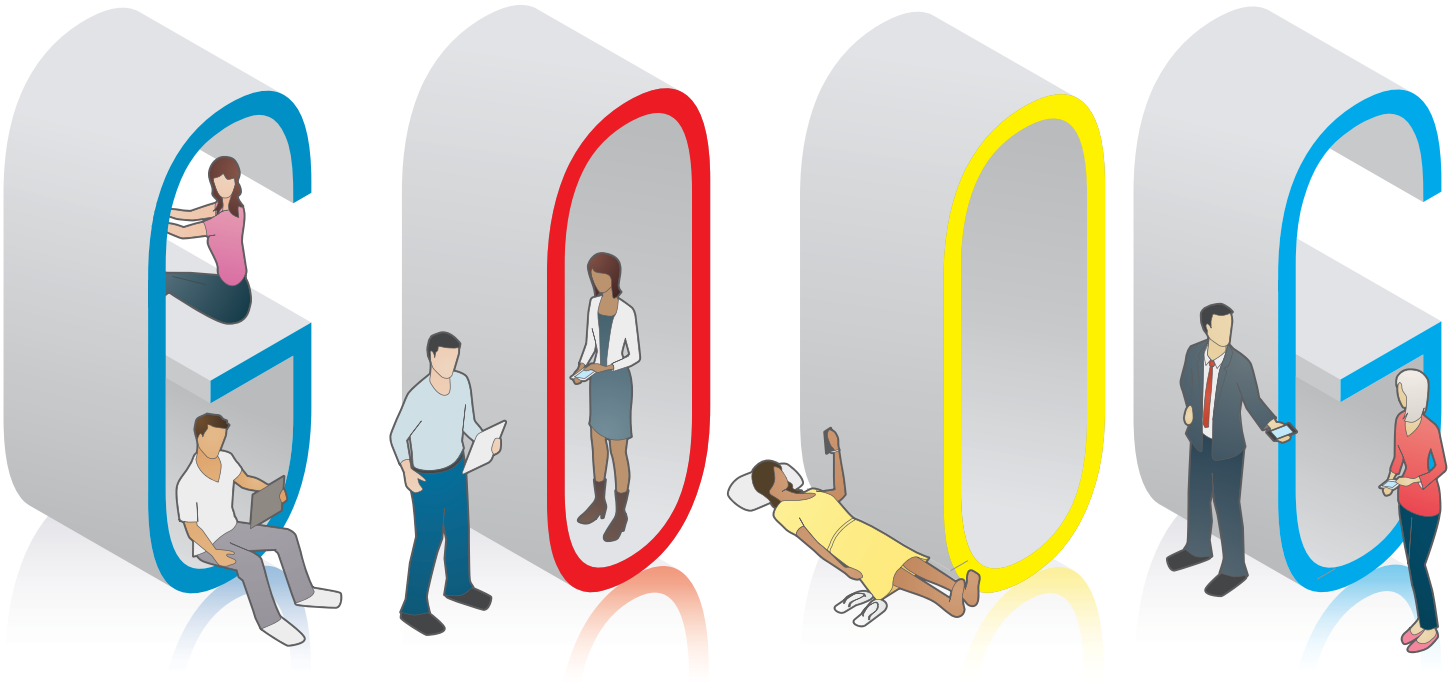
http://www.courts.ie/Judgments.nsf/FrmDeterminations?OpenForm&l=en



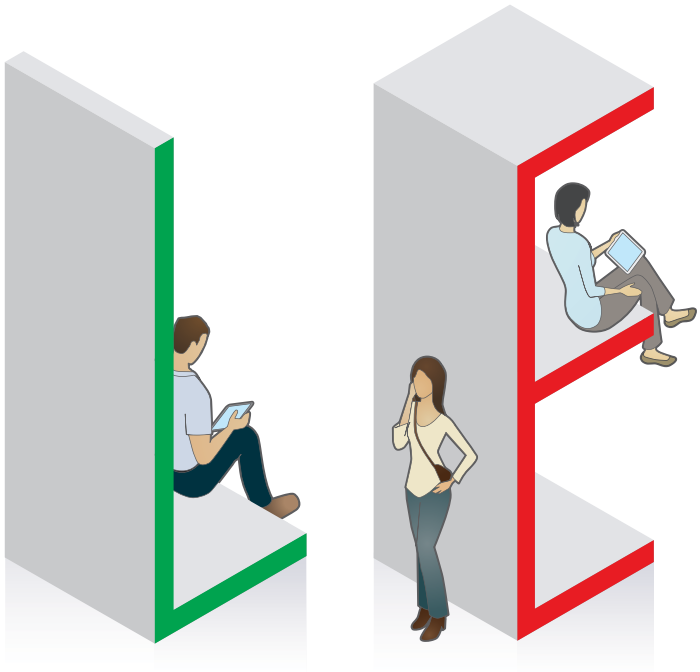
Data hosts and obligations under data protection legislation

Are data hosts such as Google responsible for protecting individuals' data protection rights? Some recent cases have examined the question.

Michael O'Doherty BL

In a significant High Court judgment in *Savage v Data Protection Commissioner*, Google Ireland was successful in its appeal against a decision that its search engine results breached an individual's data protection rights. While this is a major victory for Google, it appears to this author that the longstanding position taken by data hosts that they are mere innocent, passive participants in the publication process may no longer be tenable.

For much of this decade, and with increasing regularity, Google has been facing legal challenges, which have sought to make it responsible for the content that it links, hosts or publishes, depending on the nature of its various functions. It is a challenge being faced on a global scale, from Canada[1] to Australia,[2] and Japan[3] to Spain.[4] The English courts are also currently engaged in their first substantive consideration[5] of the seminal European Court of Justice (CJEU) judgment in *Google Spain*.[4] The recent judgment in *Savage v Data Protection Commissioner* is the first case for such a consideration in this jurisdiction.



Background

Mark Savage ran as a candidate in the north Co. Dublin local elections in 2014. As part of his campaign, he produced election literature, which criticised members of the gay community who, he claimed, had been engaging in homosexual activity on Donabate beach. This material provoked a discussion thread on Reddit.com, the heading of which was: "Mark Savage, North County Dublin's homophobic candidate". The thread criticised Mr Savage's opinions in a predictably colourful manner.

On August 31, 2014, Mr Savage made a complaint to the Data Protection Commissioner (DPC) on the basis that when his name was entered into Google's search engine facility, one of the first results produced consisted of: (a) the heading of the Reddit thread, reproduced word for word, appearing as the URL; (b) the web address of the Reddit page on which the discussion took place; and, (c) a snippet from the thread.

The DPC informed Mr Savage that he must first contact Google Ireland, seeking the voluntary de-listing of the information, which he duly did. On October 21, 2014, Google Ireland responded to Mr Savage, rejecting his request. Mr Savage appealed Google Ireland's decision to the DPC, claiming that the search engine result constituted a statement of fact that he was homophobic – an allegation which he denied – and as such should be considered to be inaccurate data for the purposes of the Data Protection Acts 1988 and 2003.

On March 26, 2015, the DPC rejected his complaint. While basing this decision partly on Mr Savage's voluntary placing of himself into public life, the Commissioner also dealt with one of the primary considerations of the Data Protection Acts, namely whether the data is "accurate". She decided that "accurate means accurate as a matter of fact, and this link remains accurate in that it represents the opinions expressed of you by a user of the relevant forum". She was satisfied that, by clicking on the URL link and being brought to the Reddit discussion, the user would be made aware that the statement in question was simply an expression of opinion on the part of a contributor, and therefore not a verified fact for the purposes of the Acts.

Mr Savage appealed the decision to the Circuit Court,[6] with Google Ireland being joined as a notice party. The Court considered in detail the *Google Spain* case and overturned the DPC's decision on what it described as a "narrow premise", namely the Commissioner's finding that the accuracy of the link should be judged by whether it accurately represents the opinions expressed on Reddit.

In relation to the URL, the Court instead found that: "It is not accurate by virtue of the fact that it is simply not clear that it is the original poster expressing his or her opinion, but rather bears the appearance of a verified fact".[7] The Court ordered that the URL be edited by Google through the insertion of quotation marks around the offending words, so as to make it clear that this was a statement of opinion.

High Court proceedings

The DPC and Google appealed this decision on points of law contending, *inter alia*, that the Circuit Court had erred in its interpretation of the *Google Spain* decision, that it had erred in law in determining that the URL was a matter of fact rather than an expression of opinion, and that it had erred in finding that the URL could be considered in isolation without reference to the underlying webpage linked to it by that URL.

In delivering his judgment, Mr Justice White referred to the *Google Spain* decision, and its finding that a fair balance should be sought between the interests of internet users in obtaining information, and the data subject's rights to private and family life under Article 7 of the Charter of Fundamental Rights, and protection of personal data under Article 8. The Court accepted the appellants' submissions that *Google Spain* was authority for the proposition that the Circuit Court judge had fallen into error by considering the search engine result in isolation, finding that such an approach was "incorrect in law".[8]

It also accepted that the editing of the search engine result ordered by the Circuit Court was not a remedy available under the authority of *Google Spain*. The High Court referred to the "automated process" by which Google produces its search engine results, and found that the order of the Circuit Court would "oblige Google to engage in an editing process not envisaged by *Google Spain*. The only responsibility placed on the data controller by that judgment is to delist the search once appropriate criteria was considered".[9]

Discussion

The High Court judgment can be seen as a significant victory for Google. An upholding of the lower Court's decision could have had immense implications for the manner in which Google operates its search engines. Certain aspects of the judgment, however, merit further attention.

At the outset, it is worth drawing attention to a fundamental aspect of *Google Spain*, a case that was considered so extensively by the DPC, the Circuit Court and the High Court, and is now synonymous with the so-called "right to be

forgotten". Because a central issue that distinguishes *Savage* from *Google Spain* is that while Mr Savage sought de-listing of the Google search engine data pertaining to him because it was inaccurate, Mr Gonzalez had no such issue with the data's accuracy in *Google Spain*.

The CJEU's landmark decision concerned Mr Gonzalez's claim that reference to his previous tax difficulties, which required attachment proceedings to be brought, was no longer relevant as his debt to the authorities had long since been settled. The information produced by Google was, *per se*, accurate – it did no more than list the name and edition of a newspaper, which contained an article about him. Mr Gonzalez's issue was that it was no longer relevant.[10] Mr Savage, on the other hand, was not looking for accurate information about him to be 'forgotten'. Instead, he was requesting that inaccurate information be removed. His claim that his data protection rights were breached was based entirely on the URL produced by Google's search engine, and his contention that it stated, as a verified fact, that he was homophobic.

It is perhaps regrettable that, as a lay litigant, Mr Savage sought to concentrate on a semantic differentiation between being "homophobic" and "homo-disgusted", and a perception of bias against him by the notice party. Such a focus should not, it is suggested, have diverted the Court from a detailed consideration of the underlying issue described above.

In simple terms, *Savage* does not fit neatly under the right to be forgotten jurisprudence of *Google Spain*, and it is questionable therefore as to why so much weight was given to the CJEU judgment. The central issue was whether the result produced by Google's search engine could be considered to be an independent processing of data for the purposes of the Act, or whether it needed to be considered in conjunction with the underlying article to which it linked. This core issue was dealt with in a relatively crisp manner in the Court's judgment, which found that "in applying the jurisprudence of *Google Spain*, (it) had a duty to consider the underlying article the subject of the search … if the court had considered the underlying discussion thread it could not have come to the conclusion that it was inaccurate data and factually correct".

While *Google Spain* did involve a consideration of the underlying article, it is questionable whether the CJEU's judgment obliges a court to do so, as suggested by the High Court. In Mr Gonzalez's case, the underlying article was considered by the domestic courts because he had requested that both it, and the search engine link which referenced it, be deleted. Mr Savage made no such request of the DPC, limiting his request to the correction of the search engine result.

Obligations

Far from obliging a joint consideration of both the search engine result and the underlying article, it is suggested that the CJEU found in *Google Spain* that they could in fact be parsed, and that notwithstanding the fact that an underlying article may not fall foul of the Data Protection Directive,[11] a search engine result which referenced it may well do. Significantly, the CJEU stressed that: "It cannot … be ruled out that in certain circumstances the data subject is capable of exercising (the data subject's right to object) against that (search engine) operator but not against the publisher of the web page".[12]

Furthermore, it emphasised the influential role that search engine results have in the moulding of public opinion, and the often greater prominence they give to dissemination of information than the web page that publishes it in the first place, which suggests that search engine results may in fact be subject to a heightened degree of scrutiny.[13]

If the High Court had found that the search engine result could be examined without reference to the underlying article, it would then have had to deal square on with the core issue of Mr Savage's complaint, namely that the URL was clearly a statement of fact, and must therefore be considered in relation to its accuracy, or whether it was clearly a statement of opinion. This may have involved a consideration of the guidelines issued by the EU's Article 29 Data Protection Working Party,[14] which deals specifically with such an issue by suggesting that: "DPAs (Data Protection Authorities) recognise that some search results will contain links to content that may be part of a personal campaign against someone, consisting of 'rants' and perhaps unpleasant personal comments. Although the availability of such information may be hurtful and unpleasant, this does not necessarily mean that DPAs will consider it necessary to have the relevant search result de-listed. However, DPAs will be more likely to consider the de-listing of search results containing data that appears to be verified fact but that is factually inaccurate".[15]

Unfortunately, the degree to which a search engine result must be clearly a link to an expression of opinion is not expanded upon, and therefore this very central issue from *Savage* is left unanswered. Even if this is authority for Google's submission that links to expressions of opinion cannot be treated as inaccurate data, it is perhaps worth pointing out that the basis of this authority is the Article 29 Working Party Guidelines, and not the *Google Spain* judgment itself.

The High Court was also critical of the fact that "the learned Circuit Court judge did not carry out any balancing tests as envisaged in the *Google Spain* judgment".[16] This balancing test, suggested in *Google Spain* and fleshed out in the Article 29 Working Party Guidelines, relates to the requirement to weigh the applicant's right to privacy against the respondent's right to freedom of expression, with an important consideration being the degree to which the applicant may have played a role in public life, which would legitimise a greater scrutiny of their opinions and beliefs.

As regards what constitutes a public figure, the Article 29 Working Party Guidelines offer the definition that: "Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain".[17] Mr Savage ran in a local election and, by his own admission, garnered a rather underwhelming tally of 125 first preference votes. While Google Ireland submitted that he might run again in the next election, Mr Savage's modest showing rather suggests that his tilt at a political career will have been a relatively short-lived one. The extent to which this makes Mr Savage a public figure does not, unfortunately, seem to have been ventilated to any great degree.

Finally, it is possible to question the High Court's finding that in *Google Spain*: "The only responsibility placed on the data controller … is to delist the search".[18] The implication, it is suggested, is that no other course of action should be open to a claimant against Google. While de-listing was the only remedy considered in *Google Spain*, that is surely because it was the only remedy that it was asked to consider. The judgment in *Google Spain* does not seem to explicitly rule out any other form of remedy, such as altering or editing; rather, it does not engage with any option, as it was not required to. In this

regard, it should be noted that Article 12 of the Data Protection Directive, which underpins the *Google Spain* judgment, guarantees the right of data subjects to obtain from the data controller: "as appropriate the rectification, erasure or blocking of data" (my emphasis). The presence of the word "rectification" seems to clearly suggest that editing of data, and not just its erasure, is available as a remedy.

Future considerations

The judgment in *Savage* is particularly interesting given the recent decisions in Australia and New Zealand, albeit in the context of cases grounded in defamation, which have considered the liability of Google for its search engine results.

The High Court stated in unequivocal fashion that: "(Google) does not carry out any editing function in respect of its activities. It is an automated process where individual items of information are collated automatically and facilitate the user searching particular topics or names".[19] The courts in other jurisdictions, however, have questioned whether the manner in which Google produces such results can be considered to be truly automated. In 2012, the High Court in New Zealand[20] tentatively questioned the potential liability of Google as a publisher for its search engine results, stating that: "Whether or not search engines are "publishers" is a novel issue in New Zealand ... There may be need to consider whether there is "a stamp of human intervention" in the way that the search engine programme is written".[21]

More significantly, a recent decision by the Supreme Court of South Australia[2] found Google to be the publisher of the results that its search engine produces, and questioned the degree to which such results are truly automated: "Google established the algorithm and programmes of its search engine and made that search engine available to all users of the internet. At the time of a search, Google, by the mechanism of its search engine, produces the snippet paragraphs, albeit at the request of the user … Google participated in the publication of the paragraphs about Dr Duffy produced by its search engine because it intended its search engine to do what it programmed it to do".[22]

A final aspect of note in Mr Justice White's judgment in *Savage* is not the finding as regards the plaintiff's data protection rights, but rather the off-topic comments at the end of his judgment. The Court referred to a submission made by Mr Savage that it should consider the findings of the Australian case of *Hockey v Fairfax*,[23] in which the plaintiff successfully argued that the content of a tweet, which referred to a newspaper article, was of itself defamatory without any recourse to the underlying article.[24] Mr Justice White stressed that he was not dealing with a case of defamation, and while commenting that the jurisprudence of *Hockey* did not reflect the law of defamation in this jurisdiction, he suggested that this "may well change in the future when the superior courts consider tweets, or for that matter the results of search engines, in the context of the laws of defamation".[25]

Elsewhere in this edition of *The Bar Review* (page 48), Conor O'Higgins BL examines the recent High Court case of *Muwema* and the difficulties encountered fixing data hosts with liability in defamation proceedings. With Mr Savage reportedly having instigated defamation proceedings based on the same facts as his original complaint to the DPC, it will be interesting to see whether he has any more success in those proceedings.

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2. *Google v Duffy* [2017] SASCFC 130.
3. Supreme Court in Japan rules on right to be forgotten. *Data Protection Ireland* 2017; 10 (2): 17.
4. *Google Spain SL and Google Inc. v Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez,* case C-131.
5. *NT1 v Google LLC* and *NT2 v Google LLC*.
6. Pursuant to section 26 of the Data Protection Act 1988.
7. *Mark Savage v Data Protection Commissioner and Google Ireland*, Record no. 2015/02589, (High Court, unreported judgment of Mr Justice White, delivered February 9, 2018) at para 46.
8. Para 29.
9. Para 33.
10. By far the most common basis on which *Google Spain* has been considered is with regard to "spent conviction" cases, wherein the data being published by Google is sought to be de-listed not because it is inaccurate, but rather because it publicises an aspect of a person's past life which they no longer consider to be relevant. The joined cases of *NT1 v Google LLC* and *NT2 v Google LLC* currently being heard in England fall into this category.
11. Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
12. *Google Spain SL and Google Inc. v Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez,* case C-131, at para 85.
13. Para 87.
14. Guidelines on the implementation of the Court of Justice of the European Union Judgment on *Google Spain Inc v Agencia Espanola de Proteccion de datos AEPD and Mario Costeja Gonzalez*, C-131/12. (Adopted November 26, 2014).
15 Ibid, Part II(5)(c).
16. Para 31.
17. Guidelines on the implementation of the Court of Justice of the European Union judgment on *Google Spain Inc v Agencia Espanola de Proteccion de datos (AEPD) and Mario Costeja Gonzalez*, C-131/12. (Adopted November 26, 2014), Part II(2).
18. Para 33.
19. Ibid.
20. *A v Google New Zealand Ltd* [2012] NZHC 2352.
21. Ibid, at 68.
22. *Google v Duffy* [2017] SASCFC 130, at para 155.
23. *Hockey v Fairfax* (2015) FCA 652.
24. It should be stressed than in *Hockey,* liability for the content of the tweets in question was fixed not on Twitter, but rather on the operator of the account who had created the tweets.
25. At para 34.

Liability of data hosts for online defamation

Data hosts receive special protection under the law, making it difficult to prove liability in defamation cases. However, there are possible legal remedies for plaintiffs, particularly where companies do more than simply host the data.[1]

Conor O'Higgins BL

Responding in September to criticism from the President of the United States, Mark Zuckerberg described Facebook as a "platform for all ideas". His point was that the social network is a conduit that simply facilitates the free expression of a multitude of different views held by its users. Recent events, however, have cast doubt on this view that data hosts who operate online platforms simply facilitate the transmission of information. For example, in December the European Court of Justice (ECJ) rejected Uber's argument that it is just the provider of a platform that arranges the connection of taxi drivers and passengers, instead finding that Uber is, above all, a private transport business.

The social networks

Returning to data hosts who operate social networks, it has been said regularly that platforms such as Facebook are akin to a wall with graffiti on it: if the graffiti is defamatory, you don't blame the wall. However, in applying this analogy it must be recognised that the 'wall' is not an inanimate object, but rather is an extremely large and successful

corporation that makes considerable profits from allowing people to graffiti.

It was possibly on this basis that, in September, the chairman of Ofcom, the UK media regulator, expressed her personal belief before a committee of the House of Commons that Facebook and Google are, actually, publishers of online material.[2] The companies in question have consistently and vigorously opposed this description of themselves, one aspect of their opposition undoubtedly being their understandable fear of assuming liability for online defamation propagated by users of their services.

Whether they can be held so liable is of course a matter of particular importance in this jurisdiction, where they, and other major data hosts, have international headquarters. When the High Court addressed this question in *Muwema v Facebook,*[3] Binchy J. expressed doubt that, under the relevant European and domestic provisions, the data host could be liable, whether by being enjoined to remove online material or in damages. This caused him considerable concern on the basis that the absence of both remedies could leave persons who have been seriously defamed online by impecunious or unidentifiable users of internet services without any effective legal remedy.

It is arguable, however, that while applicable legislation gives a significant level of special protection to data hosts, it does not leave those who have been defamed on social media and other online platforms without a practical means of vindicating their reputation. This is so, firstly, because the data host may be liable in damages where it has sufficient knowledge of the existence of defamatory material and refuses to remove it from its service. In most cases the making of an adequately particularised complaint to the data host ought to give rise to such knowledge, thereby triggering an entitlement to damages should the material not be removed promptly.

Secondly, a defamed person can protect their reputation by seeking an injunction requiring the data host to remove online material pursuant to s.33 of the Defamation Act 2009 ("the 2009 Act"). Both of these options are considered below; however, before doing so it is necessary to look at the scope of the special protection given to data hosts.

The protection from damages

Directive 2000/31/EC ("The Directive") deals with many aspects of e-commerce, and under it internet service providers of various kinds are given special protection from damages actions brought by persons whose rights have been infringed. The Directive was transposed into Irish law by the European Communities (Directive 2000/31/EC) Regulations 2003 and Regulation 18 affords protection to data hosts. Reliance on Regulation 18 is on condition that the host:

> "(a)...does not have actual knowledge of the unlawful activity concerned and, as regards claims for damages, is not aware of facts or circumstances from which that unlawful activity is apparent, or
> (b)...upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information".

This protection is consistent with and bolstered by the defence of "innocent publication" provided for by s.27 of the 2009 Act. This has its roots in the common law defence of innocent dissemination, whereby "secondary publishers" such as booksellers and newsagents, who had no knowledge of the nature of the material they were publishing, were protected from actions for defamation. Section 27(1) states that it will be a defence to an action if the defendant can prove that:

a) he or she was not the author, editor or publisher of the statement to which the action relates;
b) he or she took reasonable care in relation to its publication; and,
c) he or she did not know, and had no reason to believe, that what he or she did caused or contributed to the publication of a statement that would give rise to a cause of action in defamation.

Importantly, "publisher" as it appears in s.27(1)(a) is likely to mean "commercial publisher" – the meaning expressly given to it in the equivalent English legislation.[4] Section 27(2) lists three types of person that will not be considered such a publisher under s.27(1)(a), one of these being a person who:

> "in relation to any electronic medium on which the statement is recorded or stored, he or she [...] was responsible for the operation or provision *only* of any equipment, system or service by means of which the statement would be capable of being retrieved, copied, distributed or made available".

While clearly this subsection covers some data hosts, it is an open question whether others, for example Facebook and Google, who collect and track the data of their users in order to sell the information to advertisers, can truly be described as being engaged only in the operation or provision of a host system for data. Certainly, when the 2009 Act was enacted, the legislature could not have envisaged the emergence of a business model of this type of host, sometimes referred to as "surveillance capitalism".[5]

Knowledge and liability in damages

Under both Regulation 18 and s.27, the availability to the host of the protection from damages hinges on its knowledge of wrongdoing. In each case, the protection will disappear once a certain level of awareness is reached. Cox and McCullough believe that this occurs when the data host is put on notice of the existence of material that is on its face defamatory.[6] Thus, in *Godfrey v Demon*,[7] Morland J. held that the data host in question could not rely on the English version of the defence of innocent publication as it had refused to remove defamatory comments when requested to do so by the plaintiff.

By comparison, the protection provided by Regulation 18 is much broader. This is because it will only fail if there is actual knowledge on the part of the data host that an online defamatory publication is unlawful. The requirement that there be actual knowledge of unlawfulness is critical in the context of defamation because material that is grossly defamatory may nevertheless be entirely lawful – for instance it may be defended successfully on the ground of truth or because it was published on an occasion of qualified privilege.

Because of this somewhat unusual characteristic of the tort of defamation, a complainant's highlighting of the presence of objectionable online material may not itself suffice to confer on the data host the requisite knowledge to deprive

it of Regulation 18 protection. Instead, the complainant must bring to the data host's attention material that is prima facie defamatory and provide sufficient evidence that it is unlawful, i.e., that it cannot be defended successfully.

Quite what would amount to sufficient evidence though is difficult to say. The decision of the ECJ in *L'Oréal v eBay,* a case that concerned similar safeguards governing the online sale of trademark goods, provides some guidance.[8] There it was held that the notification of a host will be a factor in favour of inferring actual knowledge, particularly where a precise and adequately substantiated complaint outlining the circumstances of the illegality is made.

Despite this, inferring actual knowledge of wrongdoing can be problematic in cases of defamation. This is evident from *Davison v Habeeb,* where the English High Court held that Google, the operator of the "enormous burgeoning Babel", Blogger.com, did not have actual knowledge in circumstances where it first received a complaint about an online publication and then, shortly after, a conflicting statement from the original author standing over its truth.[9]

All of this has led Gatley to conclude that a host would need to know "at a minimum…something of the strength or weaknesses of available defences" before it could be held liable in damages for having actual knowledge.[10] Plainly, whether it will be so held will depend largely on the facts of each individual case. It is arguable that in order to avoid the conditions attaching to the Regulation being rendered almost meaningless, an uncontradicted, comprehensive complaint outlining the circumstances of the unlawful activity should be enough to give rise to actual knowledge.[11]

Injunction orders

The need for actual knowledge on the part of the data host does not apply, however, where what is sought is injunctive relief such as, for example, a take down order. This is because Regulation 18(3) states that the restriction on damages awards:

> "…shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights".

In Ireland, a court can grant injunction orders requiring the removal of online defamation under s.33 of the 2009 Act. Such orders can be made if, in the court's opinion:

> "(*a*) the statement is defamatory, and
> (*b*) the defendant has no defence to the action that is reasonably likely to succeed".

It is important to note that interlocutory injunctions in defamation cases have traditionally been difficult to obtain, due to a judicial reluctance to restrict the constitutional right of free expression, allied to the belief that the proper remedy for injury to one's reputation is damages. As a result, the test at common law has been that the plaintiff must show that it is clear they will succeed at trial.[12] The terms of s.33 of the 2009 Act, particularly the requirement that there be no defence open to the defendant that is reasonably likely to succeed, indicate that successful applications for injunctions in defamation cases will continue to be rare.

It is possible, however, that injunctive relief might be easier to obtain in instances of online defamation. In *Tansey v Gill,*[13] Peart J. recognised that it has features that mean injunctive relief as against the data host may be the most appropriate, or indeed the only, remedy. In this regard he pointed to the propensity for scurrilous allegations, often anonymously made, to spread online with extraordinary speed.

Moreover, in the context of online defamation on sites such as Facebook, it is arguable that damages cannot be said to be the proper remedy in circumstances where the plaintiff will be faced first with potentially insurmountable practical difficulties when attempting to sue the anonymous author of defamatory material and, secondly, with the protection afforded to data hosts from monetary awards. On this basis, there are grounds for arguing that an injunction requiring the data host to remove defamatory material might be the only viable route for the plaintiff to pursue.

Muwema and the possible absence of any remedy

More recently, however, the High Court has cast doubt on the availability of injunctive relief following its judgment in *Muwema v Facebook Ireland.* The case concerned allegations of corruption made against a Ugandan lawyer by an anonymous user. The plaintiff sought their removal. However, Facebook Ireland, the operator of the social network for users outside the USA and Canada, refused to remove them on the basis that it could not determine whether they were true or false. When Facebook suggested that the matter should be taken up with the author of the comments, the plaintiff sued for damages and injunction orders.

The judgment in *Muwema* primarily concerns the plaintiff's application for injunction orders under s.33 of the 2009 Act.[14] Although damages were not at that stage a live issue, Binchy J. made some observations on the subject that are worth noting. In particular, he appears to have accepted the submission of Facebook that, despite notification from the plaintiff, it could not adjudicate on the validity of the complaint made to it. On this basis, he believed Facebook fell within the Regulation 18 protection from damages as it lacked the requisite actual knowledge.

This is not itself inconsistent with the reasoning of the ECJ in *L'Oréal,* outlined above. It is curious, however, that the Court did not mention this case, but referred instead to *Mulvaney v Betfair*, which is authority for the proposition that the data host is under no obligation to actively monitor its service for defamatory material.[15] No argument seems to have been made by the plaintiff that Facebook had any such duty. Ultimately, prior notification by a complainant and the effect the notification has on the liability in damages of data hosts for the defamatory material of its users remains unclear.

However, the core of the decision in *Muwema,* and its most striking feature, is Binchy J.'s finding that the plaintiff had no right to an injunction order and his view, expressed in the final paragraph, that it is hard to envisage any instance where a plaintiff could obtain relief under s.33 of the 2009 Act against a data host. The basis for this was the acceptance of Facebook's submission that it was "reasonably likely to succeed" in its defence that it was an innocent publisher, thereby meaning that the plaintiff could not meet the mandatory requirement at s.33(1)(b).

This seems to have come about because of the judge's interpretation of s.27 of the 2009 Act that it effectively grants blanket innocent publisher status to all data hosts, including social networks, by virtue of the terms of s.27(2)(c). Crucially, the Court did not appear to require the data host to demonstrate that it was unaware it was contributing to a defamatory publication in order to be classed as an innocent publisher.

The findings in *Muwema* concerning the interpretation of the new, and thus far rarely relied on, statutory defence of innocent publication deserve detailed analysis that is outside the scope of this article. It is respectfully submitted, however, that the Court's reading of the section is open to question on the grounds of the knowledge requirement specified at s.27(1)(c), its common law origins in the defence of innocent dissemination and, lastly, the issue of the true role of companies such as Facebook, i.e., whether they are providing a data hosting service only.

If the judgment in *Muwema* is correct, the law in this jurisdiction is such that there may be no effective remedy available for someone who is defamed online. Moreover, based on the Court's own comments concerning the absence of an effective remedy, it is open to question whether this interpretation of the section would be compatible with the express obligation of the State under article 40.3.2 of the Constitution to protect sufficiently as best it may the good name of every citizen from unjust attack, and the principle of effectiveness in European law. The courts are, after all, under an obligation to interpret statutory provisions in a manner that is constitutional, where possible. Interpreting s.27 of the 2009 Act in a manner which places the onus on the data host to show that it did not know it was causing or contributing to a defamatory publication appears to this writer to be more fitting from a constitutional perspective.

The absence of any remedy could also be in breach of the requirement under Article 8 of the European Convention on Human Rights and Article 7 of the European Charter of Fundamental Rights to safeguard the right to the protection of one's reputation. In this respect, it is worth considering the judgment of the Grand Chamber in *Delfi v Estonia*, which makes it clear that some form of relief from online defamation is an essential element of the overall right to private and family life.[16]

Conclusion

There may be good reasons why data hosts are protected from defamation actions in a way that traditional publishers such as newspapers are not. The sheer volume of material that is online is one justification. Another is that some types of host exercise little or no control and truly act merely as conduits, not involved in the collection of data for economic purposes or its presentation. Others, such as Google and Facebook, are examples of hosts that take their user's data and, to some degree at least, determine the way in which material appears online.

In respect of these hosts, it is submitted that neither the Directive nor the 2009 Act provide total immunity from liability. As regards damages, such a host must remove impugned material once it has actual knowledge, or else must bear legal responsibility in the same way that any other publisher would. It is submitted that in most instances, a detailed complaint will give rise to such knowledge. The Directive envisages legislation permitting hosts to be enjoined to remove material that is defamatory or otherwise unlawful. Section 33 of the 2009 Act is such legislation and the remedy is well suited to dealing with online defamation carried out by unidentifiable users. Moreover, it is submitted that hosts cannot avail of the defence of innocent publication under s.27 of the same Act as a means of escaping liability in this context, in circumstance where they have received notification and, potentially also, where they do more than provide a service by which data may be retrieved, copied, distributed or made available.

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Are you being served?

The High Court has clarified that it is not acceptable for solicitors to use registered post for direct service on persons in other EU member states.

In recent times, some practitioners have developed a practice whereby proceedings were served directly upon parties in other EU member states by registered post, purportedly based on an interpretation of Article 14 of Regulation (EC) 1393/2007 (the Service Regulation) and Order 11D Rule 4(1) of the Rules of the Superior Courts (RSC). In *Grovit v Jan Jansen*[1] (*Grovit*), the High Court (Binchy J.) clarified that service in this way is not procedurally correct or acceptable.

Fiona Nolan BL

Background

The proceedings arose out of an allegedly defamatory notice published in *The Times* of London on June 19, 2014. Defamation proceedings were instituted by way of plenary summons on June 19, 2014, and an order for judgment in default of appearance was made by O'Malley J. on December 8, 2014. On July 9, 2015, the matter came before Kearns P. for assessment and on that date he made a correction order pursuant to section 30 of the Defamation Act 2009. Both O'Malley J. and Kearns P. made costs orders in favour of the respondent/plaintiff. The applicant/defendant expressly admitted to having been at all times aware of the defamation proceedings but asserted that, due to various alleged deficiencies as to service, he was under no obligation to enter an appearance.

In October 2015, a summons to tax with a return date of January 14, 2016, was sent to the offices of the applicant/defendant's Dutch legal representatives. When there was no appearance on that date, the matter was adjourned. Before the next return date, Irish solicitors came on record for the applicant/defendant and a conditional appearance was entered on May 10, 2016. On June 1, 2016, the applicant/defendant filed a motion seeking an order pursuant to Order 13, Rule 11 of the RSC setting aside the orders of O'Malley J. and Kearns P.

In bringing the application, the applicant/defendant claimed that the said orders were irregularly obtained and that, further and/or in the alternative, the applicant had a strong defence on the merits of the proceedings, with a good chance of success. For the purposes of this update the relevant alleged irregularity was the assertion that the applicant/defendant had not been validly served under Article 14 of the Service Regulation.

Article 14 of the Service Regulation

The purpose of the Service Regulation is to facilitate the easy and effective service of documents in civil and commercial matters between parties in member states. Under the Service Regulation, each EU member state nominates a transmitting agency and a receiving agency. These are, respectively, tasked with sending the documents to be served to the receiving agencies in the other member states and receiving such documents from other member states and, upon receipt, effecting service in that jurisdiction. In Ireland, the transmitting agencies are the county registrars. Order 11D of the RSC was introduced to comply with the Service Regulation and sets out the applicable procedures.

In this jurisdiction a practice developed whereby oftentimes solicitors would circumvent the transmitting/receiving agency procedure by simply serving parties in other member states by registered post. This practice was based on what might be described as a convenient misreading or fudging of Article 14 of the Service Regulation and Order 11D Rule 4 of the RSC. The judgment of Binchy J. makes its clear that service in this way is not correct. The judge also found that Order 11D Rule 4, which was the primary basis for the misapprehension under which some practitioners were operating, was "based on a mistaken interpretation of Article 14 of the Service Regulation..."

Article 14 of the Service Regulation provides that:

> "Each member state shall be free to effect service of judicial documents directly by postal services on persons residing in another member state by registered letter with acknowledgment of receipt or equivalent".

In *Grovit*, the plaintiff/respondent argued that the applicant/defendant had been correctly served in Amsterdam by registered post pursuant to Article 14 when solicitors for the plaintiff/respondent sent the "draft summons" by registered post to the offices of the applicant/defendant's legal representatives. In support of this argument, the plaintiff/respondent referred to consideration 2 of the Service Regulation, which provides:

> "The proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the member states".

The plaintiff/respondent submitted that the Regulation's own language and terminology clearly adopts the term "member states" so as to encompass all litigation, with some exceptions, conducted by and between parties in such member states. In contrast to this, the applicant/defendant submitted that the wording of Article 14 and, in particular, the reference to "each member state" clearly limited the entitlement to organs of the state. The main basis for

the plaintiff/respondent's submission was the wording of Order 11D Rule 4(1), which provides:

> "In addition to the method of service described at rule 3, a party to proceedings may choose to effect service in another member state by diplomatic or consular agents in accordance with Article 13 of Regulation No. 1393/2007 (save where that member state has indicated opposition to such method of service, in accordance with Regulation No. 1393/2007), by registered post in accordance with Article 14 of Regulation No. 1393/2007 or by direct service in accordance with Article 15 of Regulation No. 1393/2007". [Emphasis added]

Binchy J. articulated the central issue on this point:

> "It is clear from the foregoing that, to the extent that r. 11.D.4 permits service of proceedings by registered post, it does so within the parameters of Article 14 of the Service Regulation. So the question of interpretation of Article 14 remains: is it confined in its application to use by the member states themselves, or does it extend to individuals involved in litigation"?

Permissible by member states

The plaintiff/respondent argued that their interpretation appeared to be consistent with the analysis in the Irish procedural texts. The plaintiff/respondent highlighted to the Court that although, in *Civil Procedure in the Superior Courts*, Delaney and McGrath note that the wording of Article 14 could be interpreted as suggesting that such service is permissible only by member states rather than by a plaintiff, and that this issue has been circumnavigated in the UK by the Aldwych Post Box System, the authors also state that the issue does not arise in this jurisdiction as Order 11D Rule 4 simply provides that a party to proceedings may choose to effect service by registered post in accordance with Article 14. Binchy J. expressed unease with the wording of Order 11D Rule 4 and found that the text appearing therein was, in his view, based on a mistaken interpretation of Article 14:

> "Article 14 is contained in s. 2 of the Service Regulation under the heading of "other means of transmission and service of judicial documents". It is clear to me that Article 14 is intended to afford to a transmitting agency the option of serving documents by registered post (or equivalent) on a party in another member state, rather than serving through a receiving agency. It is not intended, in my view, to confer that entitlement upon the litigant himself…
>
> "…I have already set out above O.11D, r.4(1) which provides additional methods of service to those described at Rule 3. It is true that these are conferred on "a party to proceedings", and that it states that a party to proceedings may choose to effect service by registered post in accordance with Article 14 of Regulation 1393/2007. However, for the reason that I have given above I do not believe that Article 14 confers any right directly on litigants and this text appearing in O.11D, r.4 is in my view based on a mistaken interpretation of Article 14 of the Service Regulation and is of otiose because there is no right conferred on individual litigants by Article 14 of the Service Regulation. This interpretation of the Service Regulation is consistent with the manner in which it has been interpreted in England where, according to Delaney and McGrath, *Civil Procedure in the Superior Courts*, 3rd ed. 3-30, a system has evolved whereby documents are served through the Aldwych post-box system, whereby a plaintiff makes an application for leave to serve the proceedings by means of registered post, and having obtained that leave, does so on the behalf of the English courts".

Based on the foregoing, it is clear that a party is not entitled to circumvent the transmitting agency when engaging the Article 14 procedure. The utilisation of registered post is an entitlement conferred upon the county registrars only.

In *Grovit*, Binchy J. clarified that Article 14 confers no direct entitlement upon parties or their representatives themselves, and insofar as the text appearing in Order 11D Rule 4(1) creates the impression that such entitlement is conferred upon the parties, this is based on a mistaken interpretation of the Regulation. Frequently, perhaps for tactical reasons, a solicitor will be eager to serve by registered post rather than to have a situation whereby a receiving agency is attempting, and failing, to effect service by bailiff or whatever method is applicable in the receiving jurisdiction. It is therefore vitally important in instances such as this that counsel advise solicitors at the appropriate stage:

- that a solicitor cannot themselves effect service upon a party in another member state directly by registered post under Article 14; and,
- of the correct procedure for service in circumstances whereby a party wishes to effect service under Article 14.

The appropriate procedure to avail of Article 14

Article 4 of the 2007 Service Regulation sets out the procedure for the transmission of documents and states that the document to be transmitted shall be accompanied by a request drawn up using the standard form set out in Annex 1 of the Regulation. In Ireland, that request is through the office of the county registrar. Section 5.2 of Annex 1 allows the applicant to specify the "particular method of service" they wish to be utilised. It is in this section that practitioners should specify or refer to Article 14 if they so wish.

An amendment to the Rules

Although, as stated by Binchy J., the precise wording of Order 11D Rule 4(1) is possibly based on a mistaken interpretation of the Service Regulation, it does not appear to be the case that the Rule is inoperable. As such, an amendment to the rules is not absolutely necessary, although an appropriate re-wording would clarify matters. This is due to the fact that through the office of the county registrar and by way of the procedure outlined above, parties can request the county registrar to bypass the member state receiving agency by serving the party by registered post under Article 14. However, it would appear to be the case that the Aldwych Post Box System operative in the UK is a more efficient method. While the precise wording of Order 11D Rule 4(1) is ambiguous, so long as parties can choose to avail of the Article 14 procedure, the system in this jurisdiction would appear to be, in broad terms, harmonious with the Service Regulation.

Reference

1. (Unreported, High Court, Binchy J., January 17, 2018).

Peter Sutherland (1946-2018)

Peter Sutherland had a big, generous heart, a great sense of fun and occasional mischief, and a true appreciation of the gift of life. He brought all these qualities, as well as an acute intellect, to every task. Never afraid to seek advice, he regularly consulted, particularly those he had engaged to assist him in his work for the United Nations. Indeed, it was in this final role that Peter found his most complete voice. He worked tirelessly on behalf of migrants, continuing to rise early to visit migrant camps in Calais and elsewhere, attend meetings throughout the world, write articles and give countless media interviews. He gave himself freely and without complaint to this work. In February 2015, the Vatican approved his appointment as president of the International Catholic Migration Commission. He continued to read widely and reflected deeply on world events as they unfolded, always with a special eye on what impact they would have on migrants.

Flair for leadership

Educated at Gonzaga College Dublin, Peter was influenced by the late Joe Veale SJ, his English and religion teacher, for whom he had a great affection throughout his life. No visit to New York was ever complete without meeting another of his Gonzaga teachers, the late Joe Kelly SJ. Friends say that his flair for leadership first emerged when, as an eight-year-old tighthead prop, he assumed captaincy of the under nines. From then on he was always captain, going on to lead the UCD and Lansdowne rugby teams. He had a great belief in his own scrummaging ability and was known to need time and space before accepting defeat gracefully.

His love of reading and debate meant that he excelled in his chosen career. He qualified as a barrister in 1969 after studying law at University College Dublin and King's Inns. Peter loved his work as an advocate and made lifelong friends at the Bar, where he quickly developed a busy practice. He was especially proud of this work for Captain James Kelly in the Arms Trial and of his work for him before a Dáil committee, established after his acquittal. It was this latter experience that prompted Peter, in 2011, to join with seven other former Attornies General to publicly oppose the Government's referendum proposal to give the Oireachtas special powers of investigation. He argued at the time that the proposal weakened the rights of citizens to have their good name protected and limited their rights to have disputes between themselves and the Oireachtas concerning their constitutional rights (especially the rights to fair procedures) decided by an independent judiciary.

Political and business life

In 1981, Peter was appointed Attorney General, the first of two spells in that role. While he is best remembered for the advice he gave Taoiseach Garret FitzGerald on the wording of the 1983 abortion referendum, it is worth noting that he had a significant input into the 1984 Criminal Justice Act, which introduced a number of protections for suspects in custody. The Government of Garret FitzGerald nominated him as European Commissioner in 1984. In Brussels, he was initially responsible for deregulating the airline industry. Later he established the ERASMUS programme, which has enabled

over two million students to spend a year of their studies at a university outside their home country.

When his five-year term in Brussels ended, Peter returned to Dublin and became chairman of AIB. A series of international roles followed. He headed up the global trade organisation GATT – soon to be renamed the World Trade Organisation. His greatest achievement there was to bring the "Uruguay Round" to a successful conclusion, ushering in the age of globalisation. A new career in big business followed. In time, he chaired the oil giant BP, and was chairman of Goldman Sachs International for 20 years. In 2006, he was appointed by the then United Nations Secretary General, Kofi Annan, as his special representative for migration, a position he held until his death.

Special gifts

Peter did not rest on his accomplishments. He repeatedly told friends that he could not have achieved anything without the support, patience and love of his wife, Maruja. He never lost the run of himself and never had a bad word to say about anyone. He had a sense, more pronounced in later years, that he had received special gifts to be used in the service of others and the notion of retiring never entered his head. When travelling, he was constantly on the phone to Maruja, to his children, Shane, Ian and Natalia, his extended family as well as to his wide circle of friends.

Peter Sutherland did not waste time. He worked tirelessly until that fateful Sunday morning in September 2016 when he became ill after collapsing on a pavement in London, a city that he loved. He was a proud Irishman, a proud European and an internationalist in the very best sense of the word.

Mr Justice Garrett Sheehan

[Adapted from an obituary previously published in *The Tablet*.]

Public pay restoration must include barristers

In March 2016 The Bar of Ireland made a submission to the Director of Public Prosecutions (DPP) and the Department of Public Expenditure and Reform (DPER), and requested the commencement of a review process for professional fees paid to barristers for the services they provide to the DPP. This request was made arising from the Government indicating its intention to unwind the impact of the Financial Emergency Measures in the Public Interest (FEMPI) Act, which had been applied to public service workers and other professionals who provide services to the State.

From 2008 to 2011, and in the context of challenging economic circumstances, severe cuts to the professional fee levels paid to barristers ranging in the order of 28.5-69% were applied, including:

- non-payment of a 2.5% fee increase provided in 2008;
- an 8% fee reduction imposed in March 2009;
- a further 8% fee reduction imposed in April 2010; and,
- an additional 10% reduction imposed in October 2011.

The 10% reduction applied in October 2011 had no equivalent at all in public pay terms and was uniquely applied to the Bar. The result is that professional fees for barristers in 2018 are at a level that were paid in 2002.

No progress

Two years on from the Bar's submission the progress has been largely disappointing and the frustration of members is increasing.

Due credit must be given to the DPP's office for its efforts in addressing the untenable professional fees that were payable in the Court of Appeal and High Court bail fees. The DPP has continuously recognised the enormous public service undertaken by the Bar in the prosecution of criminal offences. In keeping with the parity principle that is the cornerstone of our justice system (something this profession should be very proud of and has continuously advocated for), these recent changes were also applied in the Criminal Legal Aid Scheme operated by the Department of Justice and Equality.

However, there has been a complete unwillingness by the DPER to engage in any meaningful way with the Bar on the substantive fee reductions outlined above. In the meantime the Government has proceeded to implement the unwinding of FEMPI across all levels of the public service, both for highly paid as well as less well-paid workers. In fact, Gardaí, LUAS drivers and bus workers have secured wage increases.

Damien Colgan SC
Chairman, Criminal State Bar Committee

Barristers continue to contribute to the maintenance of a robust criminal justice system, in the public interest, by providing excellent advice and advocacy services to the DPP and to defendants alike. The Bar has proactively engaged with and worked alongside all of the relevant State agencies, including the DPP, to secure cost efficiencies in the criminal justice system. The more widespread use of video links for some court appearances, the operation of practice directions to streamline criminal trials and other measures have all been implemented with the co-operation of the Bar since 2011. The Working Group on Efficiency Measures in the Criminal Justice System confirmed this proactive engagement in its October 2015 report.

The DPP avails of barrister services without having to make provision for superannuation, paid leave, continuing professional development courses, and all the other costs of practice that are, instead, borne by sole practitioner barristers. Those sole practitioners are also available to defend cases for accused persons on the same rates of pay under the parity principle.

At this stage, the severe and prolonged extent of the cuts themselves, allied to the exponential growth in the complexity and volume of work involved in preparing criminal cases, is undermining the ability of the Bar to provide a high quality service to the DPP and to accused persons. The work involved in preparing and presenting criminal trials has increased beyond all comprehension, yet is being paid at 2002 fee levels.

An obvious example in this regard is disclosure. Our members now regularly report that they have had to spend countless hours examining disclosure materials in cases (CCTV, phone records, text messages, counselling notes, etc.) where there is no payment for same, to the extent that the situation is now unsustainable. The recent revelations of disclosure difficulties in criminal trials in the United Kingdom shows that examining disclosure is vital to ensuring a fair trial for accused persons. Yet no account whatsoever has been taken of the increasing demands on practitioners arising from this matter.

Other professions that provide services for and on behalf of the State appear to be in a similar position. The Irish Medical Organisation recently launched an awareness campaign among politicians and patients on the negative impact that the 38% FEMPI cuts to general practitioner (GP) funding have had on GP services, and the consequences for the future of such services if cuts are not reversed.

Whether or not it is politically popular for politicians to raise professional fees for barristers, there is a duty to ensure that the criminal justice system functions properly and that fair trials are conducted in the State. Positive steps to acknowledge the increased contribution and complexity involved in providing a vital service in the criminal legal system are required so that the system does not collapse. The high-quality service provided by barristers cannot be maintained any longer at the current rates of payment.

It is time for the Government to make meaningful proposals in this area.

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JLT Financial Planning Ltd
Cherrywood Business Park,
Loughlinstown, Dublin D18 W2P5