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Examining the rule in *Browne v Dunn*

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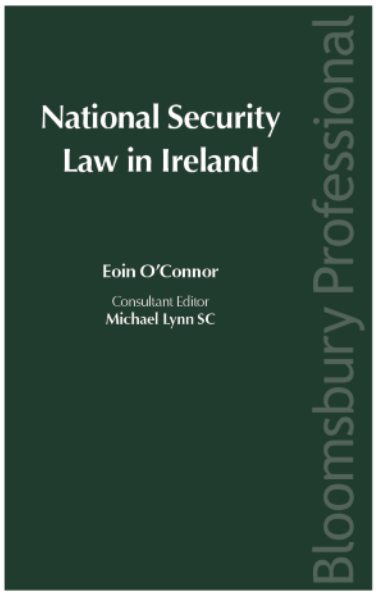

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By Eoin O'Connor
Consultant editor: Michael Lynn SC

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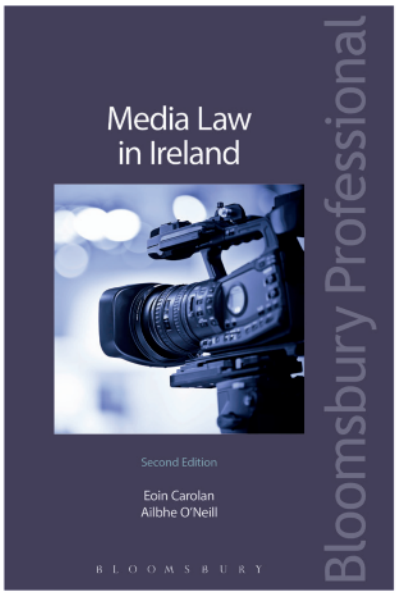

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Protecting the principles of our profession

The work of the Council, Committees and staff on behalf of members continues.

It's already five months into my term of office as Chairman of the Council and it has certainly been a busy first term.

The recent controversy that arose following a rape trial in Cork will not have escaped any member's attention. As those of us who work in the area are all too aware, this is a complex and difficult area, which is not capable of being addressed in one sound bite. The Council is making a considered and detailed submission to the review being undertaken by the Department of Justice and Equality in relation to the investigation and prosecution of sexual offences that will properly represent the core principles of our profession.

Our primary duty under the Code of Conduct is to promote and protect fearlessly and by all proper and lawful means our client's best interests. One thing that needs to be said with absolute clarity is that it is completely unacceptable that a barrister would suffer personal attack or abuse as a result of playing their part in the administration of justice. A barrister at trial is not presenting a personal point of view. Rather, he or she is presenting a case based on a client's instructions. A barrister can do no more, and must do no less. If barristers don't discharge their duty to that process, they are breaching the Code of Conduct and seriously failing in their duty to their client.

Working on members' behalf

I suspect that much of the work of the Council and its Committees goes unnoticed. I have no doubt that every busy practitioner is appreciative of all the efforts made to represent the profession and provide excellent services for the benefit of members. As Chairman, one of my aims is to ensure that every opportunity is maximised to communicate the work of the Council. A new initiative introduced this term was a short bulletin in both electronic and poster format – The Barometer – that aims to provide members of the Law Library with a summary insight into some of what the Bar Council and its Committees, together with the support of the executive staff, have been doing on your behalf over the last month.

Over a two-month period, alongside the usual day-to-day work, the Council and its Committees have overseen a range of new initiatives including: the publication of two new guidance notes in relation to professional fee matters with the CSSO and the Office of the DPP; three submissions to the Legal Services Regulatory Authority; improvement in seating facilities for members; incorporating GDPR guidance; a range of educational and promotional events in support of Women at the Bar; new opportunities for barristers to bid for legal services contracts through the public procurement process; and, a Bar Fair to encourage work/life balance of members through participation in our clubs and societies, to name but a few.

Court of Appeal

We also recently welcomed the Government proposal to increase the number of judges in the Court of Appeal from nine to 15. The foundation of the Court of Appeal was a critical step in enhancing the efficiency of the courts system and ensures that only those appeals that raise issues of major public importance or the interests of justice go to the Supreme Court. However, since its establishment in 2014, the Court has been dealing with a significant backlog, in addition to an increase in new appeals, with the delay in an ordinary appeal being heard currently at approximately 12 months, and increasing all the time. At the time of the Court's establishment in 2014, Ireland had the lowest number of judges of 47 countries examined by the European Commission at three per 100,000 inhabitants, as opposed (for example) to 10 per 100,000 in France or 24.3 per 100,000 in Germany. We have highlighted at every opportunity the need for a significant number of additional judges in the Court of Appeal since 2016 and we welcome this positive step in facilitating the Court to meet its obligations and hope that the Government ensures the prompt passage of the legislation through the Oireachtas to safeguard the proper administration of justice.

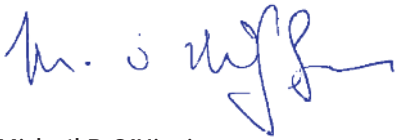
Daniel O'Connell Memorial Lecture

It was a great honour for me to introduce the 2018 Daniel O'Connell Memorial Lecture delivered by Kevin O'Malley, a lawyer who recently served as President Barack Obama's Ambassador to Ireland. His lecture was entitled: 'The Rule of Law in the United States' and was well delivered and widely reported upon across the primary media and radio outlets the following day.

LSRA Roll of Practising Barristers

At the time of writing, approximately 1,550 members of the Law Library have submitted their application to have their name entered on to the LSRA Roll of Practising Barristers. It is imperative that every member ensures that they complete this process in advance of December 29, 2018, as under section 136 of the Act, it will be an offence for a qualified barrister to provide legal services as a barrister when his or her name is not on the Roll of Practising Barristers.

Best wishes to all colleagues and their families for the festive period.



Micheál P. O'Higgins
Chairman,
Council of The Bar of Ireland

The road to regulation

It is now half a year since the EU General Data Protection Regulation came into force and what better time to assess how the new regime is working in practice. The Data Protection Commissioner, Helen Dixon, is the subject of our interview this month and she gives us a bird's eye view of the activities of the Commission, including its special investigations unit and how it will use its enforcement and sanction powers. She also discusses the interface between data protection and the large internet companies, and how these entities will be regulated in the future.

In the wake of recent controversies regarding the manner in which social media can interfere with criminal trials, the Supreme Court has issued a new practice direction, which seeks to regulate the practice of live texting and tweeting from court proceedings. Our writer analyses how the direction is likely to operate and whether it will be effective in preventing disruption to the trial process.

Elsewhere, we look at recent case law on the rules that apply when an employment is terminated because an employee has been found unfit for work, effectively on the opinion of a doctor. We examine the rules that govern the assessment of the employee's health by that medical practitioner. Finally, a recent decision of the Court of Appeal gives us some insight into the considerations that will persuade a court to revisit one of its own judgments.

A Happy Christmas to all.

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

Daniel O'Connell Medal

The Bar of Ireland was delighted to welcome former US Ambassador to Ireland Kevin O'Malley to deliver the 2018 Daniel O'Connell Memorial Lecture on November 28. Distinguished guests, including members of the judiciary, barristers and solicitors, gathered to hear Mr O'Malley deliver a most insightful speech on the rule of law in the United States. Following his talk, Chairman of the Council of The Bar of Ireland Micheál P. O'Higgins SC presented Mr O'Malley with the Daniel O'Connell Memorial Medal.

Bar fashion show

The annual Bar of Ireland Fashion Show in aid of the Bar Benevolent Fund was held on November 15. Organised by Johanna Ronan Mehigan BL, the show raised over €15,000 for the Fund, with hundreds of senior and junior members of the Bar supporting the event. Collections from Louis Copeland, Debenhams, Arnotts, Bloss of Dundrum, Costume and Phoenix_V were expertly modelled by a mixture of male and female colleagues. A raffle compèred by Richard Kean SC, and some light refreshments in the Sheds, rounded off a hugely successful night.

Bars of Ireland and Northern Ireland jointly commemorate WWI

Pictured at the joint World War I commemoration were (from left): Bernard Brady, Vice Chair of the Council of the Bar of Northern Ireland; Frank Clarke, Chief Justice of Ireland; Sir Declan Morgan, Lord Chief Justice of Northern Ireland; and, Micheál P. O'Higgins SC, Chairman, Council of The Bar of Ireland.

To mark the 100th anniversary of Armistice Day, The Bar of Ireland joined with The Bar of Northern Ireland to commemorate their fallen colleagues at a remembrance ceremony on November 9, 2018.

World War I had a very profound and far-reaching impact on the Irish Bar. *The Irish Law Times* War Supplement of 1916 numbered 126 barristers as enlisted, which amounted to 42% of the total Irish Bar membership of 300. In addition, 160 sons of barristers enlisted in the War.

Given their history in politics and rebellion, it is not surprising that many Irish barristers volunteered for service during World War I. Like other professions, there were those among the members of the Bar who sought to play their part in what they saw as a fight for freedom and the protection of small nations. The loss to the Bar arising from the Great War was devastating: of the 126 serving barristers, 25 lost their lives. The barristers commemorated were men, because at that time women were not permitted to enter the Bar or to join combat units. However, of note was that Averil Deverell, the first practising female barrister, admitted to the Irish Bar in 1921, drove with the ambulance corps in France for the duration of the War. A number of other commemorative initiatives, including an exhibition in memory of the 25 barristers who died in World War I, was also launched and will be on view to the public in the Four Courts beside the memorial sculpture.

Authors at launch

At the launch in the The Bar of Ireland's Distillery Building of Kelly: The Irish Constitution (5th ed.) *were the four authors (from left): Mr Justice Gerard Hogan; Rachael Walsh; David Kenny; and, Prof. Gerry Whyte.*

European Lawyers' Day in Dublin

The Bar of Ireland and The Law Society of Ireland hosted a panel discussion entitled 'Does the law ensure fair civil trials? An international panel perspective on upholding the rule of law' at a European Lawyers Day event on October 18. The theme of this year's European Lawyers Day was 'Why lawyers matter: defending the defenders of the rule of law'. In line with this theme, legal professionals from across the world came together in Dublin to share international perspectives on fair civil trials. Judges versus juries, the role of government investigations in civil trials, recoverable damages, and time to trial and cost were among the topics discussed in a panel discussion moderated by Robert F. Hedrick, an attorney with Aviation Law Group PS in Seattle, and Niamh Hodnett, a solicitor with the Commission for Communications Regulation (ComReg).

Pictured at European Lawyers Day were (from left): J.J. Camp QC, Associate Counsel, CFM Lawyers, Canada; Micheál P. O'Higgins SC, Chairman, Council of The Bar of Ireland; Sigrid Preissl, Managing Partner, Bourayne & Preissl, France; Robert F. Hedrick, attorney, Aviation Law Group PS, Seattle; Niamh Hodnett, solicitor, Commission for Communications Regulation (ComReg); and, Gerard Forlin QC, Cornerstone Barristers, UK.

New Equality and Diversity Committee at the Bar

A new Equality and Diversity Committee has been established by the Council of The Bar of Ireland to oversee the development and implementation of initiatives to promote equality and diversity at the Bar. The Committee, chaired by Moira Flahive BL, will work towards enhancing a work environment that is fair and inclusive, ensuring where possible that a member's ability to achieve his or her potential is not limited by prejudice or discrimination. Ensuring a diverse, independent referral bar does not only benefit members of the Law Library. Society, too, benefits from having a diverse pool of suitably qualified barristers on which to call, facilitating greater client choice and a profession that is much more representative of the community it serves.

The Committee will continue to build upon the important work of the Women at the Bar Working Group, which over the past two years championed several successful initiatives under the chairmanship of Grainne Larkin BL. Its work will now be subsumed into the work of the Equality and Diversity Committee.

Among the Committee's priorities this year is to progress the development and implementation of an equitable briefing policy for female counsel, and to support members returning to practice after a period of extended leave, including maternity, paternity and parental leave, among others. The Committee will also work closely with the Professional Practices Committee in the development and implementation of an appropriate complaints mechanism under the new harassment provision of the Code of Conduct of The Bar of Ireland.

In support of The Bar of Ireland's commitment to widen access to and strengthen diversity in the profession, the Committee will also engage with the Education & Training Committee as appropriate on the continued roll-out of the Denham Fellowship, now in its second year. The Fellowship assists aspiring barristers who come from socio-economically disadvantaged backgrounds to gain access to professional legal education at the King's Inns and professional practice at the Law Library through the provision of financial and mentorship support.

With matters of equality and diversity to the fore of many professional sectors, the Committee will endeavour to keep abreast of best practices in Ireland and abroad through ongoing research and engagement, and seek to foster relationships with other professions, including solicitors, and other networks to share information and, where possible, to identify synergies that aim to enhance equality, diversity and inclusion within the legal profession.

Marie Torrens (1950 – 2018)

It is an honour and a sorrow to pen Marie's obituary. Marie studied for the Bar in her late 30s as the mother of three young children, who recollect playing about her knee while she was at her books. She was called and joined the Law Library in Michaelmas 1989 and devilled to me in that year and Jim McArdle the year after. I remember a woman of great energy, kindness and common sense, who was utterly trustworthy, loyal and discreet. That is not to say that she was a dour creature. Quite the opposite – there was a wonderful force of nature, a mischievous and lively sense of humour in her. I think at some stage in her first year she showed me a picture of herself as a student – some time perhaps in the late 60s or so – a young woman with a big mop of hair and bellbottom trousers.

As soon as Marie struck out on her own, she acquired a very good following among solicitors. When the Criminal Bar was exiled to Parkgate Street, her practice became concentrated on the criminal end and she was an almost daily practitioner in the Dublin Circuit Criminal Court. She had a large number of devils – at least 19 – each one of whom was given a good role model as to what was proper or not, scolded when necessary, but always looked after. She seems to have mothered many of them – and well beyond, as they, in their turn, went solo.

In her criminal defence work, she was very attentive to the clients and could always speak and communicate whatever the differences in age, education or understanding. Friends speak fondly of happy times over coffee, and her gift of relating well to all, be they courts staff, prison officers, Gardaí – and her beloved clients. In conversation she always referenced our deceased colleagues Niall Durnin, Brendan Nix, Stephen McCann, Colm O'Briain, and many more. It is perhaps appropriate to say that she had many, many close friends in the Library and on the Bench, one of whom, half in jest, gave her the nickname of Mother Torrensa – a tribute to her warm skills. Her mother Eileen, sister Barbara and brother Kevin also came to the Bar.

Aside from her work, Marie will be remembered as the proudest mother and grandmother in all of Ireland. It was quite difficult to pass her desk without the latest news of her children, Paul, Greg and Lucy, and when her first grandchild, Finley, was born 12 years ago, Marie took to being an adoring grandmother with even greater gusto. Blessed with nine grandchildren, she had lots of news about her large clutch and colleagues felt as though they knew each of the children and grandchildren personally. Apparently, at home and among family, she spoke of her colleagues in a similar way.

When Marie died, suddenly but peacefully at her home on October 30, her sudden death was a source of grief to all her colleagues and those who knew her. Tributes were paid by Judge Greally and Judge Ryan in the Circuit Court that day, and Bernard Condon and Luigi Rea spoke eloquently of her achievements and the loss to the Bar.

Everybody who knew her will remember her. She enjoyed the amity of the Bar and particularly the end of term lunch organised by Luigi Rea. The book of condolence still rests on her desk, and it is still difficult to pass it without half expecting Marie to pop up and start an impromptu conversation. Her circle of friends and devils was so large, it would occupy several paragraphs to name them. Her children particularly appreciate the assistance of Darren Lalor since Marie's death.

She is survived by her husband Pat, her mother Eileen, children Paul, Greg and Lucy, son-in-law, daughters-in-law, brothers, sisters, nieces, nephews, grandchildren and, of course, her colleagues. Her funeral and the enormous presence there of the Bench, Bar, solicitors, friends, neighbours and family was a fitting tribute to a colleague who is much missed.

Patrick Gageby SC

EBA Annual Employment Law Conference

The Employment Bar Association's third annual Employment Law Conference was held in the Atrium, Distillery Building, on November 23. Pictured are (from left): Regina Doherty TD, Minister for Employment Affairs and Social Protection; Ms Justice Caroline Costello; and, Clíona Kimber SC, Chair of the EBA.

Arbitration Day 2018

The sixth Dublin International Arbitration Day 2018 took place on November 16, organised by Arbitration Ireland as Ireland's leading conference on international arbitration. Dublin International Arbitration Day has established itself as a firm fixture on the calendar of international arbitration events.

Conference sessions covered: conduct of participants in arbitration, including arbitrators; arbitral awards – the good, the bad and the ugly; choice of law in commercial contracts – perspective of corporate counsel; the psychology (or art) of persuasion; and, a final session on decision making and what arbitration can learn from rules-based decision making in sport.

This year's event commenced with an opening address from Stephen Jagusch QC, Global Chair of Quinn Emanuel's international arbitration practice, and included contributions from Mr Justice David Barniville, Arbitration Judge of the Irish High Court, Michael Collins SC, Ray O'Connor, former international hockey umpire, Paula Hodges QC, Siobhán Moriarty, General Counsel of Diageo PLC, and Philip Clifford QC, to name a few.

The conference was well attended and a tremendous success involving a mix of strong content in a social and interactive environment.

Arbitration Ireland is a growing organisation, having launched a London Chapter in 2017 and a New York Chapter in September 2018, launched by the Chief Justice of Ireland, Mr Frank Clarke. Rose Fisher was recently appointed as Executive Director with the mandate to grow and develop the association, capitalising on the opportunities present at the moment in the international market.

For those interested in becoming a member of Arbitration Ireland, please contact Rose directly at rfisher@arbitrationireland.com.

Protecting our privacy

The New York Times has called Helen Dixon "one of tech's most important regulators". Ireland's Data Protection Commissioner spoke to *The Bar Review* about the landscape post GDPR and whether the big tech companies can ever really be regulated.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Helen Dixon spent the first decade of her career working for large US IT companies with Europe, Middle East and Africa (EMEA) bases in Ireland, and it's a background that has been very useful in her role as Ireland's data protection regulator: "It taught me that compliance is taken very seriously in US companies. I also learned that no matter how devolved and delegated the functions are, the US HQ is always pulling the strings, so I go to the US with my senior staff a couple of times a year to make these companies aware of the laws they have to comply with in the EU".

The General Data Protection Regulation (GDPR), which came into effect in May, gives the EU the strongest data protection laws in the world. There is no equivalent framework in the US, so it's important to keep the US HQs informed, not least about the tougher enforcement regime that now applies: "It's been difficult for US management to grasp what the bite is in EU data protection laws in the absence of these large fines that have now grabbed everyone's imagination".

The work of the Data Protection Commission (DPC) reaches into all sectors of Irish society, so Helen is anxious that it is a trusted entity: "I want us to be seen as expert in our area, relevant in this digital era, and as fair".

Organisations (both public and private) and members of the public can go to the Commission's website for a wealth of information about compliance with the GDPR, how to protect ourselves online, and what our rights are in relation to our personal data: "I want the public to know that we're here, and that where they can't get any joy with an organisation they're dealing with, we are happy to receive their complaint and will seek to amicably resolve it as efficiently as possible.

"For companies, the public sector and charities, our Annual Report includes case studies that we hope are instructive. We also need organisations to know that the DPC is an enforcer, and where necessary we will initiate inquiries, apply corrective measures and take enforcement actions, including fines, but that in conducting these inquiries, we will follow fair procedures".

Six months in

Given that the legislation underpinning the GDPR requires mandatory reporting of data breaches, it might be expected that the numbers of reported breaches – and of complaints to the Commission – would have increased in the six months since it came into force, and that has indeed been the case. At time of going to print, 3,313 breaches, and 2,316 complaints, have been notified to the Commission since May – almost double the amount for the same six-month period in 2017. The number of consultations has increased too, as companies and Government departments look to the Commission for assistance in meeting their statutory obligations. Helen says the Commission is "incredibly busy", but with an increased budget of €15m for 2019, and a staff of 120 highly skilled investigators, legal experts and technologists (up from 28 when Helen took up her post in 2014), she feels they are equal to the

"I want the public to know that we're here, and that where they can't get any joy with an organisation they're dealing with, we are happy to receive their complaint and will seek to amicably resolve it as efficiently as possible."

task. Mandatory reporting has also resulted in a wider range of breaches coming to the Commission's attention, but the most significant number are still a result of human error, such as once-off incidents where the wrong letter is put into an envelope, although they are also seeing a significant number caused by coding errors. In terms of complaints, those regarding requests for access to personal information are still the most common, whether it's an organisation ignoring a request for access, giving incomplete access, or poorly trained staff who do not understand their obligations. Unauthorised disclosure is the second most prevalent cause for complaint, although Helen says requests around rights to erasure are on the rise.

The DPC also has the power to initiate own-volition enquiries (indeed it had this power prior to the GDPR): "As a data protection authority that's independent of Government, civil society bodies and industry, we pursue what we identify as the areas of risk in line with our statutory remit". Assistant Commissioner Tony Delaney heads up a special investigations unit, which is currently conducting investigations into data protection issues around the Public Services Card, and in relation to CCTV automatic number plate recognition. The Commission is also conducting an own-volition enquiry into a recent breach notification from Facebook, where timeline data was accessed and up to 30 million users were affected: "These own-volition enquiries are extremely important to our office and some of the biggest successes we've had in protecting data subject rights have arisen out of those".

Depending on the results of these investigations, which Helen expects will be concluded in the coming months, the DPC has access to a range of corrective measures: "We can order the halting of processing. We can point out non-compliance and require that it is brought into compliance. We can fine. In fact we're obliged where we find infringements that would cause us to apply a corrective measure, to also consider applying a fine".

The road to compliance

Helen is broadly happy with the level of awareness and compliance in Irish organisations post GDPR; she refers to a recent survey by McCann Fitzgerald and Mazars, which reports high levels of optimism among Irish companies about their compliance. The survey sounds a note of caution too, she says: "As enforcement starts to kick in, as the DPC concludes the inquiries it has, and as individuals begin taking civil actions in the courts for damages, perhaps the optimism will wane, but it's presenting a very positive picture".

She points out that this will be a long road: "Because [the GDPR] is principles based, it will always require in-context interpretation and application. I think we're going to learn through case law both at home and through the Court of Justice in the European Union, and through our own case studies".

Helen feels that public engagement has been good too, but there's some way to go in terms of helping us to fully understand the risks we take when we allow entities to use our data. The options currently offered by many companies don't help: "There is a growing awareness from members of the public that signing up to things is a matter of choice. But for us as a regulator, we think the choices still aren't good enough. There's still a little bit too much 'you either get off the platform or you use it as it's offered to you' and there's very little choice in the middle".

She's also aware that many organisations, whether by accident or design, are not making it easy for users to choose: "We are seeing evidence of some websites and apps that are purporting to provide new consent options that are clearly cumbersome to use. I think that we as a data protection authority, with our fellow authorities in the EU, need to become clear about the standard that we say is necessary in this area and about standards that simply don't comply".

Children's rights

The DPC has a specific role under the 2018 Act in encouraging organisations to develop codes of conduct around the protection of children, and it's a role it takes very seriously: "We're rolling out a very significant consultation at the end of this year. We're proposing a series of issues that we will seek views on around how children should exercise their rights, and when they are competent to exercise their own rights independent of their parents".

The DPC will be making lesson plans for schools available in January, which will aid the discussion and education around the issues. The plans were piloted in three schools earlier this year, and the results were interesting, for example around what children themselves have to say on the age of digital consent (recently set by Government at 16): "We found that children gave different answers depending on their stage of development: 10 to 11 year olds said the age of consent should be 20 or 21, 14 year olds tended to say it should be about 16, whereas 16 year olds said it should be 14!"

The aim is to publish guidance for organisations, and for children, that will lead to the generation of codes of conduct within the industry: "It's important for the Irish DPC to do this because we supervise the big internet companies, so this won't only affect children in Ireland, it will hopefully positively impact children across the EU".

Taking on big tech

Helen's position is a unique one. With the European headquarters of the world's biggest internet platforms based here, breaches and complaints concerning those companies from anywhere in the EU are routed through Ireland. The question has been asked more than once if these companies can every truly be regulated, and if so, how? Helen is quietly confident that they can, but points out that it's not purely a data protection issue: "A data protection authority like the Irish DPC ends up the *de facto* regulator of an entity like Facebook because there may be no competition regulation in terms of whether there is a dominant position, and an abuse of a dominant position, but there are also other aspects of regulation of these platforms that need to be looked at, for example whether they need to be regulated as media companies. That is for policymakers and lawmakers to decide. In Ireland, there's been quite a long debate about whether a digital safety commissioner would be introduced and that's a whole area of regulation that the Law Reform Commission called out in its 2016 report".

While these issues don't fall within the definition of personal data processing, and thus within the remit of the DPC, other issues obviously do, and Helen believes that

Renaissance woman

Helen Dixon completed an undergraduate degree in applied languages, followed by a master's in European Economic and Public Affairs. She spent a decade working for two US IT multinationals in Ireland, before becoming the first ever externally appointed Assistant Principal Officer in the Irish civil service, where she worked in the Department of Jobs, Enterprise and Innovation, first in the area of science, technology and innovation policy, and then in economic migration. She was Registrar of Companies for five years before taking up her current post in 2014.

She has a master's in governance, a postgraduate diploma in computer science, and a postgraduate diploma in judicial skills and decision making, and successfully passed all eight subjects of the FE-1 Final Examination of the Law Society of Ireland in one year. She says that she has very little free time, as she travels extensively as part of her work, but is a keen long-distance runner, enjoying mountain running and ultrarunning, and has recently taken up gymnastics.

the GDPR gives her office the power to make a real difference: "If we can enforce the principles of minimisation, of privacy by design and default, those alone will make a huge difference. Some of the inquiries that we have underway are exactly targeted at analysing what the objective standards the platforms need to reach in these areas are. And I think we will start seeing results arising from that".

She doesn't expect it to be easy: "The decisions we make will undoubtedly end up in court. Controllers are entitled to challenge the validity of decisions, and ensure that the courts are in agreement with the process we followed and the outcomes we reach. The stakes are high and that's fine. Companies have to bear up the reputational issues when they challenge decisions and we will be hoping our decisions will be as unimpeachable as possible. But I don't think they're going to be taken lying down".

Obviously Helen can't comment on ongoing cases, but she refers to None of Your Business (noyb), the NGO founded by online privacy activist Max Schrems, which has published details of the complaints that he has lodged in Europe, and which are being handled by the Irish DPC. She describes his high-profile complaint against Facebook as "one of the significant investigations that we have underway", and says it is raising fundamental issues: "The complaint asks the question: if we've consented to the terms of service that embed a privacy policy, are we essentially saying we're consenting to all of the personal data processing? And if so, is that the quality of consent, with all the specificity and well-informed nature of consent, that would be anticipated under GDPR?"

An individual's right to choose not to read the terms and conditions – to just 'click ok' – also has to be taken into account, but not as a way to avoid responsibility: "I think about it in terms of nutrition labels on food. How far does the company need to go in terms of ensuring any of us have read them? What we have to decide is: if a company meets the objective standards set out in the GDPR for concise and intelligible information, and the provision of all that's required in articles 13 and 14, is it the concern of the company whether individuals read it or not?"

She clearly feels that to some degree it is: "There should be comfort when we eat something that even if we haven't read the nutritional information, it wouldn't be for sale if it was toxic. Equally, when we click into an internet service we should, whether we've read every detail of the privacy policy or not, have a minimal expectation of our safety, and we have to ensure that that's the point we get to under the GDPR".

"Because [the GDPR] is principles based, it will always require in-context interpretation and application. I think we're going to learn through case law both at home and through the Court of Justice in the European Union, and through our own case studies".

Thoughtful user

With all the information at her disposal, and the cases her office comes into contact with, Helen could be forgiven for developing a healthy paranoia about using the internet, but she tries to take a balanced approach: "All of us need to benefit from the utility of the technologies and applications that are available.

But equally I like to be thoughtful about it in terms of being conscious of when I am giving my data, when I am going to end up profiled. But I think being overly paranoid doesn't help any of us".

She sees her own personal use as part of the bigger picture of data protection: "What I'm trying to balance personally is also the job of data protection authorities, which is to try and make sure that while we are benefiting from these new technologies, they are applying the GDPR principles and protecting us at the same time.

"This is important when we think about what's coming down the tracks with more and more facial recognition type applications, artificial intelligence and machine learning".

It's something we all need to be aware of: "These technologies signify an outsourcing of thinking and decision-making to technology. But where will that leave us as human beings? I think all of us need to be thoughtful around the bigger questions of our interaction with technology, and keep that ability to think for ourselves. Use the technology but keep other resources and outlets in your life".

Does your client have a claim eligible for ASR Hip ADR?

The ADR Process gives claimants a neutral non-binding evaluation of eligible claims

How it works

To apply, submit a completed Form B to McCann FitzGerald solicitors. Form Bs are available from McCann FitzGerald and from *www.hipadr.ie*. On receipt of Form B McCann FitzGerald may ask for additional information or documents, such as necessary medical records or details of any special damages claimed. If the claimant's case is eligible, Form B will be endorsed and returned to the claimant's solicitor. Both parties prepare written submissions which are submitted to an independent Evaluator who issues a written evaluation stating the amount of any damages assessed. The parties have 45 days to accept or reject the evaluation.

- Claimants in the ADR Process do not have to prove liability; only causation and quantum are relevant
- There is no fee to submit a claim to the ADR Process
- If necessary, McCann FitzGerald will collect the claimant's medical records where written authorisation has been provided
- Evaluators are senior counsel or retired Superior Court judges
- A €25,000 payment in respect of the claimant's legal costs, outlay and VAT will be paid within 28 days of settlement of claims within the ADR Process. This is without prejudice to a claimant's right in the circumstances of a case to seek higher costs and outlay through negotiation or taxation

Eligible claims

Claimants may avail of the ADR Process if:

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

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

Prompt notification of personal injury claims

The Bar of Ireland has been asked for its assistance in relation to a recommendation of the Personal Injuries Commission.

Paul Gallagher BL

The Minister for Business, Enterprise and Innovation, Heather Humphreys TD, has written to the Council of The Bar of Ireland seeking its co-operation in relation to the implementation of one of the ten recommendations set out in the final report of the Personal Injuries Commission (PIC).

The PIC was established in January 2017 on foot of a recommendation of the Cost of Insurance Working Group. Chaired by former President of the High Court Mr Justice Nicholas Kearns, the PIC comprised representatives from the medical, legal and insurance sectors, as well as relevant Government departments and agencies. The PIC was tasked with assessing the personal injury resolution framework in Ireland and in doing so has made a number of recommendations to the Minister with a view to enhancing the claims process. Recommendation number 6 is particularly pertinent to the legal profession. Recommendation 6 states:

"Claimants, for their part, must give prompt notification of any potential injury claim so that a proper investigation of the accident circumstances may be undertaken by a Defendant".

This recommendation follows on from a recommendation of the Cost of Insurance Working Group to enhance awareness of the notification obligations that arise under Section 8 of the Civil Liability and Courts Act 2004. Section 8 of the Act states:

8. – (1) Where a plaintiff in a personal injuries action fails, without reasonable cause, to serve a notice in writing, before the expiration of two months from the date of the cause of action, or as soon as practicable thereafter, on the wrongdoer or alleged wrongdoer stating the nature of the wrong alleged to have been committed by him or her, the court hearing the action may –

(a) draw such inferences from the failure as appear proper, and

(b) where the interests of justice so require –

(i) make no order as to the payment of costs to the plaintiff, or

(ii) deduct such amount from the costs that would, but for this section, be payable to the plaintiff as it considers appropriate.

(2) In this section "date of the cause of action" means –

(a) the date of accrual of the cause of action, or

(b) the date of knowledge, as respects the cause of action concerned, of the person against whom the wrong was committed or alleged to have been committed, whichever occurs later.

The purpose of Section 8 is to ensure that a defendant is informed as early as possible about a claim so that there is an opportunity for the defendant to make appropriate enquiries regarding the claim. For example, a defendant will be in a position to identify relevant witnesses and arrange for statements to be provided. There is furthermore a higher chance that CCTV can be preserved and retained. In essence, notification of the accident within two months gives the defendant a reasonable opportunity to mount a defence, should the defendant decide that the claim should be defended.

The Cost of Insurance Working Group recommended to the Law Society that, in the context of the initial advice given to clients, it review its Codes of Conduct and procedural guidelines to include an obligation to ask clients whether they have notified the potential defendant and, if not, be required to advise that there is an obligation for this notification to take place. The PIC now seeks to reinforce that recommendation and in giving effect to it, Minister Humphreys seeks the co-operation of The Bar of Ireland to promote among the membership a general awareness of the notification obligation.

While a solicitor representing a plaintiff is unlikely to instruct a barrister within two months of a cause of action accruing, in the unusual event that they do, Council of The Bar of Ireland urges barristers to be mindful of Section 8 when advising in relation to the claim. If a plaintiff does not send the letter of claim within the two-month period prescribed by Section 8, barristers instructed by a defendant may wish to plead same when drafting the defence, and may wish to raise Section 8 at the hearing of the action.

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

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A directory of legislation, articles and acquisitions received in the Law Library from October 4, 2018, to November 15, 2018. Judgment information supplied by Justis Publishing Ltd. Edited by Vanessa Curley and Clare O'Dwyer, Law Library, Four Courts.

ARBITRATION

Library acquisitions

Buhler, M.W., Webster, T.H. *Handbook of ICC Arbitration: Commentary and Materials (4th ed.)*. London: Sweet & Maxwell, 2018 – N398.8

Mansfield, B. *Arbitration in Ireland: Arbitration Act 2010 and Model Law: A Commentary (2nd ed.)*. Dublin: Clarus Press, 2018 – N398.C5

ASYLUM

International protection – Notice party – Stay – Applicant seeking an order making the IPAT a notice party – Whether refusal of a stay after leave has been granted is a breach of the principle of effectiveness – [2018] IEHC 559 – 08/10/2018

R.H. (Albania) v Chief International Protection Officer

Asylum and immigration – Application for declarations of refugee status and subsidiary protection – Refusal of declarations – Leave to seek judicial review – Stay of substantive appeal – [2018] IECA 322 – 19/10/2018

R.S. v Chief International Protection Officer

BANKING

Banking and finance – Loan facility – Bona fide defence – Plaintiff seeking summary judgment against the defendants – Whether the defendants had a bona fide defence to the application – [2018] IEHC 555 – 10/10/2018

AIB Mortgage Bank v Gunning

Banking and finance – Loan facility – Unfair Terms in Consumer Contracts Regulations 1995 – Plaintiff seeking judgment in respect of monies due and owing by the defendants to the plaintiff – Whether the defendants had established an arguable defence – [2018] IEHC 599 – 26/06/2018

Allied Irish Banks Plc v O'Donohoe

Banking and finance – Credit agreement – Consumer Credit Act 1995 – Defendants seeking to counterclaim for unliquidated damages – Whether the plaintiff was guilty of negligent misrepresentation – [2018] IEHC 545 – 30/07/2018

Allied Irish Banks Plc v McGrath

Banking and finance – Loan facility – Past consideration – Plaintiff seeking summary judgment – Whether the defendants raised an arguable defence – [2018] IEHC 561 – 09/10/2018

Allied Irish Banks Plc v Maguire

Banking and finance – Loan agreement – Liability – Plaintiff seeking summary judgment in respect of the entire sum owing under a loan agreement – Whether the court could identify the nature of the liability arising on the part of the defendant – [2018] IEHC 534 – 01/10/2018

Allied Irish Banks Plc v Purcell

Banking and finance – Facility letter – Plenary hearing – Plaintiff seeking judgment for the sum of €7,473,348.47 in respect of monies due and owing by the defendant to the plaintiff – Whether the defendant had established an arguable defence – [2018] IEHC 594 – 10/07/2018

Governor and Company of the Bank of Ireland v Doyle

Banking and finance – Summary summons – Plenary summons – Appellant seeking damages for various alleged wrongdoing by the defendants – Whether the trial judge erred in dismissing the claims against the defendants – [2018] IECA 320 – 15/10/2018

Governor and Company of the Bank of Ireland v Flynn; Flynn v Murray

Library acquisitions

Goode, R., van Zwieten, K. *Principles of Corporate Insolvency Law (5th ed.)*. London: Sweet & Maxwell, 2018 – N310

Statutory instruments

Central Bank act 1971 (approval of scheme of transfer between J.P. Morgan Bank (Ireland) PLC and J.P. Morgan Bank Luxembourg S.A., Dublin Branch) order 2018 – SI 386/2018

COMMERCIAL LAW

Library acquisitions

Grant, T. Mumford, D. *Civil Fraud: Law, Practice and Procedure*. London: Sweet & Maxwell, 2018 – N250

Articles

Heslin, M. Implied terms and commercial contracts – a search for what is already there. *Commercial Law Practitioner* 2018; (25) (8): 191

COMMUNICATIONS

Statutory instruments

Electricity regulation act 1999 (public service obligations) (amendment) order 2018 – SI 403/2018

COMPANY LAW

Articles

Breen, R. *Re Appleyard Motors Ltd; Toomey Leasing Group Ltd v Sedgwick*: another nail in the coffin for reckless trading? *Commercial Law Practitioner* 2018; (25) (9): 204

COMPETITION LAW

Statutory instruments

Competition act 2002 (section 27) order 2018 – SI 388/2018

Consumer protection act 2007 (Competition and Consumer Protection Commission) levy regulations 2018 – SI 425/2018

CONSTITUTIONAL LAW

Unlawful detention – Article 40.4.2 inquiry – Wardship – Applicant seeking an inquiry pursuant to Article 40.4.2 of the Constitution into her detention – Whether the applicant was unlawfully detained – [2018] IEHC 570 – 03/08/2018

A.C. v Fitzpatrick

Library acquisitions

Hogan, G. Kenny, D., Walsh, R. Whyte, G. *Kelly: The Irish Constitution (5th ed.)*. Dublin: Bloomsbury Professional, 2018 – M31.C5

Articles

McMahon, C. The abortion referendum revisited – the decisions in *Byrne v Ireland* and *Jordan v Ireland*. *Irish Law Times* 2018; (36) (17): 263

Kenny, D. Remedial innovation, constitutional culture, and the Supreme Court at a crossroads. *Dublin University Law Journal* 2017; (40) (2): 85

CONTRACT

Contract – Failure to provide reasons – Transparency – Applicant seeking to challenge the decision by the respondent to award to the notice party a contract – Whether the respondent failed to comply with its obligations to provide reasons for its decision – [2018] IEHC 566 – 12/10/2018

Sanofi Aventis Ireland Ltd trading as Sanofi Pasteur v Health Service Executive

Library acquisitions

Beale, H.G. *Chitty on Contracts (33rd ed.)*. London: Sweet & Maxwell, 2018 – N10

CONVEYANCING

Articles

Walsh, M. Bought and sold. *Law Society Gazette* 2018; (Nov): 40

COPYRIGHT

Library acquisitions

Sterling, J.A.L., Cook, T. *Sterling on World Copyright Law (5th ed.)*. London: Sweet & Maxwell, 2018 – N114

COURTS

Settlement – Variation – Provision – Applicants seeking to enforce the payment of a lump sum order due and owing on foot of a settlement entered into between the respondent and the deceased – Whether it would be fundamentally unjust and inequitable to seek to enforce the order – [2018] IEHC 567 – 25/06/2018

A., B., C. and D., Personal Representatives and Executors of the Estate of E.F., Deceased v G.H.

Preliminary application – Expert reports – Negligence – Plaintiff seeking liberty to deliver expert reports from three additional experts – Whether the interests of justice justified additional expert reports being delivered – [2018] IEHC 543 – 31/07/2018

Defender Ltd v HSBC Institutional Trust Services (Ireland) Ltd

Certiorari – Legal test – Fundamental reason – Applicant seeking an order of certiorari quashing the decision of the defendant – Whether the correct legal test was brought to bear by the defendant – [2018] IEHC 530 – 01/10/2018

Devlin v Minister for Justice and Equality

Case stated – Dangerous driving – Admissibility of evidence – District judge seeking the opinion of the High Court – Whether an answer given by an accused person pursuant to a question put to him under s. 107 of the Road Traffic Act 1961 may be admitted in evidence against him in a prosecution for an offence under the 1961 Act – [2018] IEHC 554 – 03/10/2018

DPP (Garda James Reynolds) v Burke

Penalties – Contempt of court – Publication – Appellants seeking to appeal against the severity of penalties – Whether the trial judge placed undue weight on the issue of deterrence in approaching the question of sentence – [2018] IECA 301 – 30/07/2018

DPP v Independent News and Media plc

Conviction – Contempt of court – Publication – Appellants seeking to appeal against conviction – Whether the High Court was incorrect in coming to the view that the ingredients of contempt were made out – [2017] IECA 341 – 20/12/2017

DPP v Independent News and Media plc

Case stated – Dismissal of prosecution – Alcohol testing – District judge seeking the opinion of the High Court – Whether the District judge was entitled to dismiss the prosecution as against the respondent – [2018] IEHC 577 – 09/10/2018

DPP (at the suit of Garda Eamonn Long) v McGovern

Consultative case stated – Criminal Justice (Public Order) Act 2011 s. 2 – Adult Caution Scheme – District Court judge seeking the determination of the High Court – Whether a judge of the District Court can give a direction to members of An Garda Síochána to apply the Adult Caution Scheme to a non-Schedule offence that is before the court – [2018] IEHC 528 – 01/10/2018

DPP (at the suit of Garda Fergus Grant) v Nicolae

Consultative case stated – Questions of law – Road Traffic Act 2010 – District judge seeking to refer questions of law to the High Court – Whether the doctor's form has lost its evidentiary presumption – [2018] IEHC 529 – 01/10/2018

DPP v O'Connell

Case stated – Point of law – *DPP (Moyles) v Cullen* [2014] IESC 7 – Appellants seeking to appeal from a decision of the Court of Appeal dismissing their appeal against a judgment of the High Court – Whether the High Court and Court of Appeal correctly applied the law as decided in *DPP (Moyles) v Cullen* [2014] IESC 7 – [2018] IESC 51 – 23/10/2018

DPP v Pires; DPP v Corrigan; DPP v Gannon

Abuse of process – *Forum non conveniens* – US bankruptcy law – Defendant seeking an order striking out and/or dismissing the claim of the plaintiff pursuant to the inherent jurisdiction of the High Court on the grounds of *forum non conveniens* and abuse of process – Whether the plaintiff had any standing to prosecute the proceedings – [2018] IEHC 536 – 03/10/2018

Dunne (a bankrupt) v Dunne

Unreasonable and irrational decision – Natural and constitutional justice – Oral hearing – Applicant seeking an order of certiorari quashing the decision of the respondent – Whether the respondent's decision to dismiss the applicant from its panel was unreasonable and irrational – [2018] IEHC 541 – 28/09/2018

Gill v Department of Agriculture, Food and the Marine

Title of proceedings – Amendment – Order for possession – Appellant seeking an order amending the title of the proceedings – Whether the provisions of the Companies Act 2014 justified making the order – [2018] IEHC 552 – 05/10/2018

Launceston Property Finance Ltd v Burke

Certiorari – Legal fees – *Ultra vires* – Applicant seeking an order of certiorari quashing a decision of the respondent – Whether the decision of the respondent was ultra vires the provisions of the Legal Aid Custody Issues Scheme – [2018] IEHC 558 – 28/09/2018

McDonagh v Legal Aid Board

Third-party notice – Gross and inexcusable delay – Personal injury – Third party seeking to set aside a third-party notice that was issued against it by the defendants – Whether the third-party notice was served as soon as was reasonably possible – [2018] IEHC 603 – 30/10/2018

Murray v Castlebar Town Council

Inordinate and inexcusable delay – Balance of justice – Administration of justice – Appellant seeking to appeal against the decision of the High Court – Whether the balance of justice favoured the refusal of the order sought by the respondent on the motion – [2018] IECA 296 – 01/10/2018

Sweetman v Coillte Teoranta

Interlocutory orders – Expedited appeal – Receiver – Appellants seeking an order setting aside the judgment and orders of the High Court – Whether the matter should be remitted back to the High Court for a full plenary hearing – [2018] IECA 295 – 28/09/2018

Tyrrell v Wright

Order of certiorari – Directions – Remittal – High Court judge seeking further submissions – Whether the order of certiorari should be directed to the whole, or only to a part of, the decision – [2018] IEHC 537 – 25/09/2018

Y.Y. v Minister for Justice and Equality No. 8

Statutory instruments

Circuit Court rules (family law) 2018 – SI 427/2018

Rules of the Superior Courts (appeals from the Circuit Court) 2018 – SI 428/2018

Circuit Court rules (proof of foreign public documents and translations) 2018 – SI 429/2018

Rules of the Superior Courts (personal injuries: periodic payments orders) 2018 – SI 430/2018

CRIMINAL LAW

Crime and sentencing – Sexual offences – Sexual assaults – Appeal against sentence – [2018] IECA 326 – 31/07/2018

DPP v A.A.

Sentencing – Sexual offences – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 308 – 03/10/2018

DPP v A.D.

Sentencing – Robbery – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 351 – 01/11/2018

DPP v Barnaville

Sentencing – Assault causing serious harm – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 306 – 02/10/2018

DPP v Farrell

Sentencing – Burglary – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 330 – 22/10/2018

DPP v Fitzgerald

Sentencing – Aggravated burglary – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – [2018] IECA 312 – 03/10/2018

DPP v Freeman

Sentencing – Possession of a firearm without a certificate – Undue leniency – Appellant seeking to appeal against sentence – Whether sentence was unduly lenient – [2018] IECA 331 – 17/05/2018

DPP v Friel

Sentencing – Membership of an unlawful organisation – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 329 – 19/10/2018

DPP v Glennon

Conviction – Simple possession – Duress – Appellant seeking to appeal from the judgment and order of the Court of Appeal overturning the respondent's conviction – Where an accused person seeks to rely on the defence of duress, by what standards are the accused's actions to be judged? – [2018] IESC 53 – 01/11/2018

DPP v Gleeson

Sentencing – Assault causing serious harm – Undue leniency – Appellant seeking review of sentences – Whether sentences were unduly lenient – [2018] IECA 318 – 15/10/2018

DPP v Harty

Sentencing – Assault – Undue leniency – Appellant seeking review of sentence – Whether sentence was unduly lenient – [2018] IECA 297 – 27/04/2018

DPP v Heffernan

Sentencing – Criminal damage – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – [2018] IECA 313 – 05/10/2018

DPP v Higgins

Sentencing – Burglary – Undue leniency – Applicant seeking review of sentences – Whether sentences were unduly lenient – [2018] IECA 309 – 03/10/2018

DPP v P. McC

Conviction – Membership of an unlawful organisation – Unlawful arrest – Appellant seeking to appeal against

conviction – Whether the trial court was wrong in its determination that the appellant was lawfully arrested – [2018] IECA 325 – 31/07/2018
DPP v McHale
Sentencing – Theft – Proportionality – Appellant seeking to appeal against sentences – Whether sentences were excessive and disproportionate – [2018] IECA 310 – 03/10/2018
DPP v Maguire
Sentencing – Sexual assault – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – [2018] IECA 305 – 26/02/2018
DPP v M. O'N
Crime and sentencing – Drugs offences – Cannabis – Large amount found at appellant's home – Appeal against sentence – [2018] IECA 327 – 05/10/2018
DPP v Muszak
Sentencing – Threatening to kill or cause serious harm – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – [2018] IECA 307 – 03/10/2018
DPP v O'Brien
Sentencing – Possession of an explosive in suspicious circumstances – Undue severity – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 328 – 19/10/2018
DPP v O'Shea
Conviction – Drug offences – Unsafe conviction – Appellant seeking to appeal against conviction – Whether conviction was unsafe – [2018] IECA 315 – 10/10/2018
DPP v Rattigan
Sentencing – Theft – Mitigating factors – Appellant seeking review of sentence – Whether the trial judge gave undue weight to the mitigating factors – [2018] IECA 324 – 20/07/2018
DPP v Stokes
Sentencing – Possession of stolen property – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 349 – 30/10/2018
DPP v Stokes
Conviction and sentence – Road traffic offences – Public order offence – Applicant seeking orders of certiorari quashing his conviction and sentence – Whether disclosure was provided to the applicant's solicitor by the investigating Garda or the prosecution prior to the hearing – [2018] IEHC 576 – 09/10/2018
Heffernan v DPP
Parole – Temporary release – Criminal Justice Act 1960 s. 2 – Applicant seeking an order of mandamus directing the first respondent to consider recommending the applicant for parole, remission or temporary release – Whether the second respondent acted capriciously, arbitrarily or in an unjust way – [2018] IEHC 531 – 01/10/2018
M v The Parole Board
Notice party – Joinder – Judicial review – Applicant seeking to restrain a statutory inquiry directed by the respondent – Whether the proposed notice party was directly affected by the judicial review proceedings – [2018] IEHC 565 – 18/07/2018
National Maternity Hospital v Minister for Health

Library acquisitions
Lucraft, M. *Archbold: Criminal Pleading, Evidence and Practice 2019*. London: Sweet & Maxwell, 2019 – M500
Haynes, A., Schweppe, J., Walters, M.A. *Lifecycle of a Hate Crime: Comparative Report*. Dublin: ICCL, 2018 – M540.008
Haynes, A., Schweppe, J. *Lifecycle of a Hate Crime: Country Report for Ireland*. Dublin: ICCL, 2017 – M500.C5

Articles
O'Sullivan, D. Halting a criminal trial: applications to the trial court. *The Bar Review* 2018; (23) (5): 140

DAMAGES

Damages – Personal injuries – Liability – Defendant seeking contribution or indemnity from a third party – Whether there was a sufficient basis for the joinder of a third party – [2018] IEHC 532 – 01/10/2018
Haughton v Quinns of Baltinglass Ltd
Damages – Personal injuries – Contributory negligence – Plaintiff seeking to recover damages in respect of personal injuries and loss – Whether the plaintiff was guilty of contributory negligence – [2018] IEHC 602 – 11/10/2018
Healy v O'Brien
Damages – Negligence – Statute barred – Plaintiff seeking damages for negligence and breach of duty – Whether the plaintiff's claim was statute barred – [2018] IEHC 600 – 26/06/2018
Smith v Cunnningham p/a Paul Kelly and Company Solicitors

DATA PROTECTION

Articles
Costello, R.Á. *R. (Liberty) v Secretary of State* – the struggle to keep data retention legislation afloat in "deep constitutional waters" continues. *Irish Law Times* 2018; (36) (17): 258

DEFAMATION

Defamation – Absolute privilege – Abuse of process – Plaintiff seeking damages for defamation – Whether the proceedings were an abuse of process – [2018] IEHC 548 – 28/06/2018
R.C. v K.E.

DISCOVERY

Discovery – Natural justice – Fair procedures – Appellant seeking to compel the respondent to comply with an order for discovery – Whether the respondent fully complied with his discovery obligations – [2018] IECA 294 – 28/09/2018
Coyle v Gray
Discovery – Privilege – Witness statements – Plaintiff seeking discovery – Whether a witness statement loses privilege when it is served on the opposing party or when it is adopted by a witness in open court – [2018] IEHC 587 – 15/10/2018
Defender Ltd v HSBC Institutional Trust Services (Ireland) Ltd

Library acquisitions
Hollander, C. *Documentary Evidence (13th ed.)*. London: Sweet & Maxwell, 2018 – N386

Articles
Fitzpatrick, A. A new approach to discovery. *The Bar Review* 2018; (23) (5): 136

EDUCATION

Education – Judicial review – Changes to vocational education sector – Pay and allowances – Transport Liaison Officers' Allowance – [2018] IESC 50 – 18/10/2018
McDonncha v Minister for Education and Skills

Statutory instruments
Education (admission to schools) act 2018 (commencement) order 2018 – SI 396/2018
Technological Universities Act 2018 (section 36) (appointed day) order 2018 – SI 437/2018

ELECTORAL

Election – Procedural irregularities – Declaratory relief – Plaintiffs seeking declaratory reliefs – Whether declaratory reliefs should be granted in respect of alleged procedural irregularities – [2018] IEHC 551 – 04/10/2018
Madden v Irish Countrywomen's Association

Statutory instruments
Presidential elections (ballot paper template) regulations 2018 – SI 395/2018

EMPLOYMENT LAW

Employment – Contract – Loss of earnings – Plaintiff claiming loss of earnings – Whether there was a contract of employment between the plaintiff and defendant – [2018] IEHC 592 – 12/07/2018
Adekoya v IBM International Holdings Ireland
Employment – Unfair dismissal – Specialist evaluation – Appellant seeking to appeal from a decision of a Rights Commissioner – Whether the appellant's dismissal from employment was fair – [2018] IEHC 604 – 31/07/2018
Donegan v Dublin City Council
Employer – Protection of Employees (Part-Time Work) Act 2001 – Erroneous in law – Appellant seeking to quash the finding of the respondent – Whether the finding of the respondent was wrong in law – [2018] IESC 52 – 01/11/2018
Minister for Education and Skills v Boyle

Library acquisitions
Faulkner, M. *Essentials of Irish Labour Law (3rd ed.)*. Dublin: Clarus Press: 2018 – N192.C5

Articles
Doyle, W. Office space. *Law Society Gazette* 2018; (Nov): 36
Kerr, A. Jurisdiction and choice of law issues in transnational employment rights disputes. *Irish Employment Law Journal* 2018; (15) (3): 72
Keane, E. Making a good job of the gig. *Irish Employment Law Journal* 2018; (15) (3): 76

Statutory instruments
National minimum wage order 2018 – SI 402/2018

EUROPEAN UNION

Summary return – Hague Convention – Minor – Appellant seeking to appeal against the summary return of a minor to the jurisdiction of the courts of Sweden – Whether the threshold for a Hague Convention Article 20 defence had been met – [2018] IECA 323 – 03/10/2018
C.D.G. v J.B.
European arrest warrant – Surrender – Brexit – Appellant seeking to have a previous order providing for his surrender to the United Kingdom

vacated – Whether it was necessary for the Supreme Court to seek answers to questions raised in a reference already sent to the CJEU – [2018] IESC 47 – 09/10/2018
Minister for Justice and Equality v O'Connor
European arrest warrant – Delay – Right to a defence – Applicant seeking the surrender of the respondent to the Czech Republic – Whether the respondent's surrender was prohibited by s. 45 of the European Arrest Warrant Act 2003 – [2018] IEHC 584 – 08/10/2018
Minister for Justice and Equality v Schoppik
European arrest warrant – Drug trafficking – Proportionality – Applicant seeking the issue of a European arrest warrant – Whether it was disproportionate to issue the European arrest warrant – [2018] IEHC 586 – 16/07/2018
Re: DPP (application of)

Library acquisitions
Naome, C. *Appeals before the Court of Justice of the European Union*. Oxford: Oxford University Press, 2018 – W93
Schutze, R. *European Union law (2nd ed.)*. Cambridge: Cambridge University Press, 2018 – W86

Statutory instruments
European Union (properties of waste which render it hazardous) regulations 2018 – SI 383/2018
European Union (environmental impact assessment) (Minerals development act 1940) (amendment) regulations 2018 – SI 384/2018
European Union (appropriate assessment) (Minerals development act 1940) regulations 2018 – SI 385/2018
European Communities (marketing of ornamental plant propagating material and ornamental plants) (amendment) regulations 2018 – SI 387/2018
European Union (planning and development) (environmental impact assessment) (no. 2) regulations 2018 – SI 404/2018
European Union (disclosure of non-financial and diversity information by certain large undertakings and groups) (amendment) regulations 2018 – SI 410/2018
European Union (Marrakesh treaty) regulations 2018 – SI 412/2018
European Union (food additives) (amendment) regulations 2018 – SI 413/2018
European Union (deployment of alternative fuels infrastructure) regulations 2018 – SI 414/2018
European Union habitats (Durnesh Lough special area of conservation 000138) regulations 2018 – SI 415/2018
European Union habitats (Ballyness bay special area of conservation 001090) regulations 2018 – SI 416/2018
European Union habitats (Termon strand special area of conservation 001195) regulations 2018 – SI 417/2018
European Union habitats (Lough Swilly special area of conservation 002287) regulations 2018 – SI 418/2018
European Union habitats (Glenstal Wood special area of conservation 001432) regulations 2018 – SI 419/2018
European Union habitats (Bannow Bay special area of conservation 000697) regulations 2018 – SI 420/2018
European Union habitats (Cahore Polders and Dunes special area of conservation 000700) regulations 2018 – SI 421/2018
European Union habitats (Tacumshin Lake special area of conservation 000709) regulations 2018 – SI 422/2018
European Union habitats (Raven point nature reserve special area of conservation 000710) regulations 2018 – SI 423/2018
European Union habitats (Kilpatrick Sandhills special area of conservation 001742) regulations 2018 – SI 424/2018

EVIDENCE

Affidavits – Admission – Validity – Plaintiff seeking to object to the admission of affidavits – Whether the affidavits ought to be admitted – [2018] IEHC 589 – 02/10/2018
Beakey v Bank of Ireland Mortgage Bank
Trademark registration – Admission of new evidence – *Murphy v Minister for Defence* [1991] 2 IR 161 – Plaintiff seeking leave to admit new evidence – Whether the test governing the admission of new evidence was that articulated in *Murphy v Minister for Defence* [1991] 2 IR 161 – [2018] IECA 299 – 02/10/2018
Diesel SpA v Controller of Patents, Designs and Trademarks
Recovery of fees – Liberty to adduce new evidence – Special circumstances – Appellants seeking liberty to adduce new evidence – Whether there were special circumstances that would warrant granting the relief sought – [2018] IECA 319 – 12/10/2018
Kelly v McNicholas

EXTRADITION LAW

Extradition – Inhuman and degrading treatment – Right to respect for personal and family life – Applicant seeking the extradition of the respondent – Whether extradition would be a disproportionate interference with the respondent's right to respect for her personal and family life – [2018] IEHC 583 – 22/10/2018
Attorney General v A.B.
Extradition – Judicial review – Prosecution – Applicant seeking judicial review – Whether the applicant discharged the burden of proving that a right to be considered for prosecution exists and had been violated – [2018] IEHC 585 – 22/10/2018
Mullan v DPP Ireland

FAMILY LAW

Articles
Foley, D. Breaking up is hard to do. *Law Society Gazette* 2018; (Oct): 38

FINANCIAL SERVICES

Findings of fact – Financial services – False documentation – Appellant seeking to appeal against two decisions of the Financial Services and Pensions Ombudsman – Whether the Financial Services and Pensions Ombudsman had credible and sufficient evidence to come to her decision – [2018] IEHC 581 – 16/10/2018
O'Donoghue v Office of the Financial Services and Pensions Ombudsman

Library acquisitions
Peddie, J., Simpson, M., Thomson, C. *A Practitioner's Guide to the Law and Regulation of Financial Crime (2nd ed.)*. London: Sweet & Maxwell, 2018 – N308.3

Statutory instruments
Credit institutions resolution fund levy (amendment) regulations 2018 – SI 382/2018
Credit union fund (stabilisation) levy regulations 2018 – SI 441/2018

FISHERIES

Conviction – Carrying on board a sea fishing vessel, within the exclusive fishery limits of the State, equipment prohibited by Article 32(1) of Council Regulation (EC) No. 850/98 – Unsafe verdict – Appellant seeking to appeal against conviction – Whether the trial was unsatisfactory or the verdict unsafe – [2018] IECA 317 – 11/10/2018
DPP v Meijvogel

Statutory instruments
Fishing vessel (personal flotation devices) (amendment) regulations 2018 – SI 401/2018

FORENSIC MEDICINE

Articles
Kennedy, K. Behind the Curtain. *Law Society Gazette* 2018; (Oct): 50

GOVERNMENT

Statutory instruments
Appointment of special adviser (Minister for Health) order 2018 – SI 399/2018
Oireachtas (ministerial and parliamentary offices) (secretarial facilities) (amendment) regulations 2018 – SI 426/2018
Appointment of special adviser (Minister for Employment Affairs and Social Protection) order 2018 – SI 439/2018
Multilateral convention to implement tax treaty related measures order 2018 – SI 440/2018

HEALTH

Statutory instruments
Mental health (renewal orders) act 2018 (commencement) order 2018 – SI 397/2018

HOLIDAY LAW

Library acquisitions
Bunce, S., Grant, D., Mason, S. *Holiday Law: The Law Relating to Travel and Tourism (6th ed.)*. London: Sweet & Maxwell, 2018 – N286.T6

IMMIGRATION

Immigration and asylum – Subsidiary protection – Certiorari – Applicant seeking certiorari of tribunal decision – Whether the decision was infirm – [2018] IEHC 553 – 24/09/2018
A.L. (Algeria) v International Protection Appeals Tribunal
Immigration and asylum – Certiorari – Deportation – Applicant seeking certiorari of an International Protection Act 2015 s. 49(9) decision and consequential certiorari of a deportation order – Whether the applicant sought the correct relief – [2018] IEHC 550 – 25/09/2018
A.W. (Pakistan) v Minister for Justice and Equality
Immigration and asylum – Refugee status – Judicial review – Applicant seeking judicial review of a decision by the respondent – Whether the

respondent adopted an unduly narrow definition of acts of persecution – [2018] IEHC 564 – 03/10/2018

G.E. v Refugee Appeals Tribunal

Removal order – Order of certiorari – Present and serious threat to public policy – Appellant seeking an order of certiorari to quash a removal order – Whether the appellant's conduct justified a conclusion that he was a genuine and serious present risk to public policy in the State – [2018] IECA 304 – 10/10/2018

M.V. (Lithuania) v Minister for Justice and Equality

Immigration and asylum – Revocation of refugee status – False and misleading information – Appellants seeking to appeal against the decision of the respondent to revoke their refugee status – Whether the appellants gave false and misleading information in their application for asylum – [2018] IECA 303 – 02/10/2018

S.A.S v Minister for Justice, Equality and Law Reform; A.A.S v Minister for Justice, Equality and Law Reform

INDUSTRIAL DEVELOPMENT

Statutory instruments

Industrial training (retail industry) order 2018 – SI 407/2018

Industrial training (logistics industry) order 2018 – SI 408/2018

Industrial training (laboratory industry) order 2018 – SI 409/2018

INJUNCTIONS

Articles

Murphy, N. Injunction junctions. *Law Society Gazette* 2018; (Nov): 44

INSURANCE

Library acquisitions

Graham, R. *Bingham and Berrymans' Personal Injury and Motor Claims Cases (15th ed.)*. London: LexisNexis, 2018 – N294.M6

Birds, J., Lynch, B., Paul, S., MacGillivray, E.J. *MacGillivray on Insurance Law (14th ed.)*. London: Sweet & Maxwell, 2018 – N290

INTELLECTUAL PROPERTY

Library acquisitions

Davis, R., St Quintin, T., Tritton, G. *Tritton on Intellectual Property in Europe (5th ed.)*. London: Sweet & Maxwell, 2018 – N111.E95

INTERNATIONAL LAW

Library acquisitions

Khan, K.A.A., Dixon, R. *Archbold International Criminal Courts: Practice, Procedure and Evidence (5th ed.)*. London: Sweet & Maxwell, 2018 – C219

Lastra, R.M. *International Financial and Monetary Law (2nd ed.)*. Oxford: Oxford University Press, 2015 – C222

Articles

Regan, E. A question of trust. *The Bar Review* 2018; (23) (5): 131

INTERNET

Library acquisitions

Gringras, C., Lambert, P. *Gringras: The Laws of the Internet (5th ed.)*. Haywards Heath: Bloomsbury Professional, 2018 – N347

IRISH LANGUAGE

Statutory Instruments

Gaeltacht act 2012 (designation of Gaeltacht language planning areas) (no. 5) order 2018 – SI 392/2018

JUDGMENTS

Enforcement notice – Non-European Economic Area students – Health Insurance Act 1994 – Applicant seeking orders of certiorari, together with declaratory relief, quashing the determination of the respondent – Whether there was evidence of a determination taken by the respondent to ground an Enforcement Notice – [2018] IEHC 608 – 22/10/2018

Chubb European Group plc v Health Insurance Authority

Enforcement notice – Non-European Economic Area students – Health Insurance Act 1994 – Applicant seeking to have a direction contained in an Enforcement Notice cancelled – Whether the respondent erred in its determination that a non-EEA student is ordinarily resident in the jurisdiction if attending a course of study in excess of one academic year – [2018] IEHC 609 – 22/10/2018

Chubb European Group plc v Health Insurance Authority

Articles

Keane, P. Balancing act. *Law Society Gazette* 2018; (Oct): 46

JUDICIAL REVIEW

Casual trading – Trading without a licence – Judicial review – Applicant seeking judicial review – Whether under the terms of Magna Carta Hiberniae the applicant had a common law right to trade without a licence – [2018] IEHC 544 – 24/07/2018

Alary v Cork County Council

Judicial review – Order of certiorari – Enhanced remission – Applicant seeking enhanced remission of his sentence – Whether the provisions of s. 151 of the Children Act 2001 applied to the applicant – [2018] IEHC 601 – 25/10/2018

B. (A Minor Suing through his Mother and Next Friend, C.) v Director of Oberstown Children Detention Centre

Judicial review – Conviction – Possession of an unregistered vehicle for the purpose of vehicle registration tax – Applicant seeking leave to bring judicial review proceedings – Whether the applicant had established an arguable case that a relief of certiorari lies in respect of the order of conviction – [2018] IEHC 540 – 28/09/2018

Brady v Revenue Commissioners

Judicial review – Fees – Right of access to the courts – Applicant seeking leave to bring judicial review proceedings against the respondents – Whether paragraph 5 of the Supreme and High Court (Fees) Order 2014 is invalid having regard to the Constitution – [2018] IEHC 354 – 15/06/2018

Buck v Governor of Portlaoise Prison

Judicial review – Balance of justice – Higher education – Applicant seeking judicial review – Whether the applicant's fundamental rights were engaged in the question of her admission to higher level education – [2018] IEHC 539 – 03/10/2018

Carter v Minister for Education and Skills

Judicial review – Criminal Injuries Compensation Scheme – Declaratory reliefs – Applicant seeking declaratory reliefs concerning the lawfulness of the Scheme of Compensation for Personal Injuries Criminally Inflicted – Whether Order 84 of the Rules of the Superior Courts 1986 has application in respect of decisions yet to be taken – [2018] IEHC 527 – 01/10/2018

Chakari v Criminal Injuries Tribunal

Judicial review – Order of mandamus – Counsel – Applicant seeking an order of mandamus by way of judicial review compelling the District Judge to permit counsel to appear and to conduct the proceedings as defence counsel for the applicant without requiring the instructing solicitor to be in attendance – Whether counsel was permitted to take instructions and conduct the case before the District Court without the need of the instructing solicitor to be in attendance – [2018] IEHC 596 – 14/02/2018

Hodnett v DPP

Judicial review – Declaratory relief – Fair procedures – Applicant seeking judicial review – Whether the judicial review proceedings were launched prematurely – [2018] IEHC 542 – 28/09/2018

Holland v Control Committee of Bord Na gCon

Recognisances – Independent surety – Judicial review – Applicant seeking to quash the decision of the District judge to set recognisances at a level beyond his means – Whether the High Court should make any determination on the merits of the issue – [2018] IEHC 605 – 16/10/2018

Koltze v DPP

Judicial review – Exclusion order – Remedy – Applicant seeking judicial review of removal and exclusion orders made by the respondent – Whether the High Court should quash the respondent's decision or adjourn the challenge to the decision and direct the respondent to state reasons for that decision – [2018] IEHC 538 – 01/10/2018

Krupecki v Minister for Justice and Equality No.2

Judicial review – Fair trial – Indecent assault – Applicant seeking an order of prohibition and/or an injunction restraining the respondent from proceeding with his trial – Whether the applicant could receive a fair trial – [2018] IEHC 560 – 31/07/2018

M.H. v DPP

Judicial review – Order of certiorari – No order charges – Applicant seeking judicial review – Whether the applicant was entitled to the reliefs sought – [2018] IEHC 598 – 10/07/2018

Martin v DPP

Judicial review – Planning and development – Acknowledgment – Applicant seeking to appeal to the respondent, against the decision of the notice party – Whether it was lawful for the respondent to reject the applicant's appeal – [2018] IEHC 588 – 31/07/2018

Micaud Investment Management Ltd v An Bord Pleanála

Judicial review – Criminal trial – Alternative remedy – Respondent seeking judicial review – Whether the respondent failed to avail of the appropriate alternative remedy – [2018] IECA 302 – 01/10/2018

R v DPP

Notice party – Joinder – Judicial review – Applicant seeking to restrain a statutory inquiry directed by the respondent – Whether the proposed notice party was directly affected by the judicial review proceedings – [2018] IEHC 565 – 18/07/2018

National Maternity Hospital v Minister for Health

Judicial review – Order of certiorari –

Health Act 2007 s. 9 – Applicant seeking an order of certiorari quashing the decision of the respondent requiring the notice party to undertake an investigation under s. 9 of the Health Act 2007 – Whether the respondent's decision was unreasonable – [2018] IEHC 591 – 06/09/2018
National Maternity Hospital v Minister for Health

JURISDICTION

Jurisdictional error – Judicial separation – Divorce – Defendant seeking an order setting aside a judgment obtained by the plaintiff in default of appearance – Whether the defendant had a good defence to the proceedings – [2018] IEHC 590 – 20/07/2018
Gill Traynor Solicitors v H.W.

JURISPRUDENCE

Articles
Keating, A. The economy of substantive jurisprudence. *Irish Law Times* 2018; (36) (15): 234

LAND LAW

Land – Adverse possession – Notice to quit – Plaintiff seeking possession of land – Whether the plaintiff acquired title by way of adverse possession – [2018] IEHC 597 – 22/03/2018
Byrne v Dublin City Council

LANDLORD AND TENANT

Library acquisitions
Law Society of Ireland, Brennan, G., Linnane, M., Soden, D. *Landlord and Tenant Law (7th ed.)*. Oxford: Oxford University Press, 2018 – N90.C5
Freedman, P., Shapiro, E., Slater, B. *Service Charges: Law and Practice (6th ed.)*. London: LexisNexis, 2018 – N90

LEGAL HISTORY

Library acquisitions
Dungan, M. *Irish Voices from the Great War*. Dublin: Merrion Press, 2014 – L403
Helmers, M. *Harry Clarke's war: Illustrations for Ireland's Memorial Records, 1914-1918*. Sallins: Irish Academic Press, 2016 – L403
Ó Comhraí, C. *Ireland and the First World War: A Photographic History*. Cork: Mercier Press Ltd, 2014 – L403
Middlebrook, M. *The First Day on the Somme: 1 July 1916*. London: Penguin Books, 2016 – L403
Myers, K. *Ireland's Great War*. Dublin: The Lilliput Press Ltd, 2015 – L403
Richardson, N. *A Coward if I Return, A Hero if I Fall: Stories of Irishmen in World War I*. Dublin: The O'Brien Press Ltd, 2010 – L403

Articles
Mannering, B. It's a long way to Tipperary. *Law Society Gazette* 2018; (Nov): 48

MENTAL HEALTH

Library acquisitions
Jones, R.M. *Mental Health Act Manual (21st ed.)*. London: Sweet & Maxwell, 2018 – N155.3

NEGLIGENCE

Liberty to amend defence – Negligence – Breach of contract – Defendant seeking liberty to amend its defence – Whether the amendment would unfairly prejudice the plaintiffs – [2018] IEHC 573 – 17/10/2018
Gunning v Permagreen Insulation (Ireland) Ltd
Unlawful deprivation of liberty – Negligence – Breach of contract – Intended plaintiff seeking damages – Whether leave to issue proceedings should be granted – [2018] IEHC 571 – 09/10/2018
J. O'T v Healy

PENSIONS

Statutory instruments
Trinity College Dublin, the University of Dublin Superannuation Scheme 2018 – SI 393/2018
Superannuation (designation of approved organisations) regulations, 2018 – SI 394/2018

PERSONAL INJURIES ASSESSMENT BOARD

Personal injuries – Strike out – Inordinate and inexcusable delay – Defendants seeking to strike out a personal injuries claim – Whether there was inordinate and inexcusable delay in the prosecution of the proceedings – [2018] IEHC 533 – 01/10/2018
Roche v Minister for Justice and Equality

PLANNING AND ENVIRONMENTAL LAW

Planning and development – Planning permission – Judicial review – Applicant seeking judicial review – Whether the applicant discharged the burden of proof – [2018] IEHC 547 – 30/07/2018
Nestor v An Bord Pleanala

Statutory instruments
Planning and Development (Amendment) Act 2018 (commencement) order 2018 – SI 436/2018
National oversight and audit commission (number of members) order 2018 – SI 442/2018

PRACTICE AND PROCEDURE

Right of audience – Representation – Exceptional circumstances – Appellant seeking to be represented in proceedings before the Superior Courts by a person who is not a lawyer with a right of audience – Whether exceptional circumstances had been established – [2018] IESC 49 – 18/10/2018
Allied Irish Bank plc v Aqua Fresh Fish Ltd
Striking out proceedings – Cause of action – Abuse of process – Applicant seeking an order dismissing or striking out the respondents' proceedings – Whether the proceedings disclosed a cause of action against the applicant – [2018] IEHC 526 – 23/03/2018
Byrne v National Asset Management Agency
Withdrawal of proceedings – Wardship orders – Proliferation of proceedings – General solicitor seeking to withdraw appeal – Whether general solicitor was entitled to withdraw appeal – [2018] IESC 48 – 09/10/2018
Coleman v Clohessy
Want of prosecution – Inordinate and inexcusable delay – Balance of justice – Defendant seeking an order dismissing the plaintiff's claim for want of prosecution – Whether the delay was inordinate and inexcusable – [2018] IEHC 556 – 31/07/2018
Gallagher v P.W. Shaw & Company Ltd
Want of prosecution – Inordinate and inexcusable delay – Balance of justice – Defendants seeking an order dismissing the plaintiff's claim for want of prosecution – Whether the delay was inordinate and inexcusable – [2018] IEHC 557 – 31/07/2018
Havbell DAC v O'Hanlon

Library acquisitions
Grave, D., Rowan, G., McIntosh, M. *Class Actions in England and Wales*. London: Sweet & Maxwell, 2018 – N370.2

Articles
Holmes, M. Stairway to heaven. *Law Society Gazette* 2018; (Nov): 30

PRISONS

Articles
Mulcahy, J. She sells sanctuary. *Law Society Gazette* 2018; (Oct): 32

PRIVACY

Library acquisitions
Moreham, N.A., Varuhas, J.N.E. *Remedies for Breach of Privacy*. Oxford: Hart Publishing, 2018 – N38.9

PROBATE

Library acquisitions
Clark, J., Ford, C., Learmonth, A. *Williams, Mortimer & Sunnucks: Executors, Administrators and Probate (21st ed.)*. London: Sweet and Maxwell, 2018 – N143

PROFESSIONS

Professional misconduct – Inquiry – Disciplinary committee – Applicant seeking confirmation of its decision to remove the respondent from the Register of Teachers – Whether the applicant's decision should be affirmed – [2018] IEHC 582 – 13/08/2018
Teaching Council Of Ireland v S.R.

PROPERTY

Preliminary issue – Residential Tenancies Act 2004 – Appeal out of time – Appellant seeking to appeal a determination order made by the respondent – Whether the appeal was out of time – [2018] IEHC 595 – 12/02/2018
Halbherr v Residential Tenancies Board

PUBLIC PROCUREMENT

Public procurement – Interpretation – Tender documentation – Applicant seeking to challenge the respondent's decision to award to another bidder a tolling operations contract – Whether the interpretation of the tender documentation put forward, relied upon and applied by the respondent was correct – [2018] IEHC 569 – 17/10/2018
Transcore, LP v National Roads Authority, operating under the name of Transport Infrastructure Ireland

REGULATORY LAW

Library acquisitions
Law Reform Commission. *Law Reform Commission Report on Regulatory Powers and Corporate Offences*. Dublin: Law Reform Commission, 2018 – L160.C5

REVENUE

Statutory instruments

Stamp duty (designation of exchanges and markets) (no. 3) regulations 2018 – SI 411/2018

SHIPPING

Statutory instruments

Merchant shipping (life-saving appliances) rules 2018 – SI 438/2018

SOCIAL WELFARE

Statutory instruments

Social welfare (consolidated supplementary welfare allowance) (amendment) (no. 5) (assessment of means) regulations 2018 – SI 390/2018

Social welfare (consolidated claims, payments and control) (amendment) (no. 7) (assessment of means) regulations 2018 – SI 389/2018

SOLICITORS

Articles

Mulligan, D. Burning bridges. *Law Society Gazette* 2018; (Oct): 42

STATISTICS

Statutory instruments

Statistics (monthly services inquiry) order 2018 – SI 431/2018

Statistics (retail sales inquiry) order 2018 – SI 432/2018

SUMMARY JUDGMENT

Loan agreement – Summary judgment – *Non est factum* – Plaintiff seeking summary judgment against the defendant – Whether the defendant was entitled to rely upon the defence of *non est factum* – [2018] IEHC 572 – 19/10/2018

Emberton Finance Ltd v Cronin

Banking and finance – Summary judgment – Plenary hearing – Plaintiff seeking summary judgment against the defendant – Whether the proceedings should be remitted to plenary hearing – [2018] IEHC 593 – 09/02/2018

National Asset Loan Management DAC v Anderson

Summary judgment – Credible defence – Loan facility – Plaintiff seeking summary judgment against the defendant – Whether the defendant had a credible defence – [2018] IEHC 563 – 11/10/2018

Promontoria (Arrow) Ltd v Mallon

TRANSPORT

Statutory instruments

Harbours act 2015 (Dún Laoghaire Harbour Company transfer and dissolution day) order 2018 – SI 391/2018

Road transport (operator's licence application) regulations 2018 – SI 398/2018

Pleasure craft (personal flotation devices and operation) (safety) (amendment) regulations 2018 – SI 400/2018

Road traffic (amendment) act 2018 (commencement) order 2018 – SI 405/2018

Road traffic (courses of instruction) (cars) (amendment) regulations 2018 – SI 406/2018

Road traffic (courses of instruction) (motorcycles) (amendment) regulations 2018 – SI 433/2018

Roads Act 1993 (classification of national roads) (amendment) order 2018 – SI 434/2018

Roads Act 1993 (classification of regional roads) (amendment) order 2018 – SI 435/2018

TRIBUNAL OF INQUIRY

Compensation – Hepatitis C Compensation Tribunal Acts 1997-2006 – Nervous shock – Appellant seeking compensation – Whether the appellant suffered 'nervous shock' within the meaning of s. 5 (3A) (a) of the Hepatitis C Compensation Tribunal Acts 1997-2006 – [2018] IEHC 578 – 09/08/2018

D.M. v Minister for Health and Children

Bills initiated in Dáil Éireann during the period October 4, 2018, to November 15, 2018

[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.

Dublin Transport Authority (Amendment) Bill 2018 – Bill 114/2018 [pmb] – Deputy Robert Troy

Finance Bill 2018 – Bill 111/2018

Freedom of Information (Oversight of the Office of the President) (Amendment) Bill 2018 – Bill 113/2018 [pmb] – Deputy David Cullinane

Irish Film Board (Amendment) Bill 2018 – Bill 117/2018

Just Transition (Worker and Community Environmental Rights) Bill 2018 – Bill 118/2018 [pmb] – Deputy Eamon Ryan and Deputy Catherine Martin

National Surplus (Reserve Fund for Exceptional Contingencies) Bill 2018 – Bill 116/2018

Residential Tenancies (Prevention of Family Homelessness) Bill 2018 – Bill 110/2018 [pmb] – Deputy Eoin Ó Broin

Thirty-Eighth Amendment of the Constitution (Neutrality) Bill 2018 – Bill 121/2018 [pmb] – Deputy Seán Crowe and Deputy Aengus Ó Snodaigh

Bills initiated in Seanad Éireann during the period October 4, 2018, to November 15, 2018

Farm Safety Agency Bill 2018 – Bill 115/2018 [pmb] – Senator Diarmuid Wilson, Senator Robbie Gallagher and Senator Paul Daly

Greyhound Racing Bill 2018 – Bill 109/2018

Health Service Executive (Governance) Bill 2018 – Bill 90/2018

Perjury and Related Offences Bill 2018 – Bill 112/2018 [pmb] – Senator Pádraig Ó Céidigh, Senator Michael McDowell, Senator Ian Marshall and Senator Victor Boyhan

Progress of Bill and Bills amended in Dáil Éireann during the period October 4, 2018, to November 15, 2018

Children's Health Bill 2018 – Bill 80/2018 – Committee Stage

Finance Bill 2018 – Bill 111/2018 – Committee Stage

Hallmarking (Amendment) Bill 2016 – Bill 111/2016 – Report Stage – Passed by Dáil Éireann

Health (Regulation of Termination of Pregnancy) Bill 2018 – Bill 105/2018 – Committee Stage

Mental Health (Renewal Orders) Act 2018 – Bill 98/2018 – Passed by Dáil Éireann

Public Health (Alcohol) Bill 2015 – Bill 120/2015 – Passed by Dáil Éireann

Progress of Bill and Bills amended in Seanad Éireann during the period October 4, 2018, to November 15, 2018

Copyright and Other Intellectual Property Law Provisions Bill 2018 – Bill 31/2018 – Committee Stage

Data Sharing and Governance Bill 2018 – Bill 55/2018 – Report Stage – Passed by Seanad Éireann

Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill 2017 – Bill 64/2017 – Report Stage

Traveller Culture and History in Education Bill 2018 – Bill 71/2018 – Committee Stage

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

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

Government Legislation Programme
http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Supreme Court Determinations – Leave to Appeal Granted
Published on Courts.ie – October 4, 2018, to November 15, 2018

S. v R. [2018] IESCDET 138 – Leave to appeal from the Court of Appeal granted on 11/10/2018 – (Clarke C.J., O'Donnell J., Charleton J.)

University College Cork – National University of Ireland v Electricity Supply Board [2018] IESCDET 140 – Leave to appeal from the Court of Appeal granted on 17/10/2018 – (O'Donnell J., Dunne J., Finlay Geoghegan J.)

I.F. v The Mental Health Tribunal and ors [2018] IESCDET 143 – Leave to appeal from the Court of Appeal granted on 17/10/2018 – (O'Donnell J., Dunne J., Finlay Geoghegan J.)

Word Perfect Translation Services Limited v Minister for Public Expenditure and Reform [2018] IESCDET 144 – Leave to appeal from the Court of Appeal granted on 23/10/2018 – (O'Donnell J., MacMenamin J., Charleton)

Sweeney v Ireland, The Attorney General and Director of Public Prosecutions [2018] IESCDET 146 – Leave to appeal from the High Court granted on 24/10/2018 – (O'Donnell J., Dunne J., Charleton J.)

Mungovan v Clare County Council [2018] IESCDET 147 – Leave to appeal from the Court of Appeal granted on 24/10/2018 – (O'Donnell J., Dunne J., Charleton J.)

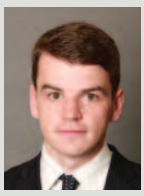
Green v Hardiman [2018] IESCDET 156 – Leave to appeal from the Court of Appeal granted on 26/10/2018 – (O'Donnell J., Dunne J., O'Malley J.)

M. v Minister for Justice and Equality and anor [2018] IESCDET 159 – Leave to appeal from the High Court granted on 30/10/2018 – (O'Donnell J., MacMenamin J., Charleton J.)

For up-to-date information please check the Courts website: http://www.courts.ie/Judgments.nsf/FrmDeterminations?OpenForm&l=en

The rule in *Browne v Dunn* – here to stay

Recent Supreme Court decisions have affirmed the applicability of the rule in *Browne v Dunn* in Irish law.



Hugh McDowell BL

In general, a party who intends to call evidence to contradict the testimony given by a witness in examination-in-chief should put that evidence to the witness during cross-examination so that he or she has an opportunity of providing an explanation in relation to that evidence.[1] This is known as the rule in *Browne v Dunn*,[2] and was explained by Halsbury L.J. as follows:

"To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to".[3]

In an article in this publication in April 2006,[4] one practitioner suggested that the rationale and origins of the rule are suspect and open to criticism. However, the applicability of the rule as a component of Irish law has been affirmed by the Supreme Court in two recent decisions: *McNamee v Revenue Commissioners* [2016] IESC 33 and *McDonagh v Sunday Newspapers Limited*

"To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity often to defend their own character".

[2017] IESC 46. The 2006 article provides a detailed and thorough account of the origins of, and justifications for, the rule in *Browne v Dunn*, and little would be achieved by restating those here. Rather, the purpose of this article is to examine the position of the rule in modern Irish law in light of those recent Supreme Court decisions. It will be seen that the Supreme Court has refused to impose an absolute obligation on a party to cross-examine a witness on particular evidence, but has warned of the consequences that may arise from a failure to do so.

McNamee v Revenue Commissioners

In *McNamee*, the Supreme Court heard an appeal of a judicial review concerning the liability of a taxpayer to capital gains tax for disposals effected by him and his wife in 2007. The taxpayer invited the Supreme Court to depart from a finding of fact made by the High Court that a particular official of the Revenue Commissioners had knowledge of a specific transaction by August 22, 2011. He argued that inferences could be drawn from certain documentation, which would have the effect of contradicting the affidavit evidence submitted by officials from the Revenue Commissioners. In response, the Revenue Commissioners argued that those officials had never been cross-examined in relation to the documents or the inferences allegedly arising therefrom (even though they were available at the trial for cross-examination), and that to impugn their evidence as to fact without such cross-examination was in breach of the rule in *Browne v Dunn*.

Having considered the relevant extracts from *Browne v Dunn*, as well as the treatment of the rule in McGrath's *Evidence*,[5] Laffoy J. was critical of the failure of the taxpayer to cross-examine:

"For the High Court, on a judicial review application, to be faced, on the one hand, with an affidavit sworn by a person whose decision it was sought to have quashed, in this case, the Nominated Officer, in which he averred clearly and unambiguously that the earliest date on which he had knowledge of the relevant transaction was August 22, 2011 and, on the other hand, with reliance by the person seeking to have the decision quashed, in this case the Taxpayer, on a paper record obtained on discovery, which it was contended was at variance with that averment, is, and it was in this case, most unsatisfactory, particularly, when the deponent, the Nominated Officer, was present in Court and was available for cross-examination. Not only that, but it seems to me that there would have been a serious risk of inherent injustice to the Nominated Officer and to the other deponents whose evidence was adduced on behalf of the Revenue Commissioners, if inferences were to be drawn which were adverse to, or contradicted, the affidavit evidence, given the very limited evidential status of the documentary record and, in particular, that it was not admitted as proof of the contents thereof. That risk would have been compounded by the absence of cross-examination, particularly given the fact that each of the deponents was available for cross-examination, but none of them was given an opportunity to comment on or explain the contents of the documents".[6]

The Supreme Court ultimately held that the trial judge's finding of fact in relation to the Revenue official's date of knowledge of the transaction was sustainable in light of the evidence, and the court's overall decision did not turn on the operation of the rule in *Browne v Dunn*. It nevertheless confirmed that the rule remained part of Irish law, though its precise status and scope were not explored in any detail.

McDonagh v Sunday Newspapers Ltd

That exploration did, however, take place almost exactly 12 months later when the Supreme Court delivered judgment in *McDonagh v Sunday Newspapers Ltd*. In that case, the Court of Appeal had overturned the verdict of a jury in the High Court that the appellant had been defamed by the *Sunday World* newspaper, which had alleged that the appellant was a drug dealer. The Court of Appeal's decision, in turn, was appealed to the Supreme Court, where one of the issues in controversy was whether the appellant adequately challenged, through cross-examination, the Garda evidence given at trial to the effect that the appellant had a bad reputation. Furthermore, the appellant's case throughout the trial and the appeal had been that notes of interviews that he allegedly gave while in police custody were, in fact, fabrications. However, the evidence given by the Gardaí in relation to the alleged interviews went unchallenged by the appellant's counsel in cross-examination.

In his judgment for the majority (Denham C.J., O'Donnell, Dunne and O'Malley J.J. concurring), Charleton J. outlined the requirements imposed by the rule on a party to litigation. In broad terms, those requirements will vary depending on the nature of the trial. However, there was, at a minimum, an obligation on the appellant to have his counsel put his "core instructions" to the relevant Garda witnesses in cross-examination.[7] Though the failure to do so was unsatisfactory, it was held that the "satisfactoriness" of the trial needed to be looked at in the round: "It was clear, despite the unsatisfactory nature of the approach to cross-examination by counsel for Martin McDonagh, what case was being made".[8] On that basis, Charleton J. upheld the verdict of the jury.

The judgment of McKechnie J. (O'Donnell J. and McMenamin J. concurring), which dissented from the majority in relation to issues beyond the scope of this article, struck a more cautious note, warning against giving the rule "the prominence which some suggest, of letting the rule dominate the result rather than letting the facts dominate the outcome".[9]

In his view: "What the rule is truly focused on and what it seeks to achieve is to ensure that evidence intended to be impugned is put in issue in a manner or way, whatever that might be, which conveys to all parties and the relevant witnesses that such evidence is being challenged".[10] The rule cannot supplant the critical function of a lawyer in deciding whether, and to what extent, certain lines of questioning should be pursued, and a trial judge should therefore "be

ever so vigilant so as to ensure that the case is decided, whether by him or her or by a jury, on the evidence produced, disregarding legitimate tactics or strategic moves when taken".[11] He concluded:

"To that end, I am satisfied that there is no rule of law which compels a party to cross-examine a witness before impeaching the credibility of such witness. I think the judgment of Lord Morris in *Browne v Dunn* is correct when he cautions against the establishment of any hard and fast rule which makes it obligatory to directly and overtly challenge such evidence before calling its integrity into question".[12]

The analysis of McKechnie J. provides a number of useful conclusions in relation to the rule. Firstly, the rule categorically forms part of Irish law.[13] Secondly, its purpose is to afford fairness to the witness whose evidence is to be impugned by either side, rather than to assist either party to the litigation.[14] It protects a witness whose truthfulness or credibility is criticised by affording them the opportunity to respond to, or reject, that criticism. Thirdly, it does not oblige the trier of fact to accept unchallenged evidence unconditionally, but unchallenged evidence may naturally carry greater weight than that evidence which is challenged in cross-examination.[15] Fourthly, whether the rule is a principle or a rule, and/or whether it is a rule of law or a rule of good practice, is unclear.[16]

Analysis

What are the obligations placed on a practitioner by the rule? If it is not strictly necessary to cross-examine a witness whose evidence or credibility one intends to impugn, to what extent, and how, is a practitioner expected to put that evidence in issue? In light of the judgments in *McNamee* and *McDonagh*, it is submitted that the following general principles flow from the rule's position in Irish law.

Firstly, though there may not be a concrete rule mandating cross-examination of a particular witness, it is good practice for an advocate to put their client's case to any witness whose evidence as to fact materially contradicts that case. The scope of such cross-examination will depend on the issue in dispute, and should at the very least consist of the "basic elements"[17] of the cross-examiner's client's case being put to the impugned witness. Only the nature of the proposed contradictory evidence and its significant aspects need be put; it does not require the cross-examiner to "slog through a witness's evidence-in-chief putting him on notice of every detail the defence does not accept".[18]

The justification for this proposition is obvious. If a judge or jury is asked to disregard a witness's evidence, or to prefer an alternative factual narrative, without the impugned witness having been given the opportunity to defend their testimony, two problems arise. The impugned witness is left exposed to the risk that their evidence will be rejected as unreliable or untruthful by the trier of fact, without being allowed to defend themselves. Furthermore, the trier of fact is asked to choose between two competing narratives without hearing the impugned witness's view of the alternative narrative and observing their comportment under cross-examination.

Secondly, the rule in *Browne v Dunn* cannot justify judicial interference with a practitioner's legitimate strategy in litigation. In the words of McKechnie J., "every lawyer worthy of his retainer will have a tactical view or game plan as to how best to advance his client's case, which in both honour and duty he is bound to do".[19] However, that is not to say that pursuit of a particular strategy will not be without consequences. A party may be restricted from giving alternative evidence during direct examination, or forced to recall the impugned witness at a later stage in the trial. A more extreme remedy for a breach of the rule is a prohibition on the party in breach from arguing that the impugned witness (who has not been cross-examined) should not be believed, as occurred in *Browne v Dunn* itself.

Thirdly, failure to cross-examine a witness will not render the course of the trial unfair if it is clear from the general manner in which the case has been conducted that the evidence will be contested.[20] If a practitioner does not engage in a meaningful cross-examination of a witness, he or she must nevertheless make clear – to the judge (and, in applicable cases, the jury) and to the relevant witnesses – whether particular evidence is in controversy or at issue in the proceedings. The means by which that will be conveyed will naturally vary depending on the nature of the case.

Browne v Dunn in non-adversarial settings

In the second interim report of the Charleton Tribunal, relating to the complaints of Garda Keith Harrison, Mr Justice Charleton cited the Supreme Court decisions in *McNamee* and *McDonagh* and stated:

"The work of a tribunal would be made easier were represented parties to bear in mind that, firstly, it is the tribunal that is enquiring and not them and that, secondly, they have an absolute and inescapable duty to put to witnesses concerned with their reputation any contrary case that they will state in evidence when their turn comes. The work of a tribunal is not a wide-ranging and unfocused exercise. Parties will have points of view that they wish to air, conclusions which they feel that the tribunal should pursue and factual contradictions which run counter to particular witnesses' testimony or points of view. It is required that these be made clear. A public enquiry is not a place for shyness or for holding cards close to the chest. Parties' counter allegations, in particular, must be put. That is the rule in every civil and criminal case and it cannot be shied away from".

It is submitted that the rule in *Browne v Dunn* can, and should, apply to non-adversarial settings, albeit with certain modifications.

It must be borne in mind that a tribunal of enquiry does not impose evidential burdens on parties to it; in fact, there are no parties to such a tribunal – merely witnesses.

A witness to a tribunal is not engaged in an adversarial process and does not necessarily have a 'case', which it wishes for the tribunal to accept or which it must put to another witness. That being said, where a witness to the tribunal gives a narrative that is clearly and materially at odds with the narrative that will be given later by another witness, it would seem incumbent upon the latter witness's counsel to put his or her client's case to the former witness.

In addition, a distinction can be drawn between evidence as to fact and opinion evidence, both of which may be admissible in non-adversarial proceedings. The rule in *Browne v Dunn* must apply to factual evidence that is in dispute. However, where a witness gives opinion evidence that does

not align with the opinion of another witness, must that controversy be raised by counsel? It is submitted that the answer is no. There is a distinction between what Mr Justice Charleton referred to as "points of view" and "allegations". A tribunal is free to accept, reject, consider or dismiss the opinion evidence given by any witness before it, but it would be unnecessary and impractical to require that every difference of opinion as between witnesses is highlighted and contested by legal representatives.

Conclusion

The recent Supreme Court consideration of the rule in *Browne v Dunn* provides some clarity and certainty as to its current position in Irish law. Though the rule does not absolutely require that a witness is asked a particular question, a failure to do so may limit the evidential avenues available to a party later in the trial process. Accordingly, practitioners must be alert to the significance for their client of contrary and averse factual testimony being left unchallenged.

Reference

1. McGrath, *Evidence (2nd ed.)*. Round Hall; Dublin, 2014: 131.
2. *Browne v Dunn* (1893) 6 R. 67.
3. Ibid., pp. 76-77.
4. Kennedy, H. Putting the case against the rule in *Browne v Dunn*. *The Bar Review* 2006; 11 (39): 43.
5. McGrath, *Evidence (2nd ed.)*. Round Hall, Dublin; 2014: 131.
6. [2016] IESC 33, 35.
7. [2017] IESC 46, par 44.
8. Ibid, par 44.
9. Ibid, par. 53.
10. Ibid, par. 59 per McKechnie J.
11. Ibid, pars. 60-61.
12. Ibid, par. 62.
13. Ibid. par. 25.
14. Ibid, par. 32.
15. Ibid, par. 46. See also the judgment of Baker J. in *DPP v Burke* [2014] 2 I.R. 651.
16. Ibid, par. 52.
17. Ibid, par. 43.
18. *R. v Verney* (1993), 67 O.A.C. 279, par 28.
19. *McDonagh*, par. 60.
20. *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 at 236.

Doctors differ…

While the procedures followed when an employee is dismissed as a result of a medical opinion are different to those for cases of misconduct, employees still have the right to be treated fairly.*

Rosemary Mallon BL

Introduction

Arguably the greatest reliance that an employer will ever place on a doctor's opinion is when that doctor makes findings that have the consequential effect of terminating an employee's employment. In these types of cases, it is in reality the doctor who is making the decision as opposed to the employer.

When an employer dismisses someone for misconduct, it is undoubtedly the case that it is the employer making the decision. Most employers know or certainly ought to know the requirements of fair procedures and natural justice that must to be applied in a disciplinary process. However, when an employee's employment is terminated by virtue of a medical opinion, one must ask what rules should govern the assessment of the employee's health by that medical practitioner.

Do fair procedures apply?

The Supreme Court case of *Maria Fitzgerald v The Minister for Defence and others*[1] concerned an applicant from the Defence Forces who applied for judicial review seeking orders quashing decisions of the Medical Board. The applicant had been diagnosed with coeliac disease and the Board had recommended that she not be finally approved. As a direct result of this, the applicant was discharged from the Defence Forces. The applicant contended that the decision was, *inter alia*, irrational. The applicant was unsuccessful before the Supreme Court. Fennelly J. considered the requirement of fair procedures in the context of a medical decision that possibly could have an adverse impact on one's employment. He stated that fairness should be employed in the making of such a decision but that the level of fair procedures required was not the same as would be required of a disciplinary body. The Court held that the decision of the Medical Board "more or less automatically triggered the discharge of the applicant" and went on to hold:

"Since the Medical Board was charged with the responsibility of making a decision capable of affecting adversely the position of the applicant, it should undoubtedly perform its functions fairly. … It would be absurd, however, to suggest that the routine decisions of such bodies should be surrounded by an elaborate panoply of hearings, formal notices and independent representation. Obviously, the Medical Board is not, in any sense, a disciplinary body".

While *Fitzgerald* is a case of judicial review, similar views were expressed recently by Ní Raifeartaigh J. in the 2018 case of *Bus Átha Cliath – Dublin Bus v Claire McKevitt*.[2] This was a case heard by the High Court on appeal under the Unfair Dismissals Acts. The employee had been dismissed on the ground that she did not have the capability

to perform the work she was employed to do, namely driving a bus. Under Section 6(4)(a) of the 1977 Unfair Dismissals Act, a dismissal for the purposes of the Act shall be deemed not to be an unfair dismissal if the dismissal results wholly and mainly from the employee's incapability to perform work of the kind that he/she was employed to do. In *McKevitt*, the argument was made that the initial decision, which was reviewed by the Chief Medical Officer (CMO) of Dublin Bus, was not a properly conducted appeal. The review was a paper review of the employee's file and reports. In respect of this argument, the Court held:

"This is premised on a view that Ms McKevitt had some right of appeal from the decision of Dr Loftus. If there is such a right, then I would agree that the appeal may well have been deficient. However, I do not see where any such right of appeal arises. … I think it is more appropriate to consider the two-stage process (Dr Loftus' involvement, and Dr Whelan's subsequent review of the file) as a process involving a decision followed by a second opinion in relation to the decision, rather than a hearing and an appeal. The latter model is that which applies in a case of alleged misconduct where witnesses may be called and findings of fact made. This does not appear to me to be the appropriate model when the situation calls for expert medical assessment of an employee's fitness".

However, when an employee's employment is terminated by virtue of a medical opinion, one must ask what rules should govern the assessment of the employee's health by that medical practitioner.

It appears that the Court was of the view that the procedures required in cases where a medical judgement is being made about an employee's capability are different to those where it is a case concerning alleged misconduct by the employee. While *McKevitt* was an appeal under the Unfair Dismissals Acts, it is in line with the views expressed by Fennelly J., that decisions based on medical judgement are not to be treated by the courts in the same manner as disciplinary decisions. Indeed, this was further emphasised by Ní Raifeartaigh J. when she held:

"Insofar as there was a suggestion that the decision was in effect made by the CMO and not the HR department, I cannot see that there was any flaw in the system used by Dublin Bus in that regard. The duty rests on the employer, Dublin Bus, to ensure that the dismissal was not unfair. In a case where a judgment call has to be made as to whether someone's medical history renders them unfit for work, it seems to me sensible that the judgment call would be made by suitably qualified and experienced medical personnel. Again, it seems to me that this submission is based upon an attempted transplantation of the procedures that would be appropriate in investigating factual allegations of misconduct into a wholly different context".

These cases are authority for the proposition that the courts (whether in the context of a judicial review or indeed an unfair dismissal claim) do not require the same array of procedures to be adopted by a medical practitioner as would be required in a disciplinary process, even though that medical opinion may have the effect of ending an employee's employment.

It would be entirely incorrect, however, to interpret these cases as suggesting that medical assessments of employees do not attract fair procedures. It is clear from the judgment in *Fitzgerald* that fairness must be applied to the decision in the context of a judicial review. It is also clear that in the context of an incapability dismissal, certain procedures are required.

What procedures apply?

The case of *McKevitt*, referred to above, concerned a bus driver who was dismissed on the ground that she did not have capability to perform the work she was employed to do. Between 2009 and 2011 inclusive, Ms McKevitt took 140 days' sick leave. She had numerous and differing medical complaints for this period. From February 2012, she was on permanent sick leave until her employment ended in April 2014. In 2011, she reported a blackout and was referred to a falls and blackout unit. In February 2014, a final report was issued from this unit, which indicated that she was at low risk of re-occurrence and that the unit was happy for her to return to driving for personal and commercial use. The doctor in the CMO office of Dublin Bus ultimately recommended that Ms McKevitt be retired on grounds of ill health. Ms McKevitt wrote to the CMO of Dublin Bus attaching a letter from her GP. Her GP indicated in that letter, *inter alia*, that she felt that Ms McKevitt was fit to return to work.

The CMO then reviewed Ms McKevitt's file and formed the opinion that the decision to find her permanently unfit for public service bus driving, and a consequent recommendation of ill health retirement, was correct.

Ní Raifeartaigh J. referred to the 1990 High Court judgment of *Bolger v Showerings*,[3] where it was held that in a case involving dismissal for incapacity, the onus is on the employer to show:

1. That the incapacity was the reason for the dismissal;
2. That the reason was substantial;
3. That the employee received fair notice that the question of his/her dismissal for incapacity was being considered; and,
4. That the employee was afforded the opportunity of being heard.

The judgment in *McKevitt* sets out the numerous consultations that Ms McKevitt attended with the doctor[4] in the CMO office and the various medical reports considered. The Court held that there was an adequate opportunity for Ms McKevitt to put forward all the medical reports she wished for an alternative viewpoint to be heard. The Court also found that there was adequate notice given to Ms McKevitt that the question of her retirement on ill health grounds was being considered.

The case of *Nolan v The Irish Prison Service and The Minister for Justice and Equality*[5] did not concern the termination of employment. The applicant challenged a decision of the respondent refusing her benefit under a scheme for the treatment of occupational injury for a period she was absent from work. Ms Justice Baker in the High Court noted that the decision in question was based on the advice received from the CMO and went on to hold:

"It would patently have been unfair if the CMO had come to a decision and relayed this to the personnel officer, without reading or weighing up the evidence adduced by the applicant and without a personal consultation or consultations with her to more fully understand and assess her medical condition. This is not what happened here and there can be no complaint about the process engaged in by the CMO who had the full co-operation of Ms Nolan…".

The cases referred to above vary from an unfair dismissal claim to a challenge to a decision by way of judicial review. The cases suggest that all employees whose employment is under threat of termination due to a medical finding should be afforded the following basic rights:

A. The employee should be clearly put on notice that the decision is being contemplated and that the decision may have an effect of ending the employment relationship. It would always be preferable that this notification be in writing from the perspective of being able to prove same in any future proceedings.
B. The employee should be given the opportunity to put forward any medical evidence or opinion that they may wish. This should be considered and weighed carefully by the deciding doctor. The doctor should, if they feel it prudent, make contact with the authors of any medical report that appears to contradict the views of the deciding doctor.
C. The employee should be examined by the doctor who will make the ultimate finding at least once. It would seem advisable (based on the case law) that there should be more than one assessment, particularly if the employee provides contradictory medical opinion/reports.

What happens when doctors differ?

One important question that arises is what happens when the doctors differ, or there is conflicting medical opinion? This was an issue that was addressed in the *Fitzgerald* case. Fennelly J. held that decisions of medical boards are amenable to judicial review, but he went on to state: "I venture to suggest that the hurdle of irrationality will be a high one".

In that case there was a difference of medical opinion put forward in relation to the coeliac condition. The Court however made it clear that the requirement was one of irrationality in the context of judicial review and, as such, the Court did not evaluate the differences in medical opinion, holding:

"The decision of the Medical Board would be irrational if no reasonable body of persons performing the function of medical assessment which was performed in this case could have reached the decision they did. Put in that way, the applicant does not, in my view, come anywhere near discharging the required onus. The reasoning of Lt Colonel Monaghan, which I have quoted, seems perfectly reasonable and even plausible. Dr Cronin, of course, disagrees. He believes that it is perfectly possible for military personnel to serve, while following a gluten-free diet. But there is nothing irrational about disagreeing with him, particularly by assessing the implications of the coeliac condition for military service".

The judgment in *Fitzgerald* suggests that the courts (in the context of judicial review) will be very slow to interfere with a decision based on medical opinion. A decision is not irrational just because a different doctor has a different view. However, in the context of capability dismissals under the Unfair Dismissals Acts, the issue is not so clear.

In the *McKevitt* unfair dismissal case, the argument was made that a third opinion should have been sought on the basis that there was conflicting medical evidence. This was rejected by the Court, which held:

"Complaint was made on behalf of Ms McKevitt that Dr Loftus should have contacted the FABU again, or sought a third opinion, because there was "conflicting" medical evidence. I do not think that this was really a case of conflicting medical evidence. The evidence of Dr Loftus was that the decision was taken on the basis of the multifactorial nature of Ms McKevitt's health problems. … The issue of syncope was only one matter, albeit, of course, one which would raise serious alarm bells with regard to the job of bus driving, where public safety is paramount and the risk of blackout, even if very low, must be carefully considered and factored into the equation. However, it seems to me that the CMO's office was not so much disagreeing with the final FABU view, but rather weighing it differently in light of all the reports they had over the entire period and the reports made by Ms McKevitt herself to Dr Loftus".

It appears that the Court in *McKevitt* was influenced by the fact that the Court was not seeing a disagreement between doctors but more a difference in emphasis and weight. It is by no means certain that a court would come to a similar conclusion if two doctors were taking two entirely different views about the fitness of an employee in respect of one health issue. For example, if an individual had a heart condition and one specialist formed the view that this did not prevent him or her carrying out the work he or she was required to do and the other formed a contrary opinion, it would seem prudent that a third opinion be obtained. In this regard, most chief medical officers, or indeed company doctors, are occupational health specialists. This is, in and of itself, a unique specialty with its own training. An employee may well argue that his treating specialist (a cardiologist) is more suitably qualified to make a determination about his heart condition than an occupational health specialist. In such cases, it would be advisable to obtain a third opinion from a suitable specialist.

The case law suggests that a very high bar in the context of judicial review to prove a medical opinion is irrational. The bar may not be as high in the context of unfair dismissal proceedings where the reasonableness of the medical opinion may be challenged. The prudent course of action from an employer's perspective would be to be at least open to considering the need for a third opinion where there is a conflict of medical opinion.

Is it in fact a medical opinion?

While the courts in the context of judicial review proceedings may be slow to find a medical opinion by a medical practitioner to be irrational, the employer must be quite sure that what is in fact being decided is a matter of medical opinion.

In *Bennett v The Minister for Defence, Ireland and the Attorney General*,[6] the applicant was a member of the Permanent Defence Forces. His period of service came to an end and he was eligible to apply for an extension of his service. In order to be eligible for this extension, he had to undergo a medical review by a medical officer in the Medical Corps. One of the categories to be graded is "constitution". If an applicant for re-engagement receives a constitution grade of less than 1, he is deemed ineligible. The applicant was examined and received a constitution Grade 2. This had the effect of ending his service. He appealed this decision to the Medical Board. The Board upheld the decision. The applicant brought judicial review proceedings seeking, *inter alia*, an order of certiorari quashing the Board's decision. The medical officer who examined the applicant noted in his report the applicant's sick leave over the past five years. The medical officer examined him and could "not detect any abnormality at this time" but determined, given the history of sick leave, that he was unable to certify the applicant as Grade 1 and certified him as Grade 2. On affidavit, the Medical Officer set out the applicant's sick leave over a period of years and also gave details regarding the average sick leave of a member with a Grade 1.

The applicant produced medical evidence from a general practitioner that he was in

"perfect health". The applicant's case included the argument that the award of Grade 2, which applies to persons with minor impairments or disabilities, was irrational when it was common case that he had none.

Mr Justice Noonan was critical of the decision to classify the applicant as a Grade 2 based on his higher than average sick leave. The Court held:

"The other striking feature of the conclusion arrived at by Commander Murphy is that he could have arrived at the same conclusion without ever examining the applicant. The conclusion was entirely unrelated to the clinical examination conducted by Commander Murphy and indeed was in spite of it. … The same conclusion could surely have been arrived at by anyone carrying out the statistical exercise undertaken by Commander Murphy and it is difficult to see how his medical qualification and expertise had any bearing on it. Accordingly it does not seem to me that this was a matter of medical judgment at all in the sense discussed by Fennelly J. in Fitzgerald".

Mr Justice Noonan was critical of a decision based on a mere statistical analysis as opposed to a medical opinion based on an examination of the employee. An employer who makes a decision that has the effect of terminating an employee's employment based on a medical opinion must ensure that it is in fact a medical opinion. On a separate point, it is interesting to note that Mr Justice Noonan appeared to be sceptical of an approach whereby the applicant's sick leave was compared to the "average" and emphasised in his judgment the difficulties in calculating what was "average". He granted an order quashing the decision.

Conclusion

A medical assessment and the consequential medical opinion in relation to an employee is governed by fair procedures. Those procedures may be somewhat different to the extensive collection of rights an employee has in the context of disciplinary proceedings, but the employee still has rights. An employee is entitled to fairness.

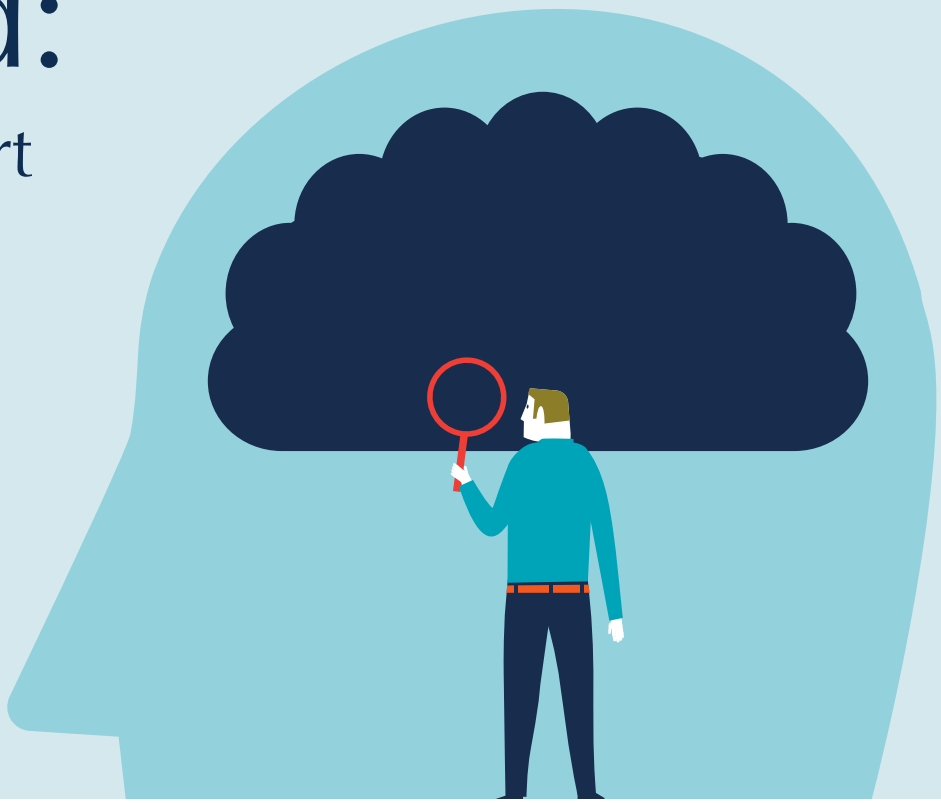
* *This is a synopsis of the paper delivered on November 23, 2018, at the EBA Employment Law Conference.*

Reference

1. [2003] IESC 57 – unreported.
2. [2018] IEHC 78 – unreported; judgment delivered on January 29, 2018.
3. [1990] ELR 184.
4. Who made the initial recommendation.
5. [2015] IEHC 101 – unreported judgment delivered on February 18, 2015.
6. [2015] IEHC 23.

Bailey revisited:

when will a court re-examine its own judgment?



A relatively recent decision of the Court of Appeal (in respect of which the Supreme Court has very recently declined leave to appeal) examines the circumstances in which the Court of Appeal will revisit a decision that it has already given but in respect of which final orders have yet to be made.

David Lennon BL

In the case of *Ian Bailey v The Commissioner of An Garda Síochána and others*, the Court of Appeal delivered a joint judgment (hereinafter the 'principal judgment') on July 26, 2017, dismissing the majority of the plaintiff/appellant's appeal but allowing the appeal in respect of a "minor" discrete aspect thereof and directing a retrial on this lone issue. The matter was thereafter adjourned to allow the parties time to consider the written judgment (which had been disseminated at the hearing) and the Court stood over the issue of final orders.

Following the principal judgment, the respondents apprehended that the court may have based its judgment, insofar as it related to the matter in respect of which a retrial was directed, on a mistake of fact, namely a mistaken characterisation of certain comments made by the trial judge. The respondents also took the view that there had been no admissible evidence led in the course of the original jury trial supporting the allegation that was to be the subject of the retrial.

The respondents drew their apprehensions to the attention of the court, which, in turn, invited submissions from the parties as to: a) the Court's jurisdiction to revisit the matter; and, b) the substantive issue as to whether the principal judgment was indeed premised on a mistake of fact and/or on a misunderstanding of the evidence led at the original trial. Written submissions were duly provided, in addition to which the Court heard oral submissions on the matter. On March 14, 2018, the Court delivered a further judgment (hereinafter the 'second judgment'), wherein it agreed

that the threshold was met for it to reconsider its earlier decision and wherein it reversed its earlier finding in favour of the plaintiff/appellant, with the result that his entire appeal was dismissed.

Jurisdiction

The Court of Appeal first considered the question of its jurisdiction. The respondents had relied on English jurisprudence as set out in the cases of *Re Barrell Enterprises*,[1] *Compagnie Noga D'Importation et D'Exportation SA v Abacha*,[2] and *Paulin v Paulin and another*[3] arguing that, whereas the *Barrell* case had put forward a test of "exceptional circumstances" before a decision should be revisited, the *Compagnie Noga* case tempered the criteria by preferring an apparently less stringent test of "strong reasons". The *Compagnie Noga* criterion was subsequently favoured by Clarke J. (as he then was) in the High Court in the case of *Re McInerney Homes Ltd*.[4] Having quoted extensively and with approval from *Paulin*, Clarke J. stated as follows:

"I also agree that the formulation suggested by Rix L.J. in *Cie Noga D'Importation et D'Exportation SA* (as approved by May L.J. in *Robinson v. Fernsby*) is a more appropriate description of the relevant test. In those circumstances, it seems to me that, in order for the court to exercise its jurisdiction to revisit a question after the delivery of either an oral or written judgment, it is necessary that there be "strong reasons" for so doing".

Later, in the concluding part of his judgment, Clarke J. stated: "However, in those circumstances it seems to me that the balance of justice does require that this matter be reopened". The matter may have benefited from a certain clarity had the learned High Court judge consistently deferred to the *Compagnie Noga* formulation thereafter. However, in a subsequent decision in the same case addressing the outcome of the review of the principal decision, the judge employed *Re Barrell* terminology without adverting to "strong reasons" (underlining added):

"The first point of note is that it is highly unusual for a court to revisit a written judgment after same has been delivered. In my view, in those circumstances, a court should be careful not to allow either party to seek to re-litigate matters which were already fully and fairly heard and determined at the hearing which led to the written judgment save only to the extent necessary to deal with the question or issue which led to the judgment being revisited. To permit such a course of action would be to court procedural chaos. Where, in exceptional circumstances, the court does allow a matter to be revisited, then the "revisiting" should be confined to whatever questions or issues led the court to consider that the interests of justice required such a revisiting to occur in the first place. No wider latitude should be permitted".

Appeal

The collective decisions of Clarke J.[5] were appealed to the Supreme Court where O'Donnell J., delivering the majority judgment,[6] affirmed the High Court decisions. However, it is suggested that in the wake of the judgment, there was still a certain amount of confusion as to the applicable test in the High Court. In particular, the Court failed to recognise or address Clarke J.'s stated preference for the *Compagnie Noga* formulation. At paragraph 17 of the judgment, O'Donnell J. stated as follows (underlining added):

"The High Court judge then had to consider whether or not he would reopen the hearing. He delivered his third judgment on January 21, 2011. He adopted the analysis set out in the decision of the UK Court of Appeal in *Paulin v Paulin* [2010] 1 W.L.R. 1057 on the circumstances in which a court can reopen a hearing after delivery of judgment, and concluded that he could do so in exceptional circumstances".

Later in the judgment, at paragraph 62, O'Donnell J. opined as follows:

"The trial judge referred to the judgment of the Court of Appeal of England and Wales in *Paulin v Paulin* [2010] 1 W.L.R. 1057 and considered that this satisfied the criteria set out therein and that it was an exceptional case which justified a rehearing limited to the question of the likely outcome of any NAMA acquisition of the loans of Anglo and Bank of Ireland. I entirely agree with the judge's conclusion that it was necessary to reopen the issue. It is not necessary to express any view on the criteria set out in *Paulin v Paulin*. Once the trial judge observed that he himself had assumed that there was no longer any prospect of NAMA acquiring the loans, and that that assumption was based upon the somewhat artificial way in which the banks had approached the matter, then, in my view, he was entitled, and indeed arguably obliged, to reopen the matter. If indeed it was the case that the NAMA acquisition of the loans of Bank of Ireland and Anglo was imminent, then it could be said that the hearing, and indeed the judgment, had proceeded almost on a basis of common mistake and that justice required that the matter should be reconsidered".

The references to Clarke J.'s view that the test required to be met was the presence of "exceptional circumstances", and to the High Court judge's view that the matters before him amounted to "an exceptional case", cause some difficulty, given that Clarke J. had, in his earlier decision, expressed a preference for the *Compagnie Noga* formulation over the *Barrell* formulation, and given that the High Court judge had satisfied himself that there were "strong reasons" for him to reopen the hearing. However, this difficulty clearly derives from Clarke J.'s own reversion to the *Barrell* terminology in the latter of the two judgments quoted above. In any event, O'Donnell J. clearly felt it unnecessary to address the matter directly or in greater depth in circumstances where, it would appear, the threshold would have been met on either formulation.

For this reason, perhaps, the Court of Appeal in the *Bailey* case, to which the foregoing case law was opened, concluded as follows:

"Even as such it does not appear, with respect that it can be said that there is a clear determination in this jurisdiction as to whether the High Court if asked to revisit an issue already decided in a written judgment but before the relevant order is perfected must be satisfied that there are "exceptional circumstances" or "strong reasons" which warrant it doing so. It may be that nothing turns on either phraseology".

Primary submission

After making the foregoing observations, the Court of Appeal addressed the appellant's primary submission, namely that, in the context of a request to the Court of Appeal to revisit its decision (as distinct from a request made of the High Court), different principles should apply. The appellant argued that, given the very limited circumstances in which a decision of the Court of Appeal will be capable of appeal to the Supreme Court, the jurisprudence relating to circumstances in which the

Supreme Court will see fit to revisit one of its own judgments prior to final orders should apply equally to the Court of Appeal.

The appellant relied on the case of *Re Greendale Developments (Ltd)*,[7] wherein Hamilton C.J., in declining an invitation to revisit a previous perfected decision of the Supreme Court, did envisage of the possibility that same might be warranted in certain circumstances:

"The common law and public policy recognised the desire for finality in proceedings *inter partes*, and Article 34.4.6 of the Constitution incorporated into the Constitution this desire and expressed it in clear and unambiguous terms. It provided that the decision of the Supreme Court shall in all cases be final and conclusive. The said provision is expressed to apply in all cases and there is nothing in the circumstances of this appeal which would justify disregarding the said provision".

In her concurring judgment, Denham J. (as she then was) considered that there may be circumstances where, despite the terms of Article 34 (which expressly provides for the finality and conclusivity of Supreme Court decisions), the Court may be justified in re-visiting a final judgment or decision where not to do so might imperil fundamental rights, including the right to fair procedures. She concluded as follows (underline added):

"The Supreme Court has jurisdiction and a duty to protect constitutional rights. This jurisdiction may arise even if there has been what appears to have been a final order. However, it will only arise in exceptional circumstances. The burden on the applicants to establish that exceptional circumstances exist is heavy. The second issue for determination is whether the applicant has successfully invoked this special jurisdiction. The Court has a duty to protect constitutional rights, including fair procedures, in its own court. This inherent jurisdiction arises in exceptional cases to protect constitutional rights and justice".

It is important to note that in the *Greendale* case, the Court was being invited to revisit a decision in which final orders had already been made, inevitably thereby giving rise to a higher threshold. The appellant in the *Bailey* case also relied upon the decision of the Supreme Court in the case of *Abbeydrive Developments Ltd v Kildare County Council*[8] where no final order was yet in being. In that case, Kearns J. (as he then was) made reference to the need to demonstrate "special or unusual circumstances" or "exceptional and unusual circumstances", and reference was also made to the need to "do justice". That court referred to the *Greendale* decision, somewhat diluting the significance of the distinction between cases where final orders have been made and cases where they have not. Finally, the attention of the Court of Appeal in *Bailey* was also brought to the decision of O'Donnell J. in the case of *Nash v DPP*,[9] wherein the jurisdiction of the Supreme Court to revisit its own decision prior to the drawing of final orders was again considered:

"The requirement of finality in litigation is not therefore the product of judicial decision or statute. It is encapsulated in the provisions of the Constitution which establishes this Court and which it is bound to uphold. That imposes constraints upon the Court when it is invited to alter or set aside its decision. On the plain words of the Constitution it is not permitted and the court is obliged to uphold both the text and the values it espouses. Notwithstanding the apparently all-embracing terms of Art. 34.4.6, there is however an exceptional jurisdiction to revisit a judgment of this Court which is otherwise entitled to finality. The justification for this is perhaps the fundamental constitutional obligation of this Court to administer justice which is in unqualified terms and is the governing principle of Art. 34. Any tension between these two provisions may perhaps be reconciled by considering that where by reason of judicial error or some other extraneous consideration, it is plain that the outcome of the case cannot be said to be the administration of justice for the purpose of Article 34 then it cannot be said to be a 'decision' for the purposes of Art. 34.4.6".

Later, O'Donnell J. provided certain guidelines for the application of the exceptional jurisdiction by quoting from the decision of Murray C.J. in the case of *DPP v McKevitt*:[10]

"Firstly the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant".

In *Bailey*, the Court of Appeal noted that it was not a court of final appeal as such; however, equally it conceded that there was no automatic right of appeal from its decisions and that, unless and until the Supreme Court grants leave to appeal, its decisions are "final and conclusive" in a similar manner to those of the Supreme Court. The court continued this reasoning in the following terms:

"Hence except, possibly, in the case of a decision on a question which obviously meets the constitutional threshold it seems appropriate that the Court of Appeal consider an application, such as this, upon the basis that its decision may be final and conclusive. In summary, whilst the Court of Appeal is not a court of final appeal as such its judgment or decision on any individual appeal may be the final and conclusive judicial decision on the disputes in question and litigation between the parties. It therefore appears that the principles set out by the Supreme Court, most recently summarised by O'Donnell J. in *Nash* (with which part of his judgment Denham C.J., Clarke J., Dunne J. and Charleton J. concurred) are the applicable principles and this Court should follow closely the approach taken by the Supreme Court in those judgments allowing for the different factual contexts and nature of the errors identified".

The Court, having cited the passage from *McKevitt* quoted above, concluded as follows:

"Applying the above to the different constitutional position of the Court of Appeal means that there is, notwithstanding Article 34.4.3, an exceptional jurisdiction to revisit a judgment of this Court which is otherwise entitled to finality where it is considered necessary to do so to comply with the constitutional imperative to administer justice. Whether that threshold is met will depend upon the relevant facts".

In the *Bailey* case, the Court of Appeal was satisfied that it had made an error the consequences of which may include "a denial of justice in the sense of a denial of fair procedures". As such, it was satisfied that exceptional circumstances had been demonstrated and that it should accede to the request to revisit its judgment.

With regard to the substantive issue, the principal judgment had directed a retrial on the question as to whether the defendants had been guilty of the unlawful disclosure of information contained in witness statements to certain media outlets in or around the time of the plaintiff's separate Circuit Court libel actions against various newspapers in 2003 (hereinafter the 'unlawful disclosure issue'). The court, in the principal judgment, quoted a statement made by the trial judge, expressly describing it as a "ruling". The statement conveyed the trial judge's view that there was probably "just about something for the jury to decide" on the unlawful disclosure issue. On the basis of this statement, the Court of Appeal concluded that the trial judge was wrong to exclude the unlawful disclosure issue from the jury by reference to the operation of the Statute of Limitations.

The respondents, relying on the transcript of the trial, argued that the statement made by the trial judge did not amount to a ruling, particularly given that the respondents/defendants had not yet been heard on the issue by the trial judge at the time.

The respondents maintained that no ruling in the terms quoted by the Court of Appeal, i.e., to the effect that there was sufficient evidence adduced subtending the claim to allow the matter to go to the jury, had been made. The respondents further argued that the unlawful disclosure issue had, in fact, been withdrawn from the jury by the trial judge on the basis of a deficit of evidence and not by virtue of the application of the statute. Again, the respondents relied heavily on the transcript of the trial in support of this argument.

The Court of Appeal, in the second judgment, accepted that it had mischaracterised the statement of the trial judge as a 'ruling' and that, on the basis of this incorrect assumption that a ruling had been made as to the sufficiency of evidence, the Court of Appeal had, again incorrectly, assumed that the matter had been withdrawn from the jury by reference to the Statute of Limitations. The Court went on to conduct a detailed review of the evidence led in the course of the trial on the unlawful disclosure issue and concluded that no admissible evidence had been proffered on the matter. Arising from this conclusion, the Court felt compelled, "in the interests of justice", to reverse that part of its original decision that had allowed part of the appellant's appeal, with the result that the plaintiff's entire appeal was dismissed.

The appellant sought leave to appeal to the Supreme Court in respect of a number of matters including in relation to the question as to whether the Court of Appeal was entitled to revisit and reverse part of its judgment. In declining to grant leave to appeal in respect of all grounds advanced, the Supreme Court, in a written determination of October 26, 2018, stated as follows with regard to the question of revisiting the earlier decision:

"The third issue raised on behalf of the applicant concerns the circumstances in which a Court of Appeal judgment may be reconsidered and set aside. This issue arose in circumstances where the Court of Appeal accepted its judgment of March 14, 2018, acknowledged an error in paragraph 50 of the judgment of the Court of Appeal in these proceedings on July 26, 2017. The applicant has submitted that the general public interest would be served by this Court providing definitive guidance on the extent to which the Court of Appeal may consider one of its own previously decided judgments prior to final orders being drawn up. It is somewhat surprising that this is raised as an issue said to give rise to the necessity of an appeal on the grounds of the general public interest in circumstances where the parties agreed that the Court of Appeal did have jurisdiction to revisit an issue decided in a written judgment before the order envisaged by the judgment was drawn up and perfected. It is the case that there was some dispute as to the criteria to be applied and the threshold to be reached before the Court of Appeal would exercise the jurisdiction to revisit the decision made. However, it is clear that the decision of the Court of Appeal in this respect applied well-established law and principles and accordingly, this issue does not give rise to any issue of law of general public importance such as would justify an appeal to this Court".

Conclusion

In conclusion, the following principles can be drawn from the case law as guidance where one seeks to request a court to revisit its judgment in advance of the perfection of that order:

- notwithstanding Clarke J.'s express preference for the latter formula in his judgment in the High Court, it is unclear whether the threshold applicable to warrant the revisiting of a judgment of the High Court is the need to establish "exceptional circumstances" or merely "strong reasons";
- it may be that nothing turns on either phraseology;
- in terms of decisions of the Court of Appeal wherein it is not obvious that an appeal to the Supreme Court will lie, the test applicable in the Supreme Court per the *Nash* case is equally applicable in the Court of Appeal, namely a test which requires the demonstration of exceptional circumstances and where the jurisdiction will only be exercised where it is necessary to do so to comply with the constitutional imperative to administer justice;
- in terms of decisions of the Court of Appeal where it is obvious that an appeal to the Supreme Court will lie, it would seem that the High Court test will apply, whatever precisely that may be;
- the overriding principle is the need to take such course of action as is in the interests of justice; and,
- this latter principle will be engaged where it can be objectively demonstrated that there is a substantive issue concerning a denial of justice in the proceedings, which can only be addressed if the judgment is revisited.

Reference

1. [1973] 1 WLR 19.
2. [2001] 3 All ER 513.
3. [2010] 1 WLR 1057.
4. [2011] IEHC 25.
5. Four decisions in total, relating to the principal order, to the decision to reopen the principal order, and to the outcome of that revisiting.
6. Fennelly and Macken J.J. dissented, though they did not demur on the point under consideration here.
7. [2000] 2 IR 514.
8. [2010] 3 IR 397.
9. [2017] IESC 51.
10. [2009] IESC 29.

Tweet nothings

Practice direction SC18 seeks to control and limit the use of electronic devices in court, but does it go far enough?

Paul O'Higgins SC

On November 26, 2018, practice direction SC18 came into force. It was signed by the Chief Justice and the Presidents of the other Courts, and applies in all of them. Its purpose is to control the recording of court proceedings on electronic devices and to prohibit their use subject to certain exceptions.

Order 123 of the Rules of the Superior Courts and its equivalents in the Circuit and District Court Rules restrict and regulate the making of a record of court proceedings otherwise than by written or shorthand notes. 'Electronic device' is broadly defined and includes "any device capable of transmitting and/or recording data or audio or video".

The rules

SC18 expands on the Rules and clarifies them. Paragraph 6 strictly prohibits the taking of photographs, and transmission by video or television of court proceedings except with permission of the President of the court.

Paragraph 7 forbids electronic recording of proceedings other than by or on behalf of the Courts Service except with the permission of the presiding judge or judges.

Making a written or shorthand note is generally permitted.

Paragraph 8 allows practising members of the legal profession, professional legal commentators and *bona fide* journalists silently to text live from a court subject to conditions and on the basis that they will not prejudice proceedings in that or another court. All others are prohibited from texting without the court's permission.

Paragraph 8 clarifies an issue that has arisen where judges have sometimes baulked at taking steps to restrict immediate reporting of events in their court in order to protect the integrity of trials in other courts where they were not presiding.

Paragraph 10 permits those in attendance to take silent notes on electronic devices unless, in the judge's opinion, it would be disruptive.

Paragraph 13 provides sanctions for infringement. These include directions to desist from use, expulsion from the court, temporary surrender of the device, and surrender of any recorded material the court may direct.

The issues

The direction is a welcome measure insofar as it attempts to make explicit regulation for matters that are only addressed in generalities by the Rules. SC18 may provide a sounder basis for taking action against those who would seek to warp or distort court proceedings by inappropriate activity.

There has been debate over the years about televising court proceedings. On balance it has not been considered a good idea. The pressures on parties and witnesses who are already giving evidence in an unfamiliar and often intimidating setting would be multiplied. The attraction for the exhibitionist – lawyer, party or witness – would do nothing for the integrity of the process. This debate has tended to take place against an expectation of coverage by big media organisations, which could, where necessary, be made accountable for their actions. Standards could be imposed and exclusion from coverage could follow from a breach.

In an age where every individual has the potential to be a virtual TV station, able to reach an audience of hundreds of thousands or millions almost instantly, the capacity to damage the cause of justice is obvious. Video coverage could be used to intimidate and embarrass those involved in court. Pressure exerted by ridicule or inflammatory comment in relation to evidence could seriously undermine the willingness of witnesses to come forward.

Inevitably, such coverage would often be selective, partial and distorted with the defeat of real justice as its object. The quality of justice, still more its public perception, would be liable to suffer. Courts in the State have in recent years experienced unprecedented levels of deliberate and contemptuous obstruction. It is timely to take steps to clarify the courts' powers and policies.

This begs the question whether the matter is best left to practice direction. Trends elsewhere towards prescription by law in matters of contempt have been eschewed in Ireland. Regulation by practice direction arguably gives the courts greater flexibility in defending the administration of justice than legislation. However, the Irish *ad hoc* approach to contempt has also had its critics and the law of contempt in the UK has long been codified by statute.

Questions remain: does the practice direction provide a sufficient legal basis for the exercise by a court of its powers? How does a court confiscate a device temporarily? How does it find out what has been recorded? How does it get a password? In light of the issues raised in the recent CRH case in the Supreme Court, how does it 'search' a device that may contain huge volumes of personal data in the era of GDPR? Lastly, does a practice direction, ordinarily directed to lawyers, effectively notify the public, who are equally affected by it?

Perhaps statutory intervention is required.