THE BAR
REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

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GUARANTEES GUARANTEED

COMING SOON

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Companies Acts 2014: 2017 Edition

The redrafting of the Companies Acts 1963–2012 ushered in significant changes to Irish company law and all company law practitioners and company law students in Ireland will need to be up to speed with the new Act's provisions.

In this new edition, the Companies Act 2014 is updated to account for all changes to it, up to and including the Companies (Accounting) Act 2017.

Amending Acts include:

- Companies (Accounting) Act 2017 (9/2017)
- Finance (Certain European Union and Intergovernmental Obligations) Act 2016 (13/2016)
- Credit Guarantee (Amendment) Act 2016 (1/2016)
- Legal Services Regulation Act 2015 (65/2015)
- Harbours Act 2015 (61/2015)
- National Cultural Institutions (National Concert Hall) Act 2015 (44/2015)
- Workplace Relations Act 2015 (16/2015)
- Irish Collective Asset-management Vehicles Act 2015 (2/2015)

The Companies Act 2014 has also been updated by a large number of statutory instruments and these changes have been incorporated into this new edition.

The Companies Act 2014: 2017 Edition is the only fully consolidated, single-volume, hard-copy edition of this Act.

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2nd Edition

Paul A McDermott

Contract Law, Second Edition is a comprehensive account of Irish contract law and contains all of the developments since the first edition was published in 2001.

This edition contains two new chapters as follows:

- How to successfully make contracts
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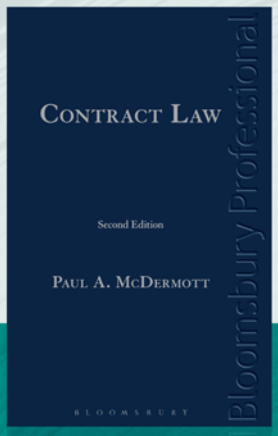
The law relating to contracts is set out and explained under clear headings and in straightforward language. In addition, every major Irish case on contract law is considered. Particular emphasis is placed on practical matters such as the construction of contracts, breach of contract and contractual remedies.

Also includes a large number of new cases from the High Court, Court of Appeal and Supreme Court on every area

Written by a practitioner who is also an academic, this book sets out the principles and case law in a clear and structured manner with easy to use headings.

Practitioners, students and anyone who has to deal with contracts in the course of their work will benefit from this most welcome new edition.



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Appointments and representations

As the legal year comes to an end, The Bar of Ireland continues its work on behalf of members.

New Attorney General

Seamus Woulfe SC was recently appointed as Attorney General. The new Attorney has given of his time for many years to assist and help the Council. He has chaired a number of committees, including Library and Finance, and until recently served as Vice-Chairman. We sincerely congratulate him and wish him the very best in his new role.

Representing and promoting the Bar

The Government has recently published draft legislation to further update the Personal Injuries Assessment Board (PIAB) system. The Council has been engaging with this and related issues over the past year. Since the Oireachtas Committee hearings in September 2016 into motor insurance costs, the Joint Committee on Finance, Public Expenditure and Reform published a report on 'The Rising Costs of Motor Insurance'. There followed the establishment of a group headed by former High Court President Kearns, which is tasked with the obligation to present a report as soon as possible. The Bar will continue to agitate on this issue.

Judicial appointments

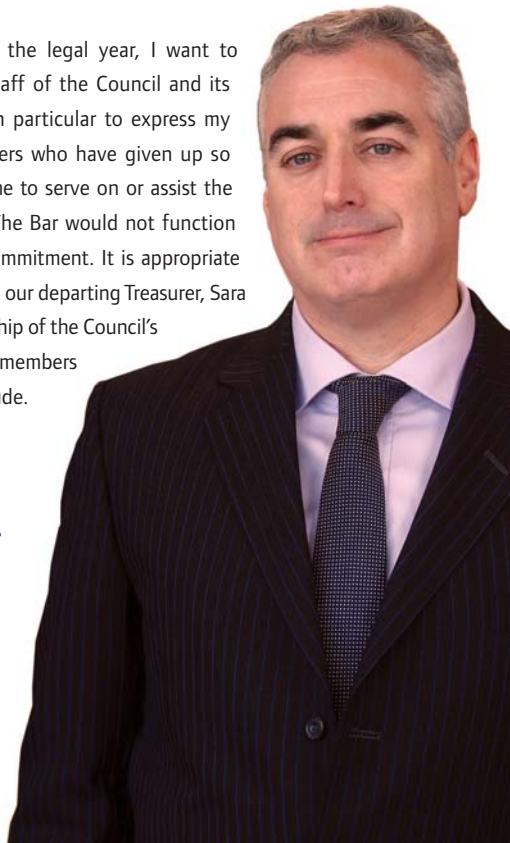
This issue has reared its head again, following the hasty publication of heads of a bill. The draft doesn't differ hugely from that circulated in December 2016. As members know, many of its provisions are objectionable. The Council's view is that the proposals will in fact increase, not reduce, political interference in the appointment process. At the time of writing, it seems that the Oireachtas Justice Committee will postpone consideration until the autumn. That may have the effect of taking some heat out of the coverage, but it is very likely that there will be a vigorous public debate when the matter comes back before the legislature.

Member surveys

The vast majority of members, as demonstrated through the regular member surveys undertaken, express high levels of satisfaction with the service improvements that have taken place across The Bar of Ireland over the last two years. Council members and staff have been engaged in a tour of the Circuits to provide information about services and continue to get feedback. This will continue during the forthcoming term.

End of the year

As we approach the end of the legal year, I want to personally thank all of the staff of the Council and its various bodies. I also want in particular to express my gratitude to all of the members who have given up so much of their professional time to serve on or assist the Council and its committees. The Bar would not function without their dedication or commitment. It is appropriate in that context that I single out our departing Treasurer, Sara Moorhead SC, for her stewardship of the Council's finances for several years. All members owe her a deep debt of gratitude.



Paul McGarry SC
Chairman,
Council of The Bar of Ireland

Making it clear

In this edition, several articles attempt to offer clarity on issues from policing to accidents abroad.

This has been a year of turmoil for An Garda Síochána. What better time to shine a spotlight on the role of the new Policing Authority? In this edition, its Chairperson Josephine Feehily discusses the new oversight framework and her vision for the force and the Authority in the years ahead. The Supreme Court has delivered its judgment in the case of *Sheehan v Corr*, which now provides some clarification with respect to the role of time records in the context of taxation. The Council of The Bar of Ireland has issued a briefing note on the case, which sets out some useful pointers to barristers regarding time records and estimates when valuing the legal work done on any given case.

Elsewhere, we examine the most recent changes to road traffic law and, in particular, the new laws in relation to drug driving. For the first time, road users will face the prospect of having bodily samples analysed for the purposes of determining the concentration of drugs in the blood system. The new rules add to the growing complexity of road traffic legislation as amendment is layered over previous amendment. The need for a consolidated Road Traffic Act is now pressing and obvious.

Finally, we take another look at the EC Regulation known as Rome II. It was hoped that this Regulation would lead to more certainty in determining the law of the country that applies to accidents abroad involving nationals from different countries. However, as our authors have discovered, all is not as simple as one might hope.

Eilis Brennan BL
Editor
ebrennan@lawlibrary.ie

Supporting professional women

On Thursday, June 1, 2017, The Bar of Ireland and the Irish Medical Organisation (IMO) hosted a conference for female barristers and doctors exploring the concept 'Definitions of Success', and examining how success has traditionally been viewed and what it will mean in the future.

From left: Dr Deborah McNamara, Consultant Surgeon, Beaumont Hospital; Oonagh McCrann SC; Dr Ann Hogan, President of the IMO; Dr John Duddy; Miriam O'Callaghan, RTÉ current affairs presenter; Grainne Larkin BL, Chair of Women's Working Group; Dr Ailin Rogers, Surgical Specialist Registrar and Lead NCHD, Beaumont Hospital; and, Orla O'Donnell, RTÉ Legal Affairs Correspondent.

Both The Bar of Ireland and the IMO undertook surveys in the last 12 months to ascertain the challenges facing their respective female members, as such this was an important event for both organisations given the issues identified for female doctors and barristers.

Similar themes arising from both surveys included gender-based discrimination, 'pigeonholing' in terms of areas of legal practice/medical specialty, challenges of work-life balance, and the low level of advancement to positions of seniority such as 'taking silk' for barristers (only 16% of 329 senior counsel are women) and becoming a medical consultant (only 29% of hospital consultants are female, and 15% of consultant surgeons are female, for example). Keynote speaker at the Conference was RTÉ's Miriam O'Callaghan, and RTÉ legal correspondent Orla O'Donnell chaired an engaging panel discussion with contributions from Marguerite Bolger SC, Mary Rose Gearty SC, Oonah McCrann SC, Dr Ann Hogan, IMO President, and Dr Ailin Rogers, Surgical Specialist Registrar and Lead NCHD, Beaumont Hospital. Dr Deborah McNamara, Consultant Surgeon, Beaumont Hospital, also made a presentation on training the next generation of surgeons.

Chairman's Dinner

The Bar of Ireland held its Annual Chairman's Dinner on Thursday, June 22, in beautiful surroundings at the King's Inns. Chairman Paul McGarry SC addressed an esteemed audience of barristers, judges, solicitors, politicians and members of the media, including Chief Justice Mrs Susan Denham, President of the High Court Peter Kelly, and Attorney General Mr Seamus Woulfe SC.

Employment Law launched

At the launch of the second edition of Employment Law, *published by Bloomsbury Professional, were (from left): Maeve Regan, co-author and Managing Solicitor, Mercy Law Resource Centre; Donal Spring, Principal, Daniel Spring Solicitors; Ms Justice Mary Laffoy; and, Ailbhe Murphy, co-author and Senior Employment Counsel (EMEA), Groupon.*

Barristers' voluntary work contributes to Drugs Act

The Bar of Ireland's *pro bono* programme – the Voluntary Assistance Scheme (VAS) – worked with the Ana Liffey Drug Project developing the draft legislation for the Misuse of Drugs (Supervised Injecting Facilities) Bill 2017, which was passed in early May.

A team of seven experienced barristers worked with the Ana Liffey Drug Project to draft the legislation, which was presented to the then Minister of State with responsibility for Drugs, Aodhán Ó Ríordáin TD, in May 2015. The legislation has now passed through the Dáil and the Seanad.

THE BAR OF IRELAND
VAS
Voluntary Assistance Scheme

This is a fine example of how the voluntary work and dedication of Law Library members can empower organisations to make a difference through the law. The committee that drafted the legislation was chaired by Emily Egan SC. Other members included Bernard Condon SC, Rebecca Broderick BL, Rebecca Graydon BL, Marcus Keane BL and Brendan Savage BL.

Consult a Colleague – mental health initiative

In recent years The Bar of Ireland has been devastated by loss, and in particular by the deaths of much-loved and respected colleagues. Partly as a response to what has been, for many, a period of mourning, and partly due to an invitation extended by the Dublin Solicitors Bar Association (DSBA), the Council of The Bar of Ireland will launch a new service in October. The Consult a Colleague programme takes its name from the programme set up by the DSBA some years ago. Like our solicitor colleagues, members of the Bar are increasingly aware of the heavy toll paid by regular engagement with traumatic facts, and the gradual erosion of mental health that can be a consequence of our work.

Volunteers from the Bar underwent training with the Helplines Partnership (specialising in helpline services) and 3Ts (a charity specialising in suicide awareness and prevention) in order to offer their support to members who want to discuss a problem in confidence. The guidelines for the service and the website content have been drafted and the service will be formally launched in October.

Two confidential phones will be operated by two of the volunteers at any one time. A call to this phone will take priority for the volunteer and will be answered immediately whenever possible.

None of the volunteers are members of the Council of The Bar of Ireland, although Grainne Larkin BL and Mary Rose Gearty SC have both undertaken the helpline training. Their experience is that members are quick to contact representatives on the Council and they hope that this will continue.

Given the nature of the service, it was decided that a group of barristers drawn from all over the country, and at different levels of seniority, might prove a more effective panel than those who are elected to the Council.

Any of our trained colleagues will accept a call if, for any reason, the caller does not want to speak to the two members listed. We hope that this service will encourage members to talk to a colleague, whether it is someone they know or not, before a problem becomes critical.

Practice management and tort CPD

Following feedback to member services, the first practice management conference took place in May. Ten speakers addressed over 60 participants. Subjects as diverse as tax, insurance, well-being, pensions and data protection were covered, and there was also time for questions. We hope that this will become an annual event, and suggestions for future content will be welcomed from members. Over 100 members came to the Distillery Building on a Saturday in June to hear five speakers at the annual Tort Law Update Conference. Expertly and efficiently chaired by Ms Justice Mary Irvine, the morning covered topics such as recent judgments, dismissal of tort actions, medical negligence and the liability of the Garda Síochána/the State in prosecution of crime. The evaluation comments were overwhelmingly positive and the Conference will run again next year.

Calcutta Run

Members of The Bar of Ireland took part in the 2017 Calcutta Run on Saturday May 20, which raised funds for the Fr Peter McVerry Trust and The Hope Foundation in Calcutta. Law Library members had great success in the Run: Annette Kealy BL and Nessa Cahill BL came in first and third place, respectively, in the 5k race. The Law Library 5k team, comprising Cliona Cleary BL, Niamh O'Sullivan BL, Chris Hughes BL and Paul McCarthy SC, were second. The Law Library 10k team came third – Eoin Martin BL, Brendan Glynn BL, Anne Fitzpatrick BL and Leonie Macauley BL. Congratulations to all!

PRDBA Conference

The speakers at the PRDBA's Regulation of Teachers Conference were (from left): Peter Ward SC; Denise Brett SC; Brendan O'Dea, Teaching Council; Louise Beirne BL; and, Patrick McCann SC.

The Professional Regulatory and Disciplinary Bar Association (PRDBA) held its annual conference on Friday, June 23, on 'The Regulation of Teachers'. According to Brendan O'Dea, Deputy Director of the Teaching Council, who chaired the conference, this is the first such conference that the Teaching Council is aware of. The event was attended by over 80 participants from both the legal world and the world of education. The Teaching Council regulates over 90,000 teachers. It is expected that the first inquiries into a teacher's fitness to teach will come before disciplinary panels of the Council in the autumn.

Louise Beirne BL spoke about the Teaching Council Act 2001, which provides the legal framework for how the system of regulation will operate in practice. Patrick McCann SC looked at the concept of poor professional performance, which is one of the grounds upon which a complaint may be made to the Teaching Council about a teacher. Denise Brett SC focused on how procedures under the Education Act 1998 operate in practice, and Peter Ward SC spoke from his particular experience of representing teachers about how the system of regulation will work from the teacher's perspective.

This is the Association's fourth such conference. It also regularly holds breakfast briefings, which are open to members of the Association. Papers from all of the PRDBA's events, including this conference, are available at www.prdba.ie.

Australian Bar Conference

The Australian Bar Association (ABA), along with barristers from all over the world and senior members of the British, Australian and Irish governments and judiciaries converged on London and Dublin from July 2-7 for the ABA Conference 2017. The aim was to share collective knowledge and prepare for future challenges to global legal systems.

The Conference explored issues including: freedom of speech and privacy laws; international law; diversity and an inclusive profession; Brexit; and, equal and fair access to justice for all.

Among the keynote speakers at the Conference were:

- Australia's High Commissioner to the United Kingdom, His Excellency, the Hon. Alexander Downer AC;
- Commonwealth Attorney General, Senator, the Hon. George Brandis QC;
- the Right Hon. Jeremy Wright QC MP, Attorney General for England and Wales and Advocate General for Northern Ireland;
- the Hon. Justice Patrick Keane, High Court of Australia;
- Australia's Ambassador to Ireland, His Excellency Ambassador Richard Andrews;
- the Hon. Justice Stephen Gageler AC, High Court of Australia; and,
- the Hon. Mrs Chief Justice Susan Denham, Chief Justice of Ireland.

Vital contributions

Should you contribute to a pension? Absolutely – it makes good financial and tax sense.

Donal Coyne
Donal is Director of Pensions, JLT Financial Planning Ltd, which operates The Bar of Ireland Retirement Trust Scheme

People are living longer and not many people wish to work forever. Therefore you must ask yourself: where will your income in retirement come from? Pensions often seem complicated – yet the basic premise is simple. Save now to provide an income you can live off in retirement. Along the way you can also benefit from the tax advantages pensions attract. Pensions are still one of the most tax-efficient ways to save for retirement – for every contribution you make, up to 40% of the contribution is paid for by the Government.

Many people are not saving for their retirement, or are not saving enough to give them the standard of living they hope for when they retire. If you are one of these people you can either retire later, start saving now or revise downwards what you can live off when you retire.

Tax reliefs are strong

A pension is basically a long-term, tax-efficient savings plan, which you can access at any time between the ages of 60 and 75. There are restrictions on how much you are allowed to contribute each year, while still qualifying for the valuable tax relief available. There is an overall salary cap of €115,000 and an age-related contribution scale as shown in **Table 1**. Any contribution falling within these limits qualifies in full for relief against income tax.

Using the funds

Your contributions are then invested and all investment growth accumulates within your fund tax free. At retirement, the fund can then be used to provide you with a maximum lump sum of 25% of the value of the pension fund – of which the first €200,000 can be paid free of all taxes (see **Table 2**).

Best investment

Pension contributions continue to make absolute financial sense as:

- income tax relief is available at up to 40%;
- investment growth is tax free;
- a lump sum can be taken of up to 25%, with the first €200,000 tax free;
- funds can pass to the estate; and,
- there is no other more tax-efficient way of saving for your retirement.

TABLE 1: Age-related contribution scale for pensions in Ireland

Age	Earnings limit	Maximum contribution
Under 30	15%	€17,250
30-40	20%	€23,000
40-50	25%	€28,750
50-54	30%	€34,500
55-59	35%	€40,250
60 and over	40%	€46,000

TABLE 2: Lump sum taxation rates

Amount	Income Tax rate
Up to €200,000	0%
€200,001-€500,000	20%
Over €500,000	40%

Annuity or ARF?

The balance of the fund can be used either to buy a traditional annuity for life or the fund can simply remain invested in what is known as an Approved Retirement Fund (ARF). It is important to note that you do not have to decide how to use your pension fund until you retire.

The Bar of Ireland Retirement Trust Scheme offers a wide range of investment funds for members. Each fund has a very competitive annual management charge. If you are unable to choose a fund, the Scheme also has a default investment strategy, which comprises three separate investment funds and has delivered a net return of +7.54% per annum over the last five years. The performances of the various investment fund managers is assessed regularly against benchmarks. Full details on each fund can be found on the members' section of The Bar of Ireland website. All Scheme members receive updated pension valuations twice yearly.

Consolidation allowed

Members should also be aware that they can consolidate any other personal pension funds into their Bar of Ireland account and benefit from the low fund management charges. In summary, you are encouraged to exploit the many tax advantages available by using The Bar of Ireland Retirement Trust Scheme to fund your retirement. The earlier you start, the better.

Pension clinics

The 2017 tax deadline will be upon us shortly. Your dedicated JLT Bar of Ireland pension team will be writing to all members well in advance to confirm the dates, times and locations of our annual pension clinics. We look forward to speaking with you then.

Key dates

The normal deadline for your 2016 tax return is October 31. However, if you make your returns and pay your tax through the Revenue Online Service (ROS), this deadline is extended this year to November 14.

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*

Supreme Court clarifies assessment of barristers' fees

This is a briefing note from the Council of The Bar of Ireland in respect of the judgment of the Supreme Court in *Sheehan v Corr* ([2017] IESC 44) delivered on June 15, 2017.

This judgment outlines the correct methodology that the Taxing Master is required to apply in respect of the taxation of costs of court proceedings. In the course of its judgment, the Court highlights critical points that are of significant relevance to barristers' fees and which should be noted by barristers in future. The Bar of Ireland acted as *amicus curiae* in this case.

Background to proceedings

1. The underlying High Court proceedings concerned a medical negligence action brought by an infant suing through her mother against a consultant obstetrician. The proceedings were ultimately settled on terms such that the defendant was ordered to pay the plaintiff's costs to be taxed in default of agreement.

Background to taxation

2. Following settlement of the proceedings, a bill of costs was prepared by the plaintiff's legal costs accountant. The bill of costs claimed a general instructions fee in the amount of €485,000. The matter came on for taxation before the Taxing Master of the High Court, Declan O'Neill, who issued a ruling on November 7, 2012, in relation to the instructions fee and certain other items in the bill of costs. Following the ruling, the plaintiff brought objections arguing that the solicitors' instructions fee had been incorrectly assessed and that the allowance was inadequate and unjust. A ruling was delivered by the Taxing Master on the objections on May 29, 2014. The solicitors' instructions fee was slightly increased.
3. An appeal was brought to the High Court by the plaintiff in June 2014 for an order pursuant to Order 99, Rule 38(3) of the Rules of the Superior Courts, seeking to review the ruling of the Taxing Master on the grounds that the methodology by which he approached the measurement of the solicitors' general instructions fee was incorrect. Kearns P. ([2015] IEHC 99) dismissed the plaintiff's appeal and upheld the approach adopted by the Taxing Master.
4. The plaintiff appealed to the Court of Appeal (Peart J., Irvine J. and Cregan J.). By judgment of Cregan J. on June 10, 2016 ([2016] IECA 168), the Court of Appeal allowed the plaintiff's appeal and remitted the matter to the Taxing Master for rehearing. Of note, the Court of Appeal allowed the appeal on a number of grounds and, in particular, emphasised the importance of "time" as a factor in assessing the solicitors' instructions fee. Cregan J. stated that the appropriate methodology for the Taxing Master to adopt was to commence with an assessment of the amount of time spent on each item making up the instructions fee, and then to proceed to consider the other factors outlined in Order 99 of the Rules of the Superior Courts. The Court also stated that the bill of costs was not adequate, as it did not provide particulars of the time spent in respect of each matter, the relevant rate of the fee earner and an assessment of each individual item that made up the solicitors' instructions fee.
5. The defendant subsequently secured leave to appeal to the Supreme Court, which determined that the following questions should be answered in the course of the appeal:
   a. To what extent, if any, may considerations as to the amount of time actually spent on a case be elevated above the relevant criteria mandated by Order 99, Rule 37 (22) for the fixing of costs?
   b. If the amount of time spent is the central part of the analysis for the Taxing Master in assessing costs, should the Taxing Master allow retrospective reconstruction of the time spent on a case and, if so, in what circumstances?
   c. Is it within the discretion of the Taxing Master to disallow the costs of two solicitors in dealing with part of a case and, if so, how may that discretion be reviewed by the Court?
   d. To what extent, if at all, are general economic conditions relevant to

the instruction of brief fees and, if so relevant, how is the economic circumstance to be assessed?

6. The Law Society of Ireland and the Council of The Bar of Ireland were granted liberty to appear as *amicus curiae* in respect of this appeal. Council was represented by a solicitor and counsel at the hearing, and written submissions were filed on its behalf.
7. The unanimous judgment of the Supreme Court was delivered on June 15, 2017, and a copy of the judgment (Laffoy J.) is available on www.courts.ie.

The role of the Council

8. The Council sought to be joined to this appeal on the basis that, although the substantive issue in these proceedings concerned the interpretation by the Taxing Master of the methodology that should be applied in assessing the solicitors' instructions fee, the Council was concerned that the comments of the Court of Appeal regarding the methodology to be applied by the Taxing Master in assessing the level of costs would have equal application to the assessment of barristers' fees.
9. In particular, there was the potential that the Court of Appeal judgment would be interpreted by the Taxing Master as requiring barristers to record time in respect of work done, a practice that does not prevail at the Bar. Also, that barristers may be required to provide detailed time records in respect of each item of work done, or in respect of a brief fee, in order for the Taxing Master to be in a position to assess a barrister's brief fee. In that regard, the Council made submissions in respect of issues a, b and d outlined at paragraph 5.
10. The Supreme Court allowed the defendant's appeal against the order of the Court of Appeal. The Court found that the Court of Appeal had erred in law in outlining the appropriate methodology to be applied by the Taxing Master in the assessment of the solicitors' instructions fee. The Court held that the Taxing Master should properly ascertain the nature and extent of the work done by a solicitor in accordance with the approach set out in *CD v Minister for Health* ([2008] IEHC 99) (unreported High Court, Herbert J., July 23, 2008) and, in particular, paragraph 48 thereof, and not as outlined by Cregan J. in the Court of Appeal.

Judgment of the Court

11. The Court answered the questions agreed by the parties and outlined at paragraph 5 as follows:
    a. The amount of time spent on a case should not be elevated above all other factors listed in Order 99 Rule 37 (22) of the Rules of the Superior Courts.
    b. The Taxing Master has the power to direct the retrospective reconstruction of time spent. Such a power is discretionary and should be exercised having regard to all relevant circumstances, including:
        i. the position of the parties as to whether it is necessary that time estimates be produced, it being suggested that where both parties agree it is not necessary, the Taxing Master should not be obliged to direct that a retrospective estimate be produced;
        ii. where a party has prepared a retrospective estimate prior to taxation and wishes to rely on same, the Taxing Master should consider whether, in all the circumstances, it is proper to allow the party to do so and, if he does allow the party to do so, to ensure that the opposing party has an opportunity to fully interrogate it;
        iii. the nature of the case and the amount of the costs claimed (it was suggested that a requirement to adduce time estimates in all cases regardless of the amount of costs being claimed would place an extremely onerous obligation on practitioners, the Taxing Master and county registrars, and is not required by Section 27 of the 1995 Act); and,
        iv. whether any contemporaneous records of time expended have been maintained.
    c. It is within the discretion of the Taxing Master to disallow the costs of two solicitors dealing with part of a case. This discretion must be exercised in a manner which enables him/her to perform his/her statutory function and must do so in a manner that is fair and reasonable.
    d. General economic conditions are relevant to the assessment of the solicitor's general instructions fee and a barrister's brief fee, and the impact of any such economic conditions on fees must be assessed by reference to appropriate evidence.
12. In light of the Court's findings, the Court remitted the matter to reassess the court attendance element of the general instructions fee, in accordance with the principles outlined in the Court's judgment.

Impact on barristers

13. It is clear that this judgment has the potential to have a significant impact on the assessment of barristers' fees. In our view, the following should be noted:
    - it is clear that the relevant statutory provisions regarding the assessment of costs by the Taxing Master apply to both barristers and solicitors;
    - there is no requirement in law for barristers to keep time records in respect of work done;
    - it may be appropriate for barristers to keep time records in respect of work done with a view to assisting the Taxing Master in assessing the appropriate fee to be paid to counsel, as it may be of assistance to the Taxing Master in ascertaining the nature and extent of the work done by a barrister in a given case, and putting a value on that work;
    - general economic conditions are relevant to the assessment of a barrister's brief fee: in the event that general economic conditions are to be taken into consideration, this must be done by reference to appropriate evidence; and,
    - barristers may be required to provide a retrospective reconstruction of time in respect of work done on a particular matter. This is a discretionary power available to the Taxing Master and must be exercised fairly and in accordance with constitutional and European Convention on Human Rights (EHCR) rights, including the right of a litigant to reasonable expedition under Article 6 of the EHCR. The Court adopted a non-exhaustive list of criteria agreed by the plaintiff and defendant, which are set out at paragraph 11(b).

The Bar of Ireland, June 29, 2017

Doing the State some service

Chairperson of the Policing Authority Josephine Feehily spoke to *The Bar Review* about holding the Guards to account in the face of controversy.

Ann-Marie Hardiman
Managing Editor at Think Media Ltd

Over the course of a 41-year career in the civil service, Josephine Feehily, to use her own words, "went from the organisation that spent almost all the money to the one that collected it". The former, the then Department of Social Welfare, was where she spent the first half of her career, including during the recession of the 1980s: "There was no money, and unemployment was at 18%. It was a grim time".

She made the move to Revenue in the 1990s, and was appointed Chairperson in 2008, just as the country was heading into another economic crisis. She found herself introducing controversial new taxes (such as the Local Property Tax) and engaging with the IMF, while dealing with potentially-catastrophic changes in her own department: "Our operating budget was slashed, and we lost huge numbers of experienced people who took advantage of the retirement scheme on offer at the time. On one Friday alone, we lost 102 people".

Josephine's reputation as a strong-minded believer in fair treatment and transparency was well known during her tenure, and it's fair to say that Revenue came out of those years still largely respected, and regarded as a section of Government that functions efficiently and well, although this didn't come easily: "We had to be single-minded, and make deliberate strategic choices, which were not necessarily understood at the time, on what posts not to fill, and to use some of the money for IT support or to keep technology current".

An unexpected challenge

Josephine retired from Revenue in early 2015, and while she intended to explore new projects, she was planning to take some time off first. However, the soon-to-be-established Policing Authority needed a Chairperson, and it was an opportunity that appealed both to her fundamental beliefs about public service, and to her professional curiosity: "I have an absolute passion for the importance of public confidence in public institutions. It's an intangible concept, but you know when you have it and when it's at risk. Also, it's not often you get an opportunity to do a 'start-up' in the public sector, to be involved in something entirely new. I knew that an opportunity as significant might not come up again".

That opportunity was no less than changing the oversight framework for the policing functions of the Garda Síochána, reducing the role of Government, and politics, in operational policing. This was never going to be an easy task, but to say the least, things have been complicated from the start: "The Garda Síochána (Policing Authority and Miscellaneous Provisions) Act was passed in December 2015 and commenced on January 1, 2016. I'd been designated a year previously, because the intention was that the Authority would be established on a shadow basis, to give us a few months to set up and get our governance, recruitment, etc., in order, but that did not happen".

The new Authority found itself dealing with a seemingly endless stream of controversies, from the treatment of whistleblowers, to staggeringly inaccurate breath test records, to the ongoing revelations about the Garda College in Templemore (to name but a few): "If I'd known the pace [of developments] I might have been more demanding of the Department of Justice in terms of our readiness".

It's hard to avoid the conclusion that Josephine thrives on the challenge, however, and she admits that she does: "As long as I can get on with it. I like to be doing!"

Driven by facts

Josephine is determined that the Authority's best response to the current circumstances is to stick to its remit, do what it was set up to do, and work steadily towards its goals. The establishing Act sets out a long list of functions, but for Josephine, the most significant are those that increase the accountability of the Garda Síochána to the Government and to the people, and that increase transparency in terms of how the Garda Síochána sets out its plans and implements them: "We set policing priorities and then approve the Policing Plan, which is prepared by the Commissioner (we are civilians so that's hugely significant). We also approve the Commissioner's strategy statement, we are responsible for the appointment of senior Gardaí, and we have put in place a Code of Ethics for the Garda Síochána". (See panel.)

For Josephine, the key to all of this is very simply to measure what's being done and set targets for what should be done: "People are great at using words – openness, transparency, accountability – but you can't have accountability without a framework within which to do it. So we've been gradually developing a performance framework that connects the Policing Plan, the Annual Report, and the monthly report the Commissioner gives us".

For example, the Plan contains a commitment to increase road policing resources by 10% by the end of the year. This is a direct result of the Road Safety Authority's concerns about rising numbers of fatalities on our roads, and is in the context of a commitment from Government to recruit an extra 800 Gardaí this year: "The Plan simply says that a certain amount of that number should be allocated to road safety. It's about setting policing priorities and the rationale behind them, making it logical and coherent, not driven by the noise in the system but based on a rationale and on evidence".

Controversy

The Authority meets monthly, and is required to hold at least four meetings annually in public, with the aim that each meeting should address particular issues set out in the Policing Plan. However, this very reasonable approach has already been complicated by events. A proposed public meeting on roads policing in April 2017 seemed like an uncontroversial choice, until the Garda Síochána held a press conference to announce that major discrepancies had been uncovered between the numbers of breath tests the guards claimed to have carried out, and the number that had actually been done (a difference of almost one million tests) and that 14,000 people had been wrongly convicted arising from traffic offences: "So suddenly what was for us a sensible way to plan our year became embroiled in controversy".

For those who might be wondering what power the Authority ultimately has to effect change in an organisation so mired in controversy, it might be worth asking the question whether such a press conference would have taken place at all if there was no Policing Authority holding public meetings. We'll never know, but as Josephine says: "There is no question that we had planned a meeting, in public, on roads policing and that this was well known to the Gardaí".

With a number of investigations ongoing, it's hard for Josephine to comment on specific controversies. Her focus is on what the Authority can do to change the culture. It's about seeing beyond the latest scandal to the bigger picture, and Josephine is clear that the Authority will not be led by what's on the cover of the newspapers: "Accountability can't only be about the latest outrage – it's too important. It is a defining activity of any State to be able to police itself and to do it with public confidence. The 'meat and potatoes' of policing is what builds public confidence – outreach to diverse communities, community policing, availability to victims, effective criminal investigations. The Gardaí have a significant track record against organised crime for example. Operation Thor in relation to burglaries has been hugely successful. They do a lot of things really well and it's too important not to keep a focus on those when you're reviewing performance".

According to the guards' own public attitude survey, public confidence in the police is consistently quite high (see panel) and Josephine says the importance of this shouldn't be underestimated: "As a State, we're lucky to have that and we have to mind it".

A key element of building that confidence is guards on the street, and the Authority has a role here too, overseeing recommendations on Garda numbers and modernisation in the Service. The Government's intention is that numbers should reach 21,000 persons by 2021, comprising 15,000 Gardaí, 4,000 civilians and 2,000 reserves. This is to happen alongside incremental progress in implementing the last report of the Garda Inspectorate: 'Changing Policing in Ireland'.

The public servant

Originally from Limerick, Josephine Feehily held a number of positions in the Department of Social Welfare and the Pensions Board before joining the Revenue Commissioners in 1993.

She was appointed one of the three Commissioners who form the Board of Revenue in 1998, the first woman to hold that position in Ireland, and was appointed Chairman in 2008. She very much hopes that her work at the Policing Authority will take up a little less of her time next year so that she can renew her interest in painting, and spend some more time at home in Co. Meath.

The Code

The new Garda Code of Ethics could have an enormous impact in terms of professionalising the Garda service, including its civilian members: "It's not about telling them how to behave. It's about having a Code that everybody in the organisation can use to guide behaviour and decision-making, but also that the community can reference to see the standards they are entitled to expect from those who work in the Garda organisation. It's about empowering citizens in their engagement with the guards, and it's about accountability". The Code of Ethics is available at http://www.garda.ie/Documents/User/Code%20of%20Ethics%20English.pdf.

Senior appointments

Another enormously significant change is that the Authority now has responsibility for senior appointments within the force: "In the past, the Commissioner's office ran the competition and interviews, and the Government made the appointments. Now we, a civilian body, do both. Members themselves have acknowledged the cultural shift involved in writing to the Authority to be considered for a position, rather than to the Commissioner. We have an operational reach into the Gardaí because we select and appoint their Supers, their Chiefs and their Assistant Commissioners".

This section of the Act commenced in January 2017, and at the time of writing, three Assistant Commissioners had been appointed by the Authority, appointments to Chief Superintendent posts were imminent, and the interviews for Superintendent posts were taking place.

Josephine says progress is being made, although not as quickly as the Authority would like: "Our recent quarterly report expressed our concern at the slow progress in engaging with the Government policy of 'civilian by default'. It's not about an ideology that says 'civilian good, guards bad'. There are sworn, trained, fully-qualified police officers who could be out catching bad guys, or doing roads policing, where their specific skills, training and expertise is badly needed in communities. The Garda Síochána also needs a specific injection of professional skills such as human resources, risk management, forensic accountancy: skills that all large organisations need".

'Soft' power

So what can the Authority do if its concerns are not addressed?

"Our power is largely soft. It's the power of transparency, of meeting in public, of us expressing a view publicly. We can write to the Minister but we don't have a power of direction or a power of sanction. We can ask the Minister to issue a direction, but that would be a 'nuclear option'".

These 'soft' powers shouldn't be underestimated, however: "Sunlight is the best disinfectant. Disinfectants can sting a little but they are healthy. There is a vulnerability in being transparent that can be tricky while you're getting used to it but it is quite a significant power".

She describes the relationship between the Policing Authority and the Garda Síochána as characterised by "an appropriate professional tension, as there should be between the overseers and the overseen. We're not doing the job if there's not".

Since our interview, a new Minister for Justice, Charlie Flanagan, has replaced Frances Fitzgerald, but Josephine says the Authority's relationship with the Department is not based on personality, but rather on mutual understanding and experience: "It's maturing nicely! We have good engagement and a relationship that respects the Authority's independence".

Josephine's formidable reputation as an experienced and supremely able public servant undoubtedly contributes to this trust, although she puts it more modestly: "I know my way around the public sector system and that was an advantage in setting up the Authority. And people knew me – I suspect that helped".

A process in flux

In May of this year, the then Minister for Justice announced the membership of the new Commission on the Future of Policing in Ireland, which is tasked with examining all of the functions of the Garda Síochána, and the roles of the Policing Authority, the Garda Inspectorate and the Garda Síochána Ombudsman Commission. It is due to report in September 2018, although it is empowered to make interim recommendations, and Josephine is in no doubt that its final report will lead to changes in the way the Gardaí, and the Authority, operate: "What emerges will be different. The Authority won't have much time to mature. GSOC and the Garda Inspectorate each had 10 years to mature: we'd had 16 months when the Commission was announced so I don't think we'll reach our tenth birthday in our current form".

One thing she is certain of is that a culture of accountability and transparency will be embedded in the system: "I only see accountability and transparency going one way – more of it".

A maturing society?

Irish people are often said to have what might be called a postcolonial culture of bending the rules when it comes to tax and the law. Josephine's career might be said to give her a unique perspective on this, and her view is a little surprising: "We're getting over it. The rate of voluntary compliance has increased steadily in recent years. For example, when we introduced the property tax, we got the first million euro in before we sent out any letters! I think there was a kind of a growing up somewhere along the way".

When it comes to the law, she feels we're more law abiding than not: "We expect a lot of the guards, and when something important and significant happens to us in our lives, like a burglary or a road crash, we want them to be there. That drives compliance. It's a complex compact between the police and the policed, the old adage of 'policing by consent', which goes back to Robert Peel".

As to whether being a postcolonial nation has any bearing, the evidence might also surprise: the Garda Síochána's own public attitudes survey shows 85% of the population having a medium to high level of trust in the police force, compared to a figure of 62% from comparable UK College of Policing research.

LEGAL UPDATE

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The Law Library

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ADMINISTRATIVE LAW

Articles

Biehler, H. Upholding standards in public decision-making: getting the balance right. *Irish Jurist* 2017; LVII: 94
Gotzelmann, C. The implementation and administration of family reunification rights in Ireland. *Irish Jurist* 2016; LV: 75
Ní Drisceoil, V. Antipathy, paradox and disconnect in the Irish State's legal relationship with the Irish language. *Irish Jurist* 2016; LV: 45

ADOPTION

Statutory instruments

Adoption Authority of Ireland superannuation scheme 2017 – SI 157/2017

AGRICULTURE

Statutory instruments

Agriculture Appeals Act 2001 (amendment of schedule) regulations 2017 SI 219/2017
Avian influenza (precautionary confinement of birds) regulations 2016 (revocation) regulations 2017 – SI 165/2017
European Communities (beet seed) (amendment) regulations 2017 – SI 212/2017
European Communities (seed of fodder plants) (amendment) regulations 2017 – SI 213/2017
European Union (cereal seed) (amendment) regulations 2017 – SI 214/2017
European Union (seed potatoes) (amendment) regulations 2017 – SI 215/2017
European Union (seed potatoes) regulations 2016 – SI 641/2015
Forestry Act 2014 (commencement) order 2017 – SI 189/2017
Forestry regulations 2017 – SI 191/2017
Horse Racing Ireland Act 2016 (commencement of section 18) (forestry) order 2017 – SI 190/2017
European Communities (pesticide residues) (amendment) regulations 2017 – SI 247/2017

ARBITRATION

Library acquisitions

Kajkowska, E. *Enforceability of Multi-Tiered Dispute Resolution Clauses*. Oxford: Hart Publishing, 2017 – N398.6
Walker, S. *Mediation: An A-Z Guide*. Haywards Heath: Bloomsbury Professional, 2016 – N398.4

Articles

Cheevers, A. The development of mediation in Irish courts – lessons from the US. *Dublin University Law Journal* 2016; (39) (1): 173
Lee, R. Mediation nation. *Law Society Gazette* 2017; (May) 50
Richardson, Dr E. Islamic finance disputes in Ireland: a comparative study of dispute resolution in Islamic finance contracts. *Irish Jurist* 2017; LVII: 35
Sammon, G. Mediation in Ireland: policy problems. *Irish Jurist* 2017; LVII: 175

ASYLUM

Asylum, immigration and nationality – Judicial review – Revocation of deportation orders – Distinguished *Li and Wang v Min for Justice* [2015] IEHC 638, Distinguished *Regina (Agyarko) v Secretary of State for the Home Department; Regina (Ikuga) v Same* [2017] 1 WLR 823, Referred to *W.S. v Minister for Justice and Equality* [2017] IEHC 128 – (O'Regan J. – 24/05/2017) – [2017] IEHC 326
Omrawoo v Minister for Justice and Equality

Asylum, immigration and nationality – Refusal of leave to seek judicial review of deportation orders – Review of original decision – Applied *KP v Minister for Justice and Equality* [2017] IEHC 95, Applied *Regina (Agyarko) v Secretary of State for the Home Department; Regina (Ikuga) v Same* [2017] 1 WLR 823 – (Humphreys J. – 24/04/2017) – [2017] IEHC 241
Rughoonauth v Minister for Justice and Equality

Asylum, immigration and nationality – The Refugee Act 1996 – The International Protection Act 2015 – Applied *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, Applied *N.M (DRC) v Minister for Justice* [2016] 7 JIC 1403 – (Keane J. – 27/01/2017) – [2017] IEHC 255
SO v Refugee Appeals Tribunal

Articles

Lynch, M. Direct provision: home away from home? *Law Society Gazette* 2017; (June) 34

AVIATION

Statutory instruments

International interests in mobile equipment (Cape Town Convention) (aircraft protocol) order 2017 – SI 187/2017

BANKING

Banking and finance – Non-payment of loan – Appointment of receiver – Applied *Campus Oil Ltd v Minister for Industry and Energy (no 2)* [1983] IR 88, Referred to *Harrington v Gulland Property Finance Ltd* [2016] 7 JIC 2906, Referred to *Tennant v McGinley* [2016] 6 JIC 1407 – (Haughton Robert J. – 18/05/2017) – [2017] IEHC 309
Langan v Promontoria (Aran) Ltd

Banking and finance – Non-payment of loan – Summary judgment – Applied *Aer Rianta cpt v Ryanair Ltd* (No 1) [2001] 4 IR 607, Applied *Harrisrange Ltd v Duncan* [2003] 4 IR 1, Referred to *Ulster Bank Ireland Ltd v O'Brien* [2015] 12 JIC 1601 – (Barrett J. – 26/05/2017) – [2017] IEHC 316
Allied Irish Banks plc v Burke

Banking and finance – Summary judgment – Discovery of documents – (Eagar J. – 15/05/2017) – [2017] IEHC 304
ACC Loan Management Ltd v Kelly

Banking and finance – Evidence – Prima facie case – Applied *R v Leicester City Justices, Ex parte Barrow and anor* [1991] 2 QB 260, Considered *McKenzie v McKenzie* [1971] P 33, Referred to *O'Toole v Heavey* [1993] 2 IR 544 – (Ryan P., Peart J., Hedigan J. – 10/05/2017) – [2017] IECA 149
Butler v Nelson & Co Solicitors

Articles

Bergin-Cross, C. Economic perspective on why banks ought not be classified as a fiduciary or agent. *Commercial Law Practitioner* 2017; 24 (4): 77 [part 1]; and, *Commercial Law Practitioner* 2017; 24 (5): 115 [part 2]

Statutory instruments

European Union (bank recovery and resolution) resolution fund levy regulations 2017 – SI 162/2017

BUILDING LAW

Library acquisitions

Uff, J. *Construction Law: Law and Practice Relating to the Construction Industry (12th ed.)*. London: Sweet & Maxwell, 2017 – N83

BUSINESS

Statutory instruments

Knowledge Development Box (Certification of Inventions) Act 2017 (Commencement) order 2017 – SI 204/2017

CHILDREN

Articles

Corbett, M. An analysis of child care proceedings through the lens of the published District Court judgments. *Irish Journal of Family Law* 2017; (20) (1): 7
Shannon, G. The role of policing in contemporary child protection. *Irish Jurist 2016;* LVI: 66

COMMERCIAL LAW

Articles

Ní Fhloinn, D. Performance securities in construction projects. *Commercial Law Practitioner* 2017; 24 (4): 86

COMMUNICATIONS

Statutory instruments

Communications (mobile telephone roaming) regulations 2013 (amendment) regulations 2017 – SI 240/2017
Wireless Telegraphy Act 1926 (section 3) (exemption of apparatus for mobile communication services on aircraft) order 2017 – SI 218/2017

COMPANY LAW

Company – The Companies Act 2014 – Restriction of directorship – Applied *Director of Corporate Enforcement v Barry Seymour* [2013] 1 IR 82, Referred to *Cahill v O'Brien* [2015] 12 JIC 1709, Referred to *Director of Corporate Enforcement v Walsh* [2016] 1 JIC 2002 – (Haughton Robert J. – 18/05/2017) – [2017] IEHC 314
Wood Products [Longford] Ltd [in liquidation] v Companies Act

Company – The Companies Acts 1963-2010 – O.15, r.13 of the Rules of the Superior Courts – Applied *O'Mahony v Horgan* [1995] 2 IR 411, Referred to *Hynes v The Western Health Board and anor* [2006] IEHC 55, Referred to *O'Connell v Building and Allied Trades Union and ors* [2012] 2 IR 371 – (Haughton Robert J. – 26/05/2017) – [2017] IEHC 246
CTO Greenclean Environmental Solutions Ltd v Companies Acts

Library acquisitions

Chivers, D., Shaw, B., Bryant, C. The *Law of Majority Shareholder Power: Use and Abuse (2nd ed.).* Oxford: Oxford University Press, 2017 – N263
Forde, M., Kennedy, H. *Company Law (5th ed.).* Dublin: Thomson Round Hall, 2017 – N261.C5

Articles

Clarke, B. Duty of care, skill and diligence – from warm baths to hot water. *Irish Jurist* 2016; LVI: 139
Hutchinson, B. The external effects of the company constitution after the companies act 2014. *Irish Jurist* 2016; LVI: 219
Khan, S. The Companies Act 2014 and company secretaries. *Irish Law Times* 2017; (35) (10): 125
Quinn, J. Passive directors and the law of restriction. *Commercial Law Practitioner* 2017; 24 (5): 106

Acts

Companies (Accounting) Act 2017 – Act No. 9 of 2017 – Signed on May 17, 2017
Companies (Amendment) Act 2017 – Act No.13 of 2017 – Signed on June 7, 2017

Statutory instruments

Industrial and provident societies (notice of petition for appointment of an examiner to an industrial and provident society) (form) regulations 2017 – SI 163/2017
Industrial and provident societies (notice of petition for appointment of an examiner to an industrial and provident society) (fee) regulations 2017 – SI 164/2017
Companies (Accounting) Act 2017 (commencement) (no. 2) order 2017 – SI 250/2017
Companies (Accounting) Act 2017 (commencement) order 2017 – SI 246/2017

COMPETITION LAW

Acts

Competition (Amendment Act 2017) – Act No.12 of 2017 – Signed on June 7, 2017

CONSUMER LAW

Articles

Martin, E. Unfair terms in consumer loan contracts. *Commercial Law Practitioner* 2017; 24 (4): 71

CONTRACT

Contract – Breach of contract – Tort – Referred to *Brandley v Deane* [2016] 3 JIC 0202, Referred to *European Property Fund Plc and anor v Ulster Bank Ireland Ltd* [2015] IEHC 425, Referred to *Last Passive Limited (Trading as Aircoach) v Revenue Commissioners* [2015] IEHC 685 (Haughton Robert J. – 28/05/2017) [2017] IEHC 254
Cantrell v AIB PLC

Contract – Misdirection – Disclosure – Applied *Hay v O'Grady* [1992] 1 IR 210 – (Clarke J., Laffoy J., Dunne J. – 05/04/2017) – [2017] IESC 23
Keaney v O'Sullivan

Articles

Wade, G. Good faith and fair dealing in contract law. *Irish Law Times* 2017; (35) (9): 113

COSTS

Library acquisitions

Cook, M.J., Middleton, S., Rowley, J. *Cook on Costs 2017: A Guide to Legal Remuneration in Civil Contentious and Non-Contentious Business*. London: LexisNexis, 2016 – L89

Articles

Cantillon, E.J. Costs – interim payment on account. *Law Society Gazette* 2017; (May) 24
Keane, M. The costs gap in judicial review: the immunity of quasi-judicial bodies and judges from costs liability. *Dublin University Law Journal* 2016; (39) (1): 245
McGarry, P. Action needed now for system of legal costs. *The Bar Review* 2017; (22) (3): 85

COURTS

Acts

Courts Act 2017 – Act No. 8 of 2017 – Signed on May 17, 2017

Statutory instruments

Circuit Court Rules (European account preservation order) 2017 – SI 202/2017
Circuit Court rules (family law) 2017 – SI 207/2017
Circuit Court Rules (Personal Injuries Assessment Board act 2003) 2017 – SI 201/2017
District Court districts and areas (amendment) and variation of days and hours (Ballina, Ardee, Drogheda, Dundalk) order 2017 – SI 181/2017
District Court (districts) order 2017 – SI 182/2017
Rules of the Superior Courts (European account preservation order) 2017 – SI 156/2017
Rules of the Superior Courts (Personal Injuries Assessment Board Act 2003) 2017 – SI 186/2017
Courts Act 2017 (commencement) order 2017 – SI 239/2017
Courts (Supplemental Provisions) Act 1961 (judicial remuneration) (section 46(9)) order 2017 – SI 234/2017
Courts (Supplemental Provisions) Act 1961 (judicial remuneration) (section 46(9A)) order 2017 – SI 235/2017

CRIMINAL LAW

Conviction – Assault causing harm – Safety of verdict – Referred to *DPP v Tobin* [2001] 6 JIC 2201 – (Birmingham J., Mahon J., Edwards J. – 12/05/2017) – [2017] IECA 147
DPP v Connaughton

Conviction – Threat to kill – Evidence – Distinguished *DPP v Maguire* [1995] 2 IR 286, Referred to *DPP v Cooney* [1997] 3 IR 205 – (Birmingham J., Mahon J., Edwards J. – 25/05/2017) – [2017] IECA 126
DPP v McCarthy

Sentencing – Aggravated burglary – Undue severity – (Birmingham J., Edwards J., Hedigan J. – 05/05/2017) – [2017] IECA 136
DPP v Byrne

Sentencing – Attempted robbery – Severity of sentences – Referred to *DPP v Cunningham* [2002] 2 IR 712 – (Birmingham J., Mahon J., Edwards J. – 11/05/2017) – [2017] IECA 145
DPP v Riordan

Sentencing – Burglary – Severity of sentence – Referred to *DPP v Lee* [2017] IECA 152, Referred to *DPP v Kelly* [2016] IECA 359, Referred to *DPP v Reilly* [2015] IECA 53 – (Birmingham J., Mahon J., Edwards J. – 12/05/2017) – [2017] IECA 148
DPP v Judge

Sentencing – Burglary – Undue severity – Referred to *DPP v Alexiou* [2003] 3 IR 513, Referred to *DPP v Tiernan* [1988] IR 250, Referred to *People v M.* [1994] 3 IR 306 – (Birmingham J., Mahon J., Edwards J. – 12/05/2017) – [2017] IECA 152
DPP v Lee

Sentencing – Manslaughter – Undue severity – (Birmingham J., Mahon J., Edwards J. – 12/05/2017) – [2017] IECA 154
DPP v Hutchinson

Sentencing – Possession of a controlled drug – Severity of sentence – (Birmingham J., Mahon J., Hedigan J. – 28/05/2017) – [2017] IECA 125
DPP v Nally

Sentencing – Possession of a double-barrelled sawn-off shotgun with intent to commit an indictable offence – Undue leniency – Followed *DPP v McCormack* [2000] 4 JIC 1801, Referred to *DPP v Grey* [1986] IR 317, Referred to *Pearce v R* 194 CLR 610 – (Mahon J., Edwards J., Hedigan J. – 02/05/2017) –

[2017] IECA 133
DPP v Kavanagh

Sentencing – Rape – Severity of sentence – Followed *DPP v W.D.* [2008] 1 IR 308 – (Mahon J., Edwards J., Hedigan J. – 09/05/2017) – [2017] IECA 144
DPP v J.D.

Sentencing – Robbery – Rehabilitation – (Birmingham J., Mahon J., Hedigan J. – 28/05/2017) – [2017] IECA 132
DPP v Daly

Sentencing – Robbery – Rehabilitation – (Birmingham J., Mahon J., Hedigan J. – 09/05/2017) – [2017] IECA 153
DPP v Doyle

Sentencing – Robbery – Severity of sentence – (Birmingham J., Mahon J., Edwards J. – 25/05/2017) – [2017] IECA 123
DPP v Kennaway

Sentencing – Sexual offences – Severity of sentence – (Birmingham J., Mahon J., Edwards J. – 24/04/2017) – [2017] IECA 139
DPP v W.L.

Sentencing – Unlawful possession of a controlled drug for the purpose of sale or supply – Severity of sentence – (Birmingham J., Mahon J., Edwards J. – 12/05/2017) – [2017] IECA 150
DPP v Berkery

Sentencing – Unlawful use of a mechanically-propelled vehicle – Undue leniency – Referred to *DPP v Cash* [2015] IECA 198, Referred to *DPP v Corbett* [2015] 7 JIC 2104, Cited *DPP v Dumbrell* [2016] 7 JIC 2811 – (Peart J., Mahon J., Hedigan J. – 05/05/2017) – [2017] IECA 143
DPP v Taylor

Library acquisitions

Eady, Sir D., Smith, A.T.H., Londono, P., Arlidge, A. *Arlidge, Eady & Smith on Contempt (5th ed.).* London: Sweet & Maxwell, 2017 – M563.3
Ní Choileáin, C. *Criminal Law (4th ed.).* Dublin: Round Hall, 2017 – M500.C5
von Hirsch, A., *Deserved Criminal Sentences: An Overview*. Oxford: Hart Publishing Ltd, 2017 – M587
Wells, C. *Abuse of Process (3rd ed.).* Oxford: Oxford University Press, 2017 – M570

Articles

Clarke, D.M. Intending as a defining feature of murder. *Dublin University Law Journal* 2016; (39) (2): 285
Collins, S. Terror from beyond! *Law Society Gazette* 2017; (May) 36
Dwyer, J. A new protocol for disclosure of counselling records in sex offence cases. *The Bar Review* 2017; (22) (3): 73
McDermott, M. In defence of the realm. *Law Society Gazette* 2017; (May) 28
Mee, J. Prevention of benefit from homicide: a critical analysis of the Law Reform Commission's proposals. *Dublin University Law Journal* 2016; (39) (1): 203
Walsh, M.J. The Criminal Justice (Psychoactive Substances) Act 2010. *Irish Law Times* 2017; (35) (9): 118

Acts

Criminal Justice (Offences Relating to Information Systems) Act 2017 – Act No. 11 of 2017 – Signed on May 24, 2017
Misuse of Drugs (Supervised Injecting Facilities) Act 2017 – Act No. 7 of 2017 – Signed on May 16, 2017

Statutory instruments

Criminal Justice (Terrorist Offences) Act 2005 (section 42) (restrictive measures concerning certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations) (no.2) regulations 2017 – SI 170/2017
Criminal Justice (Terrorist Offences) Act 2005 (section 42) (restrictive measures concerning certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations) (no.3) regulations 2017 – SI 209/2017
Criminal Justice (Offences Relating to Information Systems) Act 2017 (commencement) order 2017 – SI 249/2017

DAMAGES

Damages and restitution – Practice and procedures – Financial awards for injury to residents – Referred to *J. McE v Residential Institutions Redress Board* [2016] 2 JIC 0304, Referred to *O'G v The Residential Institutions Redress Board* [2015] 5 JIC 1501, Referred to *People Over Wind and anor v An Bord Pleanála and ors* [2015] IEHC 271 – (McDermott J. – 24/04/2017) – [2017] IEHC 251
MOS v Residential Institutions Redress Board

DATA PROTECTION

Library acquisitions

Brkan, M., Psychogiopoulou, E. *Courts, Privacy and Data Protection in the Digital Environment*. Cheltenham: Edward Elgar Publishing Limited, 2017 – M209.D5.E95

Articles

Mulligan, A. Constitutional aspects of international data transfer and mass surveillance. *Irish Jurist* 2016; LV: 199

DEFAMATION

Defamation – Damages – Discount – Applied *Ward v The Donegal Times Ltd* [2016] IEHC 711, Referred to *Christie v TV3 Television Network Ltd* [2015] IEHC 694, Referred to *KC (Claimant) v Mgn Limited (Defendant)* [2013] EWCA Civ 3 – (Peart J., Irvine J., Hogan J. – 04/05/2017) – [2017] IECA 128
Christie v TV3 Television Networks Ltd

DISCRIMINATION

Articles

Quinn, G. Civil death: rethinking the foundations of legal personhood for persons with a disability. *Irish Jurist* 2016; LVI: 286
Waddington, L., Pedersen, M., Ventegodt Liisberg, M. Get a job! Active labour market policies and persons with disabilities in Danish and European Union policy. *Dublin University Law Journal* 2016; (39) (1): 1

EMPLOYMENT LAW

Employment contract – Medical practitioner – Preliminary reference – Referred to *Hussain v Health Service Executive* [2010] IEHC 485 – (MacMenamin J., Laffoy J., Dunne J. – 06/04/2017) – [2017] IESC 22
Hussain v Health Service Executive

Articles

Doherty, M. New morning? Irish labour law post-austerity. *Dublin University Law Journal* 2016: (39) (1): 51
Laulom, S. A new agenda for reforms in France: new complexities and flexibilities of labour law. *Dublin University Law Journal* 2016: (39) (1): 93
Logan, E. Face/off. *Law Society Gazette* 2017; (May): 26
Ryan, D. Atypical work in the emergence from austerity: assumptions and expectations re-evaluated. *Dublin University Law Journal* 2016: (39) (1): 75
Hogan, C. Accommodation of faith in the workplace: European and Irish perspectives. *Irish Employment Law Journal* 2017; (14) (2): 37
Seymour, J. Chain gang. *Law Society Gazette* 2017; (June): 38
Kerr, A. Employers' insolvency: recent developments. *Irish Employment Law Journal* 2017; (14) (2): 32

Statutory instruments

Employment regulation order (security industry joint labour committee) 2017 – SI 231/2017

ENERGY

Statutory instruments

Energy Act 2016 (commencement of certain provisions) order 2017 – SI 171/2017

ENVIRONMENT

Library acquisitions

Bell, S., McGillivray, D., Pedersen, O. *Environmental Law (9th ed.).* Oxford: Oxford University Press, 2017 – N94

Statutory instruments

European Union (equipment and protective systems intended for use in potentially explosive atmospheres) regulations 2017 – SI 230/2017
European Union habitats (Ardmore Head special area of conservation 002123) regulations 2017 – SI 228/2017
European Union habitats (Carrigeenamronety Hill special area of conservation 002037) regulations 2017 – SI 221/2017
European Union habitats (Castletownshend special area of conservation 001547) regulations 2017 – SI 220/2017
European Union habitats (Cloonshanville Bog special area of conservation – 000614) regulations 2017 – SI 226/2017
European Union habitats (Cloughmoyne special area of conservation 000479) regulations 2017 – SI 222/2017
European Union habitats (Fin Lough (Offaly) special area of conservation 000576) regulations 2017 – SI 223/2017
European Union habitats (Moyclare Bog special area of conservation 000581) regulations 2017 – SI 224/2017
European Union habitats (Sharavogue Bog special area of conservation 000585) regulations 2017 – SI 225/2017
European Union habitats (Union Wood special area of conservation 000638) regulations 2017 – SI 227/2017
European Communities (Wildlife Act, 1976) (amendment) regulations 2017 – SI 166/2017
European Union (greenhouse gas emission reductions, calculation methods and reporting requirements) regulations 2017 – SI 160/2017
European Union habitats (Ballynafagh Bog special area of conservation 000391) regulations 2017 – SI 141/2017
European Union habitats (Blackwater Bank Special Area of Conservation 002953) regulations 2017 – SI 149/2017
European Union habitats (Bolingbrook Hill special area of conservation 002124) regulations 2017 – SI 147/2017
European Union habitats (Carrownagappul Bog special area of conservation 001242) regulations 2017 –

SI 140/2017
European Union habitats (Cloonakillina Lough special area of conservation 001899) regulations 2017 – SI 144/2017
European Union habitats (Doocastle Turlough special area of conservation 000492) regulations 2017 – SI 143/2017
European Union habitats (Kilduff, Devilsbit Mountain special area of conservation 000934) regulations 2017 – SI 145/2017
European Union habitats (Knockacoller Bog special area of conservation 002333) regulations 2017 – SI 142/2017
European Union habitats (Silvermine Mountains special area of conservation 000934) regulations 2017 – SI 146/2017
European Union habitats (Silvermines Mountains West special area of conservation 002258) regulations 2017 – SI 148/2017

EQUALITY

Unlawful discrimination – Disability – Equality – Applied *Mary Stokes v Christian Brothers High School Clonmel and ors* [2015] IESC 13, Considered *Equality Authority v Portmarnock Golf Club and ors* and *Cuddy and Keane v Equality Authority and ors* [2010] 1 IR 671 – (O'Regan J. – 24/05/2017) – [2017] IESC 29
Cahill v The Minister for Education and Science

EUROPEAN UNION

Library acquisitions

Holmes, M., *EU Law*. Dublin: Round Hall, 2017 – W86
Lodder, A.R., Murray, A.D. *EU Regulation of e-Commerce: A Commentary*. Cheltenham: Edward Elgar Publishing, 2017 – W104
Savin, A. *EU Internet Law (2nd ed.)*. Cheltenham: Edward Elgar Publishing Limited, 2017 – W141.5
Werner, P., Verouden, V. *EU State Aid Control: Law and Economics*. The Netherlands: Kluwer Law International, 2017 – W110.1
Prete, L. *Infringement Proceedings in EU Law*. The Netherlands: Kluwer Law International, 2017 – W86

Articles

Brittain, S. Justifying the teleological methodology of the European Court of Justice: a rebuttal. *Irish Jurist* 2016; LV: 134
Friel, R. Lingua franca. *Law Society Gazette* 2017; (June): 24
Hardiman, A.M. Doing the right thing. *The Bar Review* 2017; (22) (3): 70
Murphy, K. Global firms eye up Dublin. *Law Society Gazette* 2017; (June): 28
Little, C. UK withdrawal from the EU: procedures and process – an end to the jurisdiction of the Court of Justice of the European Union? *Commercial Law Practitioner* 2017; 24 (5): 99
O'Leary, S. Courts, charters and conventions: making sense of fundamental rights in the EU. *Irish Jurist* 2016; LVI: 4
Connellan, S., Caulfield, M. Brexit: the people implications. *Irish Tax Review* 2017; (2): 73

Statutory instruments

European Union (award of concession contracts) regulations 2017 – SI 203/2017
European Union (marine equipment) regulations 2017 – SI 177/2017
European Union (safety of toys) (amendment) regulations 2017 – SI 176/2017
European Union (lifts and safety components for lifts) regulations 2017 – SI 232/2017
European Union (pressure equipment) regulations 2017 – SI 233/2017
European Union (radio equipment) regulations 2017 – SI 248/2017
European Union (recreational craft and personal watercraft) (procedures for watercraft identification) regulations 2017 – SI 217/2017

EVIDENCE

Library acquisitions

Murphy, P., Glover, R. *Murphy on Evidence (15th ed.)*. Oxford: Oxford University Press, 2017 – M600

EXTRADITION LAW

European arrest warrant – Surrender – European law – Appellant seeking to appeal against his surrender – Whether, on a proper construction of the relevant legal materials, surrender could be ordered in the particular circumstances – Referred to *Minister for Justice and Equality v Lipinski* [2016] IECA 145, Referred to *Minister for Justice v A.P.L.* [2015] 6 JIC 1707 – (Denham C.J., O'Donnell Donal J., Clarke J., MacMenamin J., Laffoy J., Dunne J., O'Malley Iseult J. – 22/05/2017) – [2017] IESC 26
Minister for Justice and Equality v Lipinski

FAMILY LAW

Family – The Guardianship of Infants Act, 1964 – Removal of child from one jurisdiction to other without consent – Referred to *In re J (A Child) (Custody rights; Jurisdiction)* [2006] 1 AC 80, Referred to *L. (Minors) (Wardship: Jurisdiction), In re* [1973] EWCA Civ J1108-3 – (Binchy J. – 17/05/2017) – [2017] IEHC 274
DK v GY

Articles

Berkery, S. State intervention in ancillary relief matters on divorce. *Irish Journal of Family Law* 2017; (20) (1): 15
Mee, J. Trusts of the family home: social change, judicial innovation and legislative reform. *Irish Jurist* 2016; LVI: 161
Ní Shúilleabháin, M. Foreign divorce recognition and residence: a critical analysis of *H v H*. *Irish Jurist* 2017; LVII: 162
O'Brien, J. Let's call the whole thing off. *Law Society Gazette* 2017; (June): 52
Tobin, Dr B. A critique of *Re AB* (surrogacy: consent): can Ireland learn from the UK experience? *Irish Journal of Family Law* 2017; (20) (1): 3
Walsh, K. Separation anxiety. *Law Society Gazette* 2017; (May): 46
Walls, M., Toomey, Grahame. 2017 family law update. *Irish Tax Review* 2017; (2): 147

FINANCE

Statutory instruments

European Union (financial checks) regulations 2017 – SI 188/2017
European Union (restrictive measures concerning Egypt) regulations 2017 – SI 168/2017
European Union (restrictive measures concerning Iraq) (no. 3) regulations 2017 – SI 169/2017
European Union (restrictive measures concerning Libya) regulations 2017 – SI 180/2017
European Union (restrictive measures concerning Somalia) regulations 2017 – SI 167/2017
European Union (restrictive measures concerning Ukraine) (no.2) regulations 2017 – SI 208/2017
European Union (restrictive measures concerning Yemen) regulations 2017 – SI 210/2017
Finance Act 2015 (section 19(2)(f)) (commencement) order 2017 – SI 216/2017
Finance (no. 2) act 2013 (section 70) (commencement) order 2017 – SI 193/2017

FISHERIES

Articles

O'Keeffe, L. The point system for fishing vessels – dead in the water? *Dublin University Law Journal* 2016; (39) (2): 429

FOOD

Statutory instruments

European Union (nutrition and health claims made on foods) (amendment) regulations 2017 – SI 154/2017
Food standards (ice-cream) (revocation) regulations 2017 – SI 195/2017

GARDA SÍOCHÁNA

Statutory instruments

Garda Síochána Act 2005 (section 42) (no. 3) (special inquiry relating to the Garda Síochána) order 2017 – SI 198/2017
Garda Síochána Act 2005 (section 42) (no. 4) (special inquiry relating to the Garda Síochána) order 2017 – SI 199/2017
Garda Síochána Act 2005 (section 42) (no. 5) (special inquiry relating to the Garda Síochána) order 2017 – SI 200/2017
Garda Síochána Act 2005 (section 42) (no.2) (special inquiry relating to the Garda Síochána) order 2017 – SI 197/2017
Garda Síochána Act 2005 (section 42) (special inquiry relating to the Garda Síochána) order 2017 – SI 196/2017

GOVERNMENT

Statutory instruments

Health (delegation of ministerial functions) order 2017 – SI 178/2017
Statistics (waste generation and treatment survey) order 2017 – SI 139/2017

HEALTH

Health – Safety, Health and Welfare at Work (Quarries) Regulations 2008 – Safety, Health and Welfare at Work (Construction) Regulations 2013 – Applied *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317, Distinguished *Maguire v South Eastern Health Board* [2001] 3 IR 26 – (Humphreys J. – 24/04/2017) – [2017] IEHC 242
O'Connell v Solas

Statutory instruments

Health (Amendment) Act 2017 (commencement) order 2017 – SI 155/2017
Misuse of Drugs (Amendment) Act 2016 (commencement) order 2017 – SI 172/2017
Misuse of drugs (designation) order 2017 – SI 174/2017
Misuse of drugs (exemption) order 2017 – SI 175/2017
Misuse of drugs regulations 2017 – SI

173/2017
Occupational Therapists Registration Board criteria for restoration to the register following removal on request bye-law 2017 – SI 152/2017
Occupational Therapists Registration Board criteria for restoration to the register following cancellation of registration bye-law 2017 – SI 153/2017
Physiotherapists Registration Board criteria for restoration to the register following removal on request bye-law 2017 – SI 183/2017
Physiotherapists Registration Board criteria for restoration to the register following cancellation of registration bye-law 2017 – SI 184/2017
Health Identifiers Act 2014 (commencement) order 2017 – SI 236/2017
Health Identifiers Act 2014 (health services provider) regulations 2017 – SI 237/2017

HOUSING

Articles

Wall, R. Wherever I lay my hat... *Law Society Gazette* 2017; (June): 56

HUMAN RIGHTS

Library acquisitions

Ramcharan, B.G. *United Nations Protection of Humanity and its Habitat: A New International Law of Security and Protection*. The Netherlands: Brill Nijhoff, 2016 – C401
Smyth, C.M. *Social and Economic Rights in Ireland*. Dublin: Clarus Press, 2017 – C200.C5
Samuel, Z. *Female Genital Mutilation: Law and Practice*. Bristol: LexisNexis, 2017 – C200
Leach, P. *Taking a Case to the European Court of Human Rights (4th ed.)*. Oxford: Oxford University Press, 2017 – C200

Articles

Butler, G. The ultimate stumbling block? The common foreign and security policy, and accession of the European Union to the European Convention on Human Rights. *Dublin University Law Journal* 2016; (39) (1): 229
Greene, A. Through the looking glass? Irish and UK approaches to Strasbourg jurisprudence. *Irish Jurist* 2016; LV: 112
Murphy, C. 'A matter of humanity'? Emerging principles relating to deportation and human rights. *Dublin University Law Journal* 2016; (39) (1): 259

IMMIGRATION

Articles

Coffey, D. Standards of scrutiny in judicial review of deportation decisions involving Article 3 ECHR: *X.X. v Minister for Justice and Equality*. *Irish Jurist* 2017; LVII: 144

INSOLVENCY

Library acquisitions

Fletcher, I.F. *The Law of Insolvency (5th ed.)*. London: Sweet & Maxwell, 2017 – N310

Articles

Costello, K. The Irish shopkeeper and the law of bankruptcy 1860-1930. *Irish Jurist* 2016; LVI: 180

INSURANCE

Liability – Compensation – Motor accidents – Applied *Gurtner v Circuit* [1968] 2 QB 587, Applied *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 – (Denham C.J., O'Donnell Donal J., McKechnie J., Clarke J., MacMenamin J., Charleton J., O'Malley Iseult J. – 25/05/2017) – [2017] IESC 31
The Law Society of Ireland v The Motor Insurers' Bureau of Ireland

Library acquisitions

Henley, C., Kemp, S. *The Law of Insurance Broking (3rd ed.)*. London: Sweet & Maxwell, 2016 – N290

INTELLECTUAL PROPERTY

Articles

Carolan, E. Establishing the public interest in media publication: the difficulties with *Denis O'Brien v RTÉ*. *Irish Jurist* 2016; LV: 189

Statutory instruments

Patent (Amendment) Rules 2017 – SI 206/2017
Patents, Trade Marks and Designs (Fees) (Amendment) Rules 2017 – SI 205/2017

INTERNATIONAL LAW

Articles

Hansvall, S. Flying by the CETA your pants. *Law Society Gazette* 2017; (June): 48

JUDICIAL REVIEW

Library acquisitions

Orbinson, W., Connolly, F. *Planning and Judicial Review Case Summaries 1976-2016*. Newtownards: Planning Online, 2016 – N96.4.C4

Articles

Fitzgibbon, C. Errors on the face of the record: the approach of the "modern law". *Irish Criminal Law Journal* 2017; (27) (2): 34
McDermott, P.A. From boom to bust: the unexpected rise and fall of fair trial judicial review in Irish criminal law. *Irish Jurist* 2016; LVI: 261

JURISPRUDENCE

Articles

Flanagan, B. 1966-2016: legal philosophy as patient. *Irish Jurist* 2016; LVI: 123
Hogan, G. Mr Justice Brian Walsh: the legacy of experiment and the triumph of judicial imagination. *Irish Jurist* 2017; LVII: 1
Jordan, M. Illegality and the law of fast-fish and loose-fish. *Irish Jurist* 2017; LVII: 14
Keating, A. Interpretative sources of law. *Irish Law Times* 2017; (35) (10): 129
Keating, A. The confirmation of natural rights and validity of legal rules. *Irish Law Times* 2017; (35) (8): 100

LAND LAW

Easements – Common areas – Right-of-way – Referred to *Conneran and O'Reilly v Corbett and Sons Ltd and Radical Properties Ltd* [2004] IEHC 389, Referred to *Dwyer Nolan Developments Ltd v Kingscroft Developments Ltd* [1999] 1 ILRM 141, Referred to *Honiball and ors v McGrath and Mac Enterprises Ltd* [2002] IESC 26 – (Ryan P., Edwards J., McDermott J. – 10/05/2017) – [2017] IECA 141
Palaceanne Management Ltd v Allied Irish Bank plc

Library acquisitions

Cousins, E.F., Honey, R. *Gadsen on Commons and Greens (2nd ed.)*. London: Sweet & Maxwell, 2012 – N60

LANDLORD AND TENANT

Lease – Specific performance – Damages – Appellants seeking to appeal against judgment and order of High Court – Whether it was the conduct of the appellants that prevented agreement from being implemented – Referred to *Hay v O'Grady* [1992] 1 IR 210 – (Peart J., Irvine J., Hedigan J. – 12/05/2017) – [2017] IECA 157
Reynolds v Altomoravia Holdings Ltd

Articles

Brennan, G. Renewal rights for agricultural tenants – who cares? *Conveyancing and Property Law Journal* 2017; (22) (2): 30

Statutory Instruments

Residential Tenancies (Amendment) Act 2015 (section 17(c)) (commencement) order 2017 – SI 159/2017

LEGAL AID

Articles

Grace, F. You have the right to a lawyer – an empirical study. *Irish Criminal Law Journal* 2017; (27) (2): 50

LEGAL HISTORY

Articles

Coffey, D. 1916, 1921 and the "destruction of the legal unity of the British Empire". *Dublin University Law Journal* 2016; (39) (2): 333
Daly, E. Irish popular sovereignty in historical and theoretical perspective. *Dublin University Law Journal* 2016; (39) (2); 349
Hanly, C. The 1916 proclamation and jury trial in the Irish free state. *Dublin University Law Journal* 2016; (39) (2): 373
Mohr, T. The Irish question and the evolution of British imperial law, 1916-1922. *Dublin University Law Journal* 2016; (39) (2): 405
Quinn, P. John O'Donovan's and Eugene O'Curry's notes and the construction of the ancient laws of Ireland. *Irish Jurist* 2016; LV: 166

LEGAL PROFESSION

Library acquisitions

Prince, M.M. *Prince's Dictionary of Legal Abbreviations: A Reference Guide for Attorneys, Legal Secretaries, Paralegals, and Law Students (7th ed.)*. New York: William S Hein & Co., Inc., 2017 – REF
Miller, E., Hodgson, K. *LinkedIn for Lawyers: Developing a Profile to Grow your Practice*. London: Ark Group, 2015 – L50
Mills, C. *Making Every Six Minutes Count*. London: Ark Group, 2016 – L50
Goodman, J. *Robots in Law: How Artificial Intelligence is Transforming Legal Services*. London: Ark Group, 2016 – L50

Articles

Holmes, M. Rise of the machines. *Law Society Gazette* 2017; (June): 26
Roche, L. Start me up! *Law Society Gazette* 2017; (June): 30
Rowe, D. Challenge accepted. *Law Society Gazette* 2017; (June): 44
O'Brien, J. Let's call the whole thing off. *Law Society Gazette* 2017 (June): 52

LEGAL SYSTEMS

Library acquisitions

Fagan, F., Levmore, S. *The Timing of Lawmaking*. Cheltenham: Edward Elgar Publishing Limited, 2017 – M83

Articles

Parry, G. Is breaking up hard to do? The case for a separate Welsh jurisdiction. *Irish Jurist* 2017; LVII: 61

LIMITATIONS

Articles

McDowell, H. Limitation periods in debt recovery claims. *The Bar Review* 2017; (22) (3): 81

MEDICAL LAW

Acts

Medical Practitioners (Amendment) Act 2017 – Act No. 10 of 2017 – Signed on May 23, 2017

MENTAL HEALTH

Library acquisitions

Ruck Keene, A., Edwards, K., Eldergill, *A. Court of Protection Handbook: A User's Guide (2nd ed.).* London: Legal Action Group, 2017 – N155.3

PERSONAL INSOLVENCY AND BANKRUPTCY

Insolvency – Personal Insolvency Acts 2002-2015 – Personal insolvency arrangement – Referred to *In re Dunne (A Debtor)* [2017] IEHC 59, Referred to *In the matter of Sarah Hill* [2017] IEHC 18, Referred to *Re JD (a debtor)* [2017] IEHC 119 – (Baker J. – 22/05/2017) – [2017] IEHC 325
Re Callaghan (a debtor)

Insolvency – S.91(3) of the Personal Insolvency Acts 2012-2015 – Personal insolvency arrangement – Referred to *In the matter of Michael Hickey* [2017] IEHC 20 – (Baker J. – 22/05/2017) – [2017] IEHC 324
Hickey (a debtor)

PLANNING AND ENVIRONMENTAL LAW

Environment, transport and planning – The Planning and Development Act 2000 – Judicial review – Followed *Okunade v Minister for Justice and ors* [2012] 3 IR 152 – (Costello J. – 15/05/2017) – [2017] IEHC 312
Callaghan v An Bord Pleanala

Unauthorised development – Technical proof – Mooring – Applied *Chapman v The United Kingdom* (2001) 10 BHRC 48, Applied *Fingal County Council v Kennedy* [2015] 7 JIC 3102 – (Denham C.J., McKechnie J., Clarke J., Laffoy J., Dunne J. – 25/05/2017) – [2017] IESC 32
Fingal County Council v Kennedy

Library acquisitions

Orbinson, W., Connolly, F. *Planning and Judicial Review Case Summaries 1976-2016.* Newtownards: Planning Online, 2016 – N96.4.C4
Orbinson, W. *Planning Appeals Principles: The Decision-Taking Approach of the Planning Appeals Commission (4th ed.).* Newtownards: Planning Online, 2014 – N96.95.C4

Articles

Kingston, S. Regulating Ireland's environment in 2016: hierarchy, networks and values. *Irish Jurist* 2016; LVI: 42

PRACTICE AND PROCEDURE

Delay – Sexual assault – Prejudice – *Applied Primor plc. v Stokes Kennedy Crowley* [1996] 2 IR 459, Referred to *Comcast International Holdings Incorporated and ors v Minister for Public Enterprise and ors* [2012] IESC 50, Referred to *McNamee v Boyce* [2016] 2 JIC 0403 – (Denham C.J., O'Donnell Donal J., Clarke J., MacMenamin J., Dunne J. – 18/05/2017) – [2017] IESC 24
McNamee v Boyce

Practice and procedures – O.19, r.28 of the Rules of the Superior Courts – Striking out of proceedings – Referred to *AA v Medical Council* [2003] 4 IR 302, Referred to *Riordan v An Taoiseach* [2001] 5 JIC 1104 – (Eagar J. – 05/05/2017) – [2017] IEHC 270
Rooney v Ireland

Practice and procedures – O.40, r.1 of the Rules of the Superior Courts 1986 – Cross-examination of witness – Referred to *Carlow Kilkenny Radio Ltd v Broadcasting Commission* [2003] 3 IR 528, Referred to *Dunnes Stores v Dublin City Council* [2016] IEHC 724, Referred to *S.T.E. v Minister for Justice and Equality* [2016] 6 JIC 2410 – (Barrett J. – 18/05/2017) – [2017] IEHC 315
Murphy v Minister for Transport, Tourism, and Sport

Practice and procedures – O.99, r.1 and r.4 of the Rules of the Superior Courts – Award of costs – Followed *Godsil v Ireland* [2015] 2 JIC 2403, Applied *Veolia Water UK plc and others v Fingal County Council, Respondent (No. 1)* [2007] 1 IR 690 – (Barr J. – 28/05/2017) – [2017] IEHC 249
Dardis v Poplovka

Practice and procedures – Striking out of proceedings – *Res judicata* – Applied *McHugh v Allied Irish Banks Plc and ors* [2009] IEHC 340, Referred to *Daniel McAteer v Senan Burke and ors* [2015] IECA 215, Referred to *Komady Ltd and anor v Ulster Bank Ireland Ltd* [2014] IEHC 325 – (Noonan J. – 26/05/2017) – [2017] IEHC 247
McAteer v Burke

Summary summons – Summary judgment – Dismissal of claim – Appellant seeking to appeal against two orders of the High Court – Whether High Court judges erred in law – Applied *Aer Rianta cpt v Ryanair Ltd (No 1)* [2001] 4 IR 607 – (Peart J., Irvine J., Hogan J. - 26/05/2017) – [2017] IECA 121
Danske Bank A/S trading as Danske Bank v Fox

Library acquisitions

Sime, S., French, D., Kay, M. *Blackstone's Civil Practice 2017.* Oxford: Oxford University Press, 2017 – N365

Articles

Biehler, H. Dismissal of proceedings on grounds of delay: recent developments. *Irish Jurist* 2016; LV; 175
Haynes, S.M. The impressive reach of the 'leapfrog' appeal. *The Bar Review* 2017; (22) (3): 77
Noonan, R. Stare decisis, overruling, and judicial law-making: the paradox of the JC case. *Irish Jurist* 2017; LVII: 119

PRISONS

Articles

O'Mahony, C. Responding to defendants and offenders with mental health problems in Ireland: the need for reform. *Irish Criminal Law Journal* 2017; (27) (2): 39

PROFESSIONS

Professional misconduct – Litigation – Legal professionals – Referred to *McCool v Monaghan* [2015] IEHC 700 – (Peart J., Irvine J., Hogan J. – 04/05/2017) – [2017] IECA 129
McCool v Monaghan

REGULATORY LAW

Articles

Schiller, A. Lost in translation. *Law Society Gazette* 2017; (May): 54

RELIGION

Articles

Daly, E. Religion as public good and private choice in Irish constitutional doctrine. *Irish Jurist* 2016; LVI: 103

RESTITUTION

Articles

Cleary, N. Restitution for mistake of law in Ireland. *Irish Jurist* 2016; LV: 25

ROAD TRAFFIC

Statutory instruments

Road Traffic Act 2010 (sections 15 and 17) (prescribed forms) (amendment) regulations 2017 – SI 151/2017
Road traffic (large public service vehicles) (licensing) regulations 2017 – SI 192/2017
Road traffic (signs) regulations 2017 – SI 150/2017

SOCIAL WELFARE

Statutory instruments

Social housing assessments (summary) regulations 2013 (revocation) regulations 2017 – SI 161/2017
Social welfare (consolidated claims, payments and control) (amendment) (no. 4) (household budgeting) regulations 2017 – SI 185/2017

SUCCESSION

Library acquisitions

Spierin, B.E. *The Succession Act 1965 and Related Legislation: A Commentary (5th ed.).* Dublin: Bloomsbury Professional, 2017 – N120.C5
Law Reform Commission. *Law Reform Commission Report on Section 117 of the Succession Act 1965: Aspects of Provision for Children.* Dublin: Law Reform Commission, 2017 – L160.C5

Articles

Keating, A. Personal liability of nominated executors. *Conveyancing and Property Law Journal* 2017;(22) (2): 26

TAXATION

Library acquisitions

Clarke, G., Lawrance, D. *Clarke's Offshore Tax Planning 2016-17 (23rd ed.).* London: LexisNexis, 2016 – M336.76
Maguire, T., Judge, N.E. *Irish Income Tax 2017 (2017 ed.).* Dublin: Bloomsbury Professional, 2017 – M337.11.C5
Mitchell, F., Brodie, S., Kennedy, D., Dillon, G. *Value-Added Tax and VAT on Property: Finance Act 2016* (19th/13th ed.). Dublin: Irish Taxation Institute, 2017 – M337.45.C5

Articles

Garavan, C. Access for exiles: the McManus case, the domicile levy and the double taxation treaty network. *Irish Tax Review* 2017; (2): 139
Hardy, K. Capital allowances: back to basics. *Irish Tax Review* 2017; (2): 105
Scully, M., O'Brien, P. Farming taxation: the tax impact of diversification. *Irish Tax Review* 2017; (2): 123
McNally, J. Ireland's "new" co-operative compliance framework: an international comparison. *Irish Tax Review* 2017; (2): 100
Ludlow, M., Power, T. Onus of proof in tax cases. *Irish Tax Review* 2017; (2): 135
Dillon, G. Protection of the "revenue": how is this achieved in the VAT world? *Irish Tax Review* 2017; (2): 111
Smyth, L. Qualifying disclosures and offshore matters: implications post 1 May 2017. *Irish Tax Review* 2017; (2): 83
Maguire, T. Recent (and not so recent) views on what is an asset for capital gains tax purposes. *Irish Tax Review* 2017; (2): 87
Ryder, A. Tax risk management: a clear tax governance policy is essential. *Irish Tax Review* 2017; (2): 132
Norton, K., Bane, A.M. Transfer pricing dispute resolution in Ireland today. *Irish Tax Review* 2017; (2): 77
Cosgrove, N. Anti-tax avoidance directive 2: an overview. *Irish Tax Review* 2017; (2): 67
Harrison, H., Roche, S. Are we there yet? The journey towards US tax reform. *Irish Tax Review* 2017; (2): 61

TORT

Articles

Binchy, W. Tort law in Ireland: a half-century review. *Irish Jurist* 2016; LVI: 199
Fitzgibbon, C. The vicarious liability of religious orders in child abuse civil actions. *Irish Law Times* 2017; (35) (8): 104

TRANSPORT

Statutory instruments

European Union (transport of dangerous goods by rail) (amendment) regulations 2017 – SI 194/2017
National vehicle and driver file (access) (amendment) regulations 2017 – SI 179/2017
Vehicle Clamping Act 2015 (commencement) order 2017 – SI 211/2017
European Union (road transport) (working conditions and road safety) regulations 2017 – SI 229/2017
Roads Act 1993 (Extinguishment of Public Right of Way) Order 2017 – SI 238/2017
Road Traffic Act 2010 (Part 3) (Commencement) Order 2017 – SI 241/2017
Road Traffic Act 2010 (part 3) (Fixed Charge Offences) Regulations 2017 – SI 244/2017
Road Traffic Act 2010 (Section 35(6)) (Prescribed Document) Regulations 2017 – SI 245/2017
Road Traffic Act 2010 (Section 36(1) (Prescribed Notice) Regulations 2017 – SI 243/2017
Road Traffic Act 2016 (Part 5 and Section 36(d)) (Commencement) Order 2017 – SI 242/2017

TRAVEL LAW

Library acquisitions

Saggerson, A., Prager, S., Harding, J., Chapman, M. *Saggerson on Travel Law and Litigation (6th ed.).* London: Wildy, Simmonds and Hill Publishing, 2017 – N320

TRIBUNAL OF INQUIRY

Articles

Donson, F., O'Donovan, D. Designing effective parliamentary inquiries: lessons learned from the Oireachtas banking inquiry. *Dublin University Law Journal* 2016; (39) (2): 303

WHISTLEBLOWERS

Library acquisitions

Lewis, J., Bowers, J., Fodder, M. *Whistleblowing: Law and Practice (3rd ed.).* Oxford: Oxford University Press, 2017 – N192.29

Bills initiated in Dáil Éireann during the period April 27, 2017, to June 21, 2017

[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.

Asian Infrastructure Investment Bank Bill 2017 – Bill 62/2017
Criminal Justice (Commission of Sexual Offences) (Amendment) Bill 2017 – Bill 73/2017 [pmb] – Deputy Kevin 'Boxer' Moran
Financial Services and Pensions Ombudsman Bill 2017 – Bill 59/2017
Foal Levy Bill 2017 – Bill 66/2017 [pmb] – Deputy Clare Daly
Harassment, Harmful Communications and Related Offences Bill 2017 – Bill 63/2017 [pmb] – Deputy Brendan Howlin
Health and Safety (Funfair) (Amendment) Bill 2017 – Bill 69/2017 [pmb] – Deputy Niall Collins
Health and Social Care Professionals (Amendment) Bill 2017 – Bill 76/2017 [pmb] – Deputy Dessie Ellis and Deputy Imelda Munster
Independent Reporting Commission Bill 2017 – Bill 77/2017
Planning and Development (Amendment) Bill 2017 – Bill 75/2017 [pmb] – Deputy Ruth Coppinger, Deputy Paul Murphy, Deputy Mick Barry
Road Traffic (Quads and Scramblers) (Amendment) Bill 2017 – Bill 74/2017
Urban Regeneration and Housing (Amendment) Bill 2017 – Bill 65/2017 [pmb] – Deputy Catherine Murphy and Deputy Roisin Shortall
Valuation (Amendment) Bill 2017 – Bill 72/2017 [pmb] – Deputy Barry Cowen

Bills initiated in Seanad Éireann during the period April 27, 2017, to June 21, 2017

Autism Spectrum Disorder Bill 2017 – Bill 61/2017 [pmb] – Senator James Reilly
Controlled Drugs and Harm Reduction Bill 2017 – Bill 68/2017 [pmb] Senator Ivana Bacik, Senator Frances Black, Senator Victor Boyhan, Senator Gerard P. Craughwell, Senator John Dolan, Senator Joan Freeman, Senator Alice-Mary Higgins, Senator Kevin Humphreys, Senator Colette Kelleher, Senator Billy Lawless, Senator Michael McDowell, Senator Gerald Nash, Senator David Norris, Senator Grace O'Sullivan, Senator Brian Ó Domhnaill, Senator Aodhán Ó Ríordáin and Senator Lynn Ruane.
Declaration of Independence Day Bill 2017 – Bill 60/2017 [pmb] – Senator Keith Swanick, Senator Diarmuid Wilson, Senator Mark Daly and Senator Paul Daly
Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill 2017 – Bill 64/2017 [pmb] – Senator Ivana Bacik, Senator Kevin Humphreys, Senator Aodhán Ó Ríordáin and Senator Gerald Nash
Judicial Council Bill 2017 – Bill 70/2017
Litter Pollution (Amendment) Bill 2017 – Bill 58/2017 [pmb] – Senator Catherine Ardagh, Senator Jennifer Murnane O'Connor, Senator Ned O'Sullivan, Senator Aidan Davitt, Senator Robbie Gallagher and Senator Gerry Horkan
Údarás na Gaeltachta (Amendment) Bill 2017 Bill 2017 – Bill 67/2017 [pmb] – Senator Trevor Ó Clochartaigh, Senator Niall Ó Donnghaile and Senator Paul Gavan

Progress of Bills and Bills amended in Dáil Éireann during the period April 27, 2017, to June 21, 2017

Central Bank and Financial Services Authority of Ireland (Amendment) Bill 2014 – Bill 88/2014 – Committee Stage – Report Stage
Coroners Bill 2015 – Bill 67/2015 – Committee Stage
Courts (No. 2) Bill 2016 – Bill 120/2016 – Committee Stage – Report Stage
Criminal Justice Bill 2016 – Changed from Bail (Amendment) Bill 2016 – Bill 108/2016 – Committee Stage – Report Stage
Criminal Justice (Victims of Crime) Bill 2016 – Bill 121/2016 – Committee Stage
Inland Fisheries (Amendment) Bill 2017 – Bill 51/2017 – Committee Stage – Report Stage
Minerals Development Bill 2015 – Bill 69/2015 – Committee Stage
National Shared Services Office Bill 2016 – Bill 20/2016 – Committee Stage
Parole Bill 2016 – Bill 29/2016 – Committee Stage
Planning and Development (Amendment) Bill 2016 – Bill 1/2016 – Committee Stage – Report Stage
Prohibition of the Exploration and Extraction of Onshore Petroleum Bill 2016 – Bill 37/2016 – Committee Stage

Progress of Bills and Bills amended in Seanad Éireann during the period April 27, 2017 to June 21, 2017

Adoption (Amendment) Bill 2016 – Bill 23/2016 – Committee Stage – Report Stage
Domestic Violence Bill 2017 – Bill 13/2017 – Committee Stage
Sea-Fisheries (Amendment) Bill 2017 – Bill 19/2017 – Committee Stage

For up to date information please check the following websites:

Bills & Legislation – http://www.oireachtas.ie/parliament/
Government Legislation Programme updated January 17, 2017 – http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Supreme Court Determinations – Leave to Appeal Granted – Published on Courts.ie – April 25, 2017 to June 21, 2017

Walsh v The Minister for Justice and Equality and ors – [2017] IESCDET 53 – Leave to appeal from the High Court granted on 26/05/2017 – (O'Donnell J., McKechnie J., Dunne J.)
Rowan v Kerry County Council and anor – [2017] IESCDET 47 and [2017] IESCDET 24 – Leave to appeal from the High Court granted 15/05/2017 (further hearing required) – (Clarke J, MacMenamin J., Laffoy J.)
Director of Public Prosecutions v Forsey – [2017] IESCDET 45 – Leave to appeal from Court of Appeal granted 26/04/2017 – (Clarke J, MacMenamin J., Laffoy J.)

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

Recent developments in the law of guarantees

There have been some recent interesting developments in the construction of guarantees and some equally intriguing defences

Jennifer M. Good BL

The law of guarantees is an area in which there has been a surge in recent case law, both in summary proceedings and substantive hearings (mostly before the Commercial Court). While it is true to say that general contractual principles apply, there are a number of specific legal rules that apply to guarantees given that they give rise to dependant, and sometimes contingent, obligations. This paper gives a broad overview of some of the current trends in guarantee cases, firstly, regarding the construction of types of guarantee, and secondly, in relation to attempted defences which have been raised in the recent case law.

Construction, contractual terms and types of guarantee

The terms of a guarantee should be clear (although standard form contracts are increasingly used).[1] It should set out on its face whether the guarantor is liable for past debts of the principal, or debts arising after the guarantee has been executed, any temporal term of the guarantee, and whether the guarantee is a limited one (intended to cover a specific debt only) or an "all money" guarantee that is binding as a continuing security. In the absence of a contractual provision to the contrary, a continuing guarantee can be withdrawn at any time by the guarantor on notice.

In the case of *McGrath v Danske Bank,*[2] Ms Justice Murphy considered the proper construction of a "demand" guarantee and whether, in accordance with its terms, it was validly terminated. The defendant bank contended that any purported termination merely relieved her of liability in respect of future borrowings and crystallised the sum due. Clause 3 of the guarantee at issue stated:

> "This guarantee shall be binding as continuing security on me, my executors, administrators and legal representatives until the expiration of three calendar months after I or in the case of my dying or becoming under a disability my executors' administrators or legal representatives shall have given to the bank notice in writing to discontinue and determine the same".

The Court was required to decide whether a letter of termination from the guarantor was sufficient to invoke clause 3 of the guarantee and, if so, the effect of such an invocation. On the issue of construction, the parties agreed that contracts of suretyship should be strictly construed so that no liability is imposed on the surety that is not clearly and distinctly covered by the terms of the agreement. It was observed that ambiguities should be construed *contra proferentem* as against the creditor. The plaintiff guarantor submitted that under clause 3, revocation could be effected by giving notice in writing and the intention of the party to be no longer bound by the guarantee. The Court then considered the effect of this termination. The defendant submitted that there were two possibilities: firstly, that the liability is terminated in respect of future borrowings; or, secondly, that it is terminated in respect of existing, historic borrowings. The plaintiff argued that under clause 3, the guarantee remained in force for three calendar months after the notice in writing and, after that, it ceased to be effective. If the defendant wished to call in the security provided for by the guarantee by way of demand, it had three months to do so.

The Court held that the general rule in relation to revocation is that the guarantor would be relieved of future liabilities, but remained liable for accrued liabilities. This, however, does not apply in relation to demand guarantees, under which the liability of the surety to pay is contingent upon the demand, and no cause of action accrues until the demand is validly made. The plaintiff also made arguments in relation to a principal debtor type clause, but the Court did not accept that submission. The decision in this case shows that construction of the actual terms and the intention of the parties are determinative in deciding the precise nature and effect of any given guarantee. Therefore, it is no surprise that there has been an increase in litigation in the area in recent times.

Purported defences

Recent case law demonstrates an emphasis on guarantors seeking to avoid liability by the invocation of a broad range of factual, equitable and statutory defences, which will briefly be considered in the remainder of this paper.

Realisation of other security

A factual argument that has appeared in recent case law is where a guarantor seeks to argue that a creditor should or is obliged to attempt to realise other assets or security in advance of resorting to calling in the debt as against the guarantor. On its face, this proposition appears to have an element of common sense, given that a guarantor's liability is dependent upon the liability of the principal debtor, that the liability can be contingent and that in most cases no actual, tangible benefit can be seen to pass to a guarantor. However, such contention must be considered in the light of the terms of a guarantee. The issue has been raised in the recent cases of *Allied Irish Banks PLC v Yates*[3] and *The Governor and Company of Bank of Ireland v Gordon.*[4]

In *Yates,* the defendant argued that the bank should not be allowed to enforce a guarantee without first realising other security available. Noonan J. observed that the creditor could realise its debt by three modes: sue the debtor; sell the mortgage securities; or, sue the sureties, holding that these modes could be exercised at any time simultaneously or contemporaneously, and that there was no obligation on the bank to first realise other security. In *Gordon*, the defendant argued that the application was premature and that the bank should await realisation of the assets in the receivership. Fullam J. cited the case of *ACC Bank PLC v McEllin and ors*[5] as authority for the proposition that there was no obligation for the creditor to enforce rights at any particular time. These cases indicate that in the absence of terms in the guarantee to the contrary, the creditor is entitled to enforce the security as and when it sees fit.

Non est factum

Another factual defence gaining prominence in pleas of defendants in such cases is the defence of *non est factum* (essentially a plea that a person signed a document without fully realising what it meant). This defence was raised in the case of *Yates*, referred to above. In that case, the defendant and her husband were directors of the company to which the loan was advanced. The defendant signed a *pro forma* guarantee and then claimed that she thought she was signing the documents for administrative purposes only, and understood that the plaintiff would not have recourse to those assets. The Court held that this case involved loans for the benefit of a company in which she was a major shareholder, as well as a director and secretary; she was by her own admission involved in the affairs of the company. The Court held that for the defence of *non est factum* to succeed, the defendant must demonstrate: 1) a difference between what he signed and what he thought he was signing; 2) a mistake as to the character of the document, not the legal effect; and, 3) no negligence on his part. *Non est factum* was also raised in the case of *Bank of Ireland v Curran*,[6] where Mrs Curran executed a guarantee in favour of a company in which her son was involved. The Court considered the recent decisions of *Allied Irish Bank PLC v Higgins and ors*[7] and *IBRC v* Quinn,[8] and held that if Mrs Curran had read the document she would have had absolutely no difficulty understanding that she was signing a guarantee for €1m, and providing security to the bank separate from any earlier security provided. The defence of *non est factum* was also alluded to in the judgment of Clarke J. in the case of *Ulster Bank v Roche and Buttimer*,[9] where he held that a person who signed a document which might have significant legal effect, and did so without reading the document or without applying himself to the content, must accept the consequences of signing a commercially binding document and prima facie would be bound. The strict requirements for this defence necessitated defendants to seek to avoid liability under a guarantee by invoking other, more inventive, defences.

Misrepresentation

One such defence is misrepresentation, which was raised in the case of *The Governor and Company of Bank of Ireland v Gordon*.[10] In this case, the defendant claimed that the "all sums" guarantee was limited to business assets of the defendant, and such was evidenced by representations made by the bank. He submitted that emails from the bank containing representations affected the construction of the guarantee and limited recourse to business assets. The representations were alleged to have been calculated to entice the defendant into remaining a customer of the bank by offering favourable terms for future finance. The plaintiff claimed that these communications could not have altered the terms, given a clause within the guarantee which prevented reliance on representations.[11] The Court held that the email communications might, on full evidence, be argued as meaning that the second guarantee was limited and that this issue could not be resolved at summary stage.

Undue influence

A more commonly-invoked defence, and one which has featured heavily in recent cases on guarantee, is undue influence. It should be noted that undue influence in these cases is rarely alleged against the creditor, but usually as against the principal debtor. In the case of *Curran*[12] the defendant claimed that she guaranteed the liabilities of a company (in which she was a director and secretary) as a result of the undue influence of her son, who had an interest in procuring such guarantee. The Court of Appeal considered that the test for undue influence should be considered in two stages:

> "…it is clear that in order to establish a defence of undue influence at a plenary hearing Mrs Curran would first have to satisfy the court that but for the undue influence exerted upon her by her son she would not have executed the guarantee and second, that the bank, i.e., the creditor, had actual or constructive notice that the guarantee was procured by the undue influence. … It is only relevant to consider whether it is arguable that the bank was obliged to make inquiries to ascertain whether, having regard to her connection with the company, she fully understood and was freely entering into the guarantee, if she could first establish a credible or arguable case on the facts that she executed the guarantee in circumstances of undue influence".[13]

It was held that Mrs Curran had made only a bald assertion and therefore did not meet the relatively low threshold. The Court of Appeal considered the decision of Clarke J. in the *Roche and Buttimer*[14] case, in which the first defendant had a business in the motor trade and was in a personal relationship with the second defendant. The second defendant had no involvement in the business but was a director. She had signed a guarantee over the liabilities of the company up to €50,000, but claimed that she was under the undue influence of the first-named defendant. It was held by Clarke J. that a regime which placed no obligation on a bank to take any steps to ascertain whether, in the presence of circumstances suggesting a non-commercial aspect to a guarantee, the party offering the guarantee might not be fully and freely entering same, gave insufficient protection to vulnerable sureties. The Court stated:

> "Constructive knowledge can often usefully be broken down into two separate questions. The first is as to what factors place a party on inquiry. The second is as to the nature of the inquiry or action that may then be required. If, in circumstances where a party is put on inquiry, that party does not carry out the inquiries necessary or take whatever other form of action may be mandated, then the party will be fixed with knowledge of matters which it would have discovered had it made the appropriate inquiries or, at least, may be faced with the situation where the court views the case on the basis that appropriate steps were not taken".[15]

When considering whether the plaintiff had been placed on inquiry in the present case, the Court held that it was clear that the second-named defendant was not a shareholder in the company although she was a director, and there was some knowledge that the defendants were in a personal relationship, and that the evidence suggested that the defendants lived at the same address. It was held that where a party was not a shareholder and the bank was not aware of any active involvement in the business, the personal relationship would emerge as a more significant factor. The Court felt that it was therefore unnecessary to consider the appropriate steps the bank should have taken. The plaintiff's claim was dismissed.

Again, the defence was considered in the case of *Ulster Bank (Ireland) Ltd v DeKrester and Fox*[16] with Mr Justice Birmingham giving the majority decision and Mr Justice Hogan dissenting. In this case, the Court considered whether a guarantee was valid and whether there was a positive duty on the bank to ensure that Ms Fox understood the nature of the guarantee, and had done what was required in relation to obtaining independent legal advice. Evidence emerged that Ms Fox had introduced the bank and the company, that she had previously run a business and had entered guarantees with the bank in that business. She submitted that she only held 1% of the shares in the present company, was not involved in the day-to-day running of the company, and did not benefit personally. However, she was a director and did receive a monthly salary. The Court considered the case law and held that the facts of the present case were clear cut. There was no basis for suggesting that there was a presumption of undue influence.

It was attempted to extend the defence further in the recent case of *ACC Loan Management Ltd v John and Maurice Connolly*,[17] where Ms Justice Finlay Geoghegan gave the majority decision and Hogan J. dissented. In this case, the guarantor did not contend that he entered into a guarantee under undue influence or by reason of some other wrongdoing on the part of the principal debtor. However, the issue arising was whether there was an arguable defence against the claim made by a creditor pursuant to a guarantee, on the ground that the creditor was on notice of a family relationship between the debtor and the guarantor, and was obliged to take steps to ensure the guarantor understood the nature of the guarantee and/or freely consented. In this case, the appellant guarantor was father of the first defendant. The Court stated:

> "…I am not satisfied that, in the absence of the father making out an arguable defence that he gave the guarantee under the undue influence of his son (or because of any other alleged wrong such as misrepresentation), there is any arguable defence available in Irish law to him that the bank was under an obligation by reason of the known fact that he, the proposed guarantor, was the father of the principal debtor to take steps to ensure that he received independent legal advice or otherwise ensure that the guarantee was freely entered into such that the failure of the bank to take such steps is an arguable defence to the enforcement of the guarantee against him".[18]

The Court therefore held that no undue influence was raised and the bank was not put on inquiry. The case law appears to be settled in relation to undue influence. However, as noted, the two recent Court of Appeal decisions in *DeKrester* and *Connolly* have strong written dissents by Mr Justice Hogan. It will therefore be interesting to see how the case law develops with regard to this defence.

Statutory defences

Finally, there are two statutory defences that may be open to guarantors;

however, they both only apply to consumers. It should be borne in mind that it is not a requirement that the guarantor himself be a consumer, but simply that the principal debtor is. The first of these defences is under the Consumer Credit Act, 1995 and in particular section 30(1)(b), which states that when a guarantee is signed by a consumer, the agreement should be handed to the guarantor or posted to him within 10 days, in default of which section 38 renders same unenforceable.

The other recourse is under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, which protects consumers from terms used (usually in standard form contracts) that represent unfair terms; for example, abuses of power by powerful lenders. Consider the standard term at play in the *Gordon*[19] case. If the principal debtor in that case had been a consumer, consideration might have been given to claiming that the clause in the standard form contract explicitly disallowing reliance upon a representation was an unfair term and an abuse of power. The Regulation has given rise to European case law,[20] which has held that a national court is required to assess of its own motion (without the need for a specific pleading) whether a contractual term falling within the scope of the Regulation is in fact unfair.

As can be seen from the brief examination covered by this paper, there are numerous defence options open to a guarantor and it is the writer's opinion that the case law in the area will continue to expand and develop.

References

1. See European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, discussed later.
2. [2015] IEHC 712.
3. [2016] IEHC 60.
4. [2016] IEHC 39.
5. [2013] IEHC 454.
6. [2016] IECA 399.
7. [2010] IEHC 219.
8. [2011] IEHC 470.
9. [2012] 1 I.R. 765.
10. *Op. Cit.*
11. See below comments on the Unfair Terms in Consumer Contracts Regulations.
12. *Op. Cit.*
13. At paragraph 32.
14. *Op. Cit.*
15. At paragraph 25.
16. [2016] IECA 371.
17. [2017] IECA 119.
18. At paragraph 28.
19. *Op. Cit.*
20. See for example case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya.*

The highs and lows of the Road Traffic Act 2016

The Road Traffic Act 2016 adds considerably to one of the most complex areas of Irish law.

The Road Traffic Act 2016 ("RTA 2016") marks the most significant development in road traffic law since the commencement of the Road Traffic Act 2010. The enactment signals a renewed focus by the legislature on further developing this notoriously-complex and technical area of law, which impacts upon the lives of almost every person in Ireland on a daily basis, and is the primary tool by which the State regulates the use of Irish roads and guards the safety of road users.

Once fully commenced, the RTA 2016 will deliver reform across a diverse range of areas, from provision for a register of written-off vehicles, to making it an offence for a car owner to permit a learner driver to drive their vehicle while unaccompanied. It also provides for the regulation of rickshaws, now a common, and until now totally-unregulated, feature of the nightscape of Irish city streets. The most revolutionary development wrought by the Act, however, is the introduction of strict liability drug driving offences, together with a range of additional powers that will be available to the Gardaí in the detection and investigation of such offences. Although certain reforms introduced by the RTA 2016 are to be welcomed, its enactment adds further to the entangled web of multitudinous statutes that comprise road traffic law in Ireland. The RTA 2016 is but another example of the need for this vast body of law to be consolidated for the benefit of the public, practitioners and the judiciary alike, and in order to promote certainty in the law and limit the hazard of error being made in its application.

Given the breadth of the RTA 2016, the purpose of this article is to set out the areas in which the most significant change has been or will be effected upon commencement.

Strict liability drug driving offences

Part 3 of the RTA 2016 concerns newly-created strict liability drug driving offences and was commenced on April 13, 2017.[1] Section 8 of the RTA 2016 makes a number of amendments to the RTA 2010 by the insertion of ss. 4(1A-1C) and 5(1A-1B), as well as the addition of a schedule. Sections 4(1A) and 5(1A) of the RTA 2010 (as amended) provide that where a specified concentration of a constituent element of a named drug identified in the new schedule – generally speaking cannabis, cocaine or heroin – is exceeded in the body of a person driving a vehicle, or in charge of one with the intent to drive it, that person shall be guilty of an offence. A conviction for drug driving under the newly-created offences will not be dependent on whether the capacity of the driver was compromised as a result of their intoxication, which is an essential proof in a prosecution for an offence contrary to s. 4(1) of the RTA 2010, being the provision under which prosecutions for drug driving were heretofore maintained.

Garda powers in relation to the detection of drug driving have been enhanced substantially. Since the commencement of ss. 49 and 50 of the RTA 1961 (and their respective successors ss. 4 and 5 of the RTA 2010), there has always been a power to arrest a driver under suspicion of an intoxicated driving offence,

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irrespective of whether the driver's intoxication is thought to have stemmed from the consumption of alcohol or drugs. The Gardaí have, however, been somewhat limited by the tools available to enable them to form an opinion as to whether or not a drug driving offence is being or has been committed. Whereas, in the case of intoxicating liquor, the power to require a person to provide a breath specimen at the roadside has been available to Gardaí for decades, similar powers relating to roadside testing for drugs have been entirely absent except perhaps for those relating to driver impairment testing pursuant to s. 11 of the RTA 2010.[2] These powers have been available to Gardaí since November 2014, but do not appear to be engaged frequently. Sections 10 and 11 of the RTA 2016 have amended ss. 9 and 10 of the RTA 2010 so that they now include a power to compel drivers to provide a sample of "oral fluid" for the purpose of preliminary drug tests at the roadside, which are currently conducted using a Dräger DrugTest 5000 machine. In the event of a sample testing positive for the presence of drugs, a garda will be able to rely upon the result of the roadside test in the formation of an opinion that the subject of that test has committed or is committing an offence contrary to ss. 4 or 5 of the RTA 2010 as the case may be, and effect an arrest on the basis of this opinion.

As in the case of drunken driving, a person arrested for, *inter alia*, a drug driving offence may be required to provide a specimen for the purpose of determining the nature and concentration of any drug in their system. Section 13B of the RTA 2010 (as inserted by s. 13 of the RTA 2016) provides that where an oral specimen has been taken or an impairment test conducted in respect of a person who has been arrested pursuant to any of the nine provisions recited in s. 13B, and that person has, in the opinion of a garda, committed an offence contrary to ss. 4(1A) or 5(1A) of the RTA 2010, they may be required to permit a designated doctor or nurse to take from them a specimen of their blood. In a break from tradition, however, and unlike a requirement pursuant to s. 12 of the RTA 2010 made of a person arrested for drunken driving,[3] there is no option to provide a urine specimen in lieu of permitting blood to be taken – one assumes this is on account of technical limitations in analysing urine specimens for drug concentration levels. The Medical Bureau of Road Safety's functions have been enlarged by the RTA 2016 so that it is now required to analyse specimens, not alone for the presence of an intoxicant – which was previously the limit of its functions in drug driving cases – but also, having determined the presence of a drug in a blood sample(s), it now falls to the Bureau to ascertain the concentration thereof.

Minimum disqualification periods

Reform in the area of drug driving has also given rise to a benefit for putative offenders insofar as mandatory minimum disqualification periods are concerned. Section 26 of the RTA 1961, which concerns consequential disqualification orders, has been amended by s. 21 of the RTA 2016 to take account of the new offences and to bring the periods of disqualification that follow conviction more into line with those that apply in relation to drunken driving. Previously, the mandatory minimum length of a consequential disqualification for drug driving was considerably longer than that for drunken driving. The reason for this is that prior to the commencement of part 3 of the RTA 2016, the only way in which an individual could be prosecuted for drug driving was for an offence contrary to s. 4(1) of the RTA 2010, which, by operation of s. 26 of the RTA 1961 (as substituted by s. 65 of the RTA 2010), carried with it a mandatory disqualification of four years upon a first conviction, and six years upon a second or subsequent conviction. By comparison, separate strict liability offences relating to the concentration of alcohol in a driver's blood, urine or breath are long established, as are separate periods of disqualification, all of which are referable to specific concentration ranges and are three years or less in the case of a first conviction. While a tiered gradation of increasing concentrations of specific drugs in a person's system and increasing minimum disqualification periods referable to the concentration level of the relevant drug have not been introduced, where a person is convicted of an offence under either s. 4(1A) or 5(1A) of the RTA 2010, the minimum period of disqualification is one year in the case of a first offence or two years in the case of a second or subsequent offence. It is of further note that the existing fixed-penalty notice procedures under s. 29 of the RTA 2010 relating to drunken driving have not been extended to apply in respect of the new drug driving offences.

While some commentators may say that there now exists a minimum drug driving limit akin to drunken driving, such a view is, in large part, fallacious and could give rise to unwarranted alarm. The provisions that have always existed on the statute book in relation to intoxicated driving remain, and where a driver is intoxicated to such an extent as to be rendered incapable of driving a vehicle in a public place, such driver will be guilty of an offence under ss. 4(1) or 5(1) of the RTA 2010, as the case may be, and will be liable to prosecution irrespective of whether or not the concentration of the drug found in the blood exceeds the limits specified in the schedule.

A curious exemption

One of the more curious features of the RTA 2010, as amended by the RTA 2016, is submitted to be s. 4(1B) and its counterpart s. 5(1B), which each provide for exemption of a person from the strict liability offences relating to cannabis under certain circumstances. Where, in the case of s. 4(1B), a person has been lawfully prescribed a substance containing Δ^9-Tetrahydrocannabinol (one of the two elements of cannabis identified in the schedule) or, in the case of s. 5(1B), a person has been lawfully prescribed a substance containing either Δ^9-Tetrahydrocannabinol or 11-nor-9-carboxy-Δ^9-Tetrahydrocannabinol (being the second element of cannabis identified in the schedule), and that person is the holder of a medical exemption certificate[4] issued by their prescribing doctor, then the strict liability offences relating to cannabis shall not apply to them. The reason for the exclusion of 11-nor-9-carboxy-Δ^9-Tetra hydrocannabinol from s. 4(1B) is unclear. The exclusion appeared in s. 4 of the Road Traffic Bill 2016 (as initiated in Seanad Éireann) and the explanatory memorandum suggests that it was intended that s. 5 of the RTA 2010 would be amended in a manner identical to s. 4 of the RTA 2010, and that the exclusion was intended to provide for drivers who have been lawfully prescribed with cannabis-based medicines such as Sativex.

It might initially appear somewhat anomalous that the legislature would simultaneously prohibit persons from driving when there is present in their body a certain quantity of a named intoxicant that has, presumably on the basis of empirical data, been demonstrated as likely to impair one's ability to control a vehicle, but permit such behaviour where that intoxicant happens to be prescribed by a physician. However, it must be recalled that s. 4(1) of the

RTA 2010 will apply irrespective of whether a medical exemption certificate has issued. Therefore, if a prescribed medicine actually affects a person's capacity to properly control a vehicle in a public place, that person will be guilty of an offence and liable to prosecution. This could give rise to unfortunate consequences for an individual who holds a medical exemption certificate and is not liable to prosecution under s. 4(1A), which carries a one-year disqualification. That person will instead be at the hazard of being prosecuted for an offence under s. 4(1) of the RTA 2010, which will result in a mandatory consequential disqualification order of at least four years upon conviction.

Fixed-charge offences

Part 5 of the RTA 2016[5] concerns fixed-charge offences and amends part 3 of the RTA 2010, which itself was only commenced as recently as June 1, 2017.[6] The object of part 3 of the RTA 2010 is to allow a person who has been served with a summons in relation to a fixed-charge offence, in respect of which a fixed-penalty notice had issued and gone unpaid, to make a payment not later than seven days prior to the return date on the summons. This will result in the prosecution being discontinued.

If a prescribed medicine actually affects a person's capacity to properly control a vehicle in a public place, that person will be guilty of an offence and liable to prosecution.

Section 44 of the RTA 2010[7] now requires that a summons relating to a fixed-charge offence be accompanied by a 'section 44 notice' informing the person summonsed of, *inter alia*, their ability to pay double the fine initially imposed by the fixed-penalty notice, and that if that amount is duly paid there will be no need to attend court and the prosecution will be discontinued. Crucially, the effect of s. 44(10) of the RTA 2010 (as substituted by s. 27 of the RTA 2016) is that where a summons is accompanied by a 'section 44 notice', and the accused does not avail of the opportunity to pay double the original fine, that person cannot rely on the defence that s/he did not receive the original fixed-penalty notice. Curiously, the RTA 2016 does not require that the 'section 44 notice' contain any information concerning the operation and effect of s. 44(10) of the RTA 2010 such that, in the absence of taking advice, those summonsed who did not receive a fixed-penalty notice may (perhaps reasonably) assume that they will be able to rely on this fact in their defence in court. One must query why someone who genuinely did not receive a fixed-penalty notice will have to either pay double the standard fine or face conviction in court, where a greater fine is likely to be imposed together with an enhanced number of penalty points?

Nonetheless, the commencement of part 3 of the RTA 2010 will no doubt provide welcome relief to dilatory recipients of fines, as well as to the District Court lists, which are overburdened by prosecutions for fixed-charge offences, which occupy considerable court resources[8] and can result in prosecuting Gardaí being in court for lengthy periods, instead of being available for duty elsewhere.

Disqualification recognition between Ireland and the UK

From January 28, 2010, the mutual recognition of driving disqualifications by the UK and Ireland was provided for under the rubric of the European Convention on Driving Disqualifications. However, the UK opted out of its application as of December 1, 2014, following which time no arrangement for mutual recognition of disqualifications has operated between the two jurisdictions.

The lacuna in relation to the recognition of disqualification orders between Ireland and the UK is to be remedied by the implementation of the Agreement on the Mutual Recognition of Driving Disqualifications Between Ireland and the United Kingdom of Great Britain and Northern Ireland executed in Dublin on October 30, 2015 ("the Agreement"). This will come into force upon the later notification by either jurisdiction that the internal procedures necessary for the implementation of the Agreement have been put in place.[9]

Under Article 3 of the Agreement, each respective state shall notify the other's central authority of the imposition of a driving disqualification consequent upon conviction of a person for certain specified road traffic offences, including intoxicated driving, reckless or dangerous driving, speeding and driving while disqualified, or where a person is convicted of any offence consequent upon which a disqualification of six months or greater is imposed. Article 4 of the Agreement requires the state receiving the notification to give effect to the decision that imposed the disqualification. In doing so, the state cannot extend the term of the disqualification or reduce the length thereof to a period not less than the maximum term provided for in respect of similar offences under national law. Article 5 identifies the circumstances under which the state notified shall refuse to give effect to the disqualification and other circumstances under which it may refuse to give effect to the disqualification.

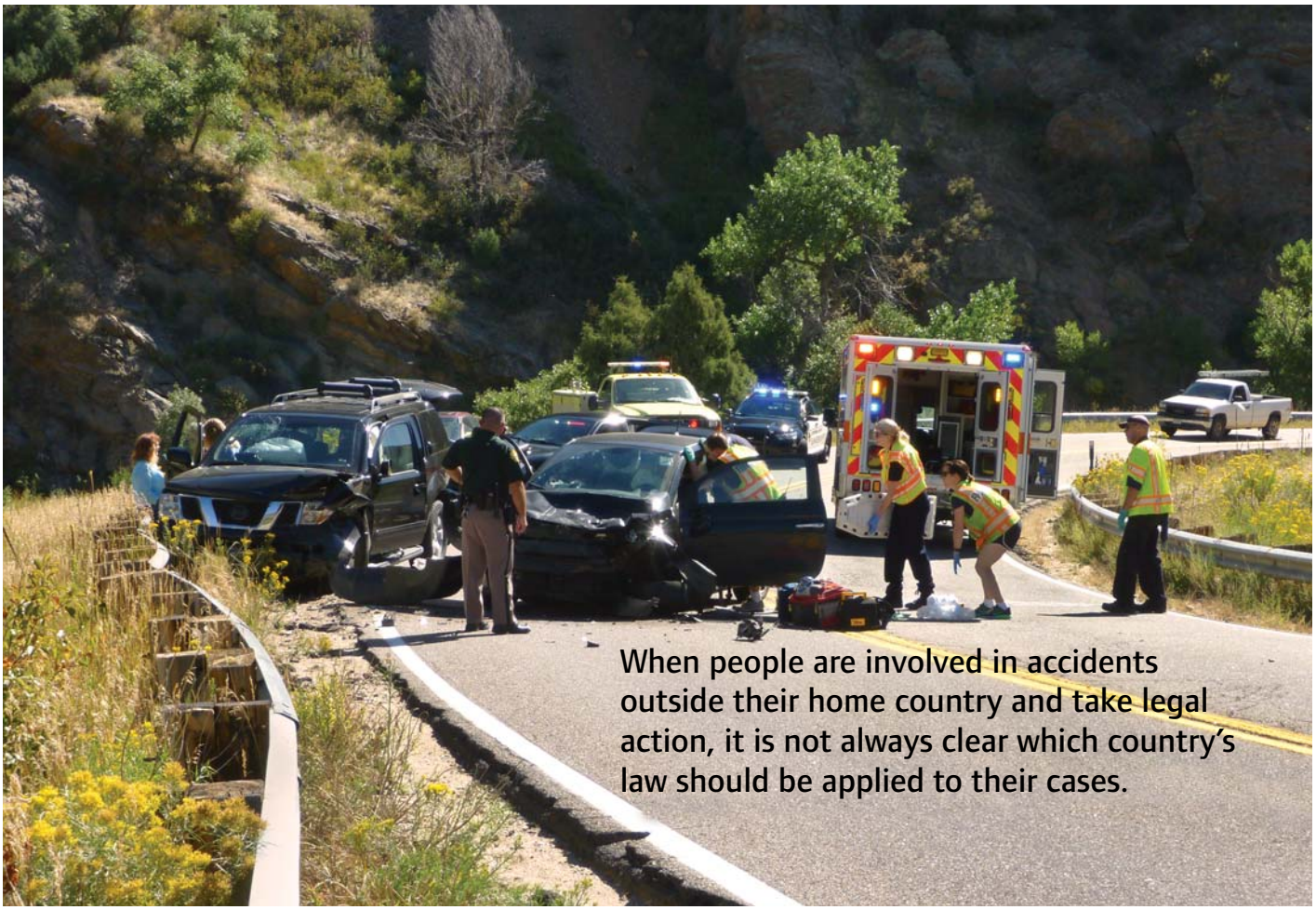
Once commenced, s. 40 of the RTA 2016 will be the means by which the State will give effect to the Agreement pursuant to Article 9 thereof. The central authority as understood by the Agreement is the licensing authority and it will be obliged to act upon a notification made in accordance with Articles 3 and 6 of the Agreement, in respect of a person who normally resided in the State on the date of the offence or who is the holder of an Irish driving licence or permit. An application must be made to the District Court judge assigned to the district in which the subject of the application resides or carries on any business, occupation or profession or, in the case of an Irish licence or permit holder, the district in which the address indicated on the licence or permit is located. Article 5(2)(c) of the Agreement provides that the only circumstances where a state may refuse to enforce the order is where the offence that gave rise to the disqualification is not one known to national law, is not an offence in respect of which a national court may order a person be disqualified from driving, or where less than three months of the disqualification remain unexpired on the date the order is to be made. Although the district judge will enjoy virtually no discretion in section 40 applications, it bears noting that notwithstanding Article 8(1) of the Agreement, providing that the state in which the disqualification is originally imposed shall notify the subject thereof that a notification will be made under the Agreement, no requirement will be made of the licensing authority by either s. 40 of the RTA 2016 or the Agreement that the person who is the subject of the application is to be put on notice of either the application or, it appears, the resulting order.

Conclusion

The Road Traffic Acts are a quagmire of technical and complex enactments rivalled only by perhaps liquor licensing laws or the Local Government Acts 1925-2014 and associated legislation. The benefits of consolidating the law can be seen from examples such as the Companies Act 2014 and the Taxes Consolidation Act 1997. The body of legislation that comprises road traffic law in the State spans over half a century from 1961 to 2016, and remains an intricately-woven mesh of provisions that repeal, substitute or amend one another and, accordingly, consolidation at this juncture is likely warranted, if not required. The Road Traffic Act 2016 brings significant change to the existing statutory framework. In the absence of consolidation of the law, close familiarity with its provisions and how they affect existing legislation is essential for practitioners.

References

1. Road Traffic Act 2016 (Commencement Order) 2017 (S.I. 129/2017).
2. Section 11 of the Road Traffic Act 2010 is substituted by s. 12 of the Road Traffic Act 2016.
3. Or indeed any person arrested under any of the ten provisions recited in s. 12(1) of the Road Traffic Act 2010.
4. For the prescribed form see, Road Traffic Act 2010 (Medical Exemption Certificate) Regulations 2017 (S.I. 158 of 2017).
5. Commenced on June 1, 2017 by Road Traffic Act 2016 (Part 5 and section 36(d)) (Commencement) Order 2017 (S.I. 242 of 2017).
6. Road Traffic Act 2010 (Part 3) (Commencement) Order 2017 (S.I. 241 of 2017).
7. As substituted by s. 27 of the Road Traffic Act 2016.
8. See, for example, Courts Service statistics for 2015 indicating that of the 298,797 matters disposed of summarily, 179,705 (60.14%) were road traffic matters of which 66,471 (36.9% of road traffic matters) were penalty point offences of which a considerable portion would have been fixed-charge offences. Available at: http://www.courts.ie/courts.ie/library3.nsf/66d7c83325e8568b80256ffe00466ca0/594035f3fbf3c16180258022005b7af8?OpenDocument.
9. In the United Kingdom, the Specified Agreement on Driving Disqualifications Regulations 2017 (S.I. 628 of 2017) was made on April 27, 2017, pursuant to s. 71A(1) of the Crime (International Co-operation) Act 2003 following approval by each house of parliament of the regulations in draft form.



When people are involved in accidents outside their home country and take legal action, it is not always clear which country's law should be applied to their cases.

Accidents abroad: some emerging case law

Gerry Danaher SC
Robert Ó Géibheannaigh BL

While many cases involving accidents abroad have been resolved since *Kelly v Groupama*,[1] there does not appear to have been any further written judgement in Ireland on the effects of Rome II (EC Regulation no. 864/2007 on the law applicable to non-contractual obligations). However, there have been several relevant judgements in the European Court of Justice (ECJ) and in the courts of other member states, which should be of interest to Irish practitioners.

Secondary victims: "damage" or "indirect consequences"?

Under Article 4(1) of Rome II, the basic rule for determining the applicable law in any relevant case is that the law of the country "in which the damage occurs" shall apply, irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country or countries in which the indirect consequences of that event occur.

In the *Lazar* case,[2] a Romanian national was killed in a road traffic accident in Italy by an Italian wrongdoer. The deceased, while a Romanian national, had been residing in Italy. At the time of her death, her remaining relatives included Florin Lazar, her father, a Romanian national residing in Romania.

Under Italian law, such a member of a deceased's family is entitled to claim compensation in respect of non-material damage (e.g., psychiatric injury) and material damage (e.g., financial loss). The judgement of the ECJ does not state what the corresponding position is in Romania, but one can probably safely assume that the application of Romanian law would not have favoured Mr Lazar.

It was argued on behalf of Mr Lazar that the damage sustained in their country of residence by the close relatives of a person who died in an accident which occurred in the state of the Court seized must be regarded as constituting indirect consequences of the damage suffered by the immediate victim of the accident. The term "country in which the damage occurs" must be interpreted as referring to the place in which the direct damage, i.e., the killing of the primary victim, occurred. Thus, Italian law should be applied.

However, it was submitted on behalf of the defendant insurer that material and non-material damage suffered by the family members of a person who has died in another member state does not necessarily constitute indirect consequences of the tort for the purposes of Article 4(1). It should follow that, because it is based on an allegation that is distinct from the obligation as between the defendant and the person who died in the accident, a claim for compensation by the relatives of a person who has died in an accident that occurred in the state of the Court seized must be assessed by reference to the law of the place in which the damage sustained by those relatives occurred, namely the place of their habitual residence, unless it can be demonstrated that, in accordance with Article 4(3), it is clear from all the circumstances of the case that there are manifestly-closer connections with another country. The insurer defendant therefore sought to have Romanian law applied.

The ECJ did not have regard to the status of the tort under either national law, holding that Article 4(1) had to be applied so as to achieve a uniform interpretation throughout the European Union.

Article 2 of Rome II provides that damage shall cover "any consequence" arising from tort, but the court interpreted "damage" within the meaning of Article 4(1) as being "direct damage". It held that, in the context of the *Lazar* case, "damage" for the purposes of Article 4(1) related to the death of the deceased, which had occurred in Italy, and the injuries suffered by the claimants must be classified as "indirect consequences" of the accident "event". Accordingly, the applicable law was Italian law.

Chasing one's tail

The issue of whether the effect of Article 4(3) (the so called "escape clause" from Article 4(1) and 4(2)) can result in resurrecting, so to speak, the law which would apply under Article 4(1), if that law was not displaced by Article 4(2), seems to have been resolved, at least in England and Wales.

That this was a matter of some scholarly controversy was previously noted.[3]

The decision came in rulings made by the High Court and, subsequently, the Court of Appeal, in the related cases of *Pickard* and *Marshall*.[4]

These cases arose out of a road traffic accident which happened in France. It involved two English residents, a Mr Marshall, who died, and a Mr Pickard, who was injured. The accident was caused by an uninsured French driver, a Ms Bivard, colliding first with Messrs Pickard and Marshall, who were standing on the road, and then with Mr Pickard's stationary car, forcing it into another French vehicle, a vehicle recovery truck, the trailer of which came down on Mr Marshall.

Actions were brought in England by Mr Pickard and Mrs Marshall (as Mr Marshall's widow) against the Motor Insurers' Bureau (MIB) under the Motor Vehicles (Compulsory Insurance) Regulations 2003. The MIB denied liability on the basis that its French equivalent, the Fonds de Garantie, would not be liable to compensate them. The matter came before the UK High Court on a number of preliminary issues, the first of which related to which law was applicable in respect of any claims Mr Pickard and Mrs Marshall had against the various identified defendants, i.e., the MIB, Generali (as the insurer of the recovery truck) and RSA (as Mr Pickard's insurer).

Under Article 4(1), French law would be applied, as the damage caused by the accident had occurred in France. Mr Pickard, as owner of a vehicle that had been "involved" in the accident, would have been liable under French law to Mrs Marshall, although there had been no negligence on his part.

However, the applicable law under Article 4(1) (French law) seemed to be displaced by reason of Article 4(2), which provides that where the person claimed to be liable (Mr Pickard) and the person sustaining damage (Mrs Marshall) both have their habitual residence in the same country (England) at the time when the damage occurs, then the law of that country shall apply. Of course, if English law were applied then, as he was not guilty of any negligence whatsoever, Mr Pickard could not be liable.

This left the potential of invoking Article 4(3), which provides that where it is clear from "all the circumstances of the case" that the tort is manifestly more closely connected with a country "other" than that indicated in Article 4(1) or 4(2), then the law of that "other" country "shall" apply.

Of course, to do so in the circumstances of the Pickard and Marshall cases would be to "resurrect" French law as the applicable law.

In the event, the High Court of England and Wales rejected the suggestion that had been made in various textbooks – but which was not relied on by the parties – that Article 4(3) could not be applied so as to lead one back to a law which would have been applied under Article 4(1) had it not been displaced by Article 4(2). It also found that the factual circumstances made the tort more closely connected to France than to England, i.e., Mr Pickard and Mr Marshall were hit by a French car driven by a French driver on a French road. Accordingly, the Court held that French law was the applicable law.

The Court of Appeal of England and Wales subsequently refused leave to appeal. It held that although Article 4(3) is an escape clause, its ambit should not be unduly narrowed, and that while certainty is important, so too is doing justice in individual cases. The Court determined that as Pickard and Marshall had been hit by a French-registered car driven by a French national, that collision was the cause of the accident, the subsequent collisions and the injuries sustained. The trial judge had been quite correct to find that French law applied.[5]

Compulsory motor insurance: no limit?

Although not of relevance solely to accidents abroad, a recent ECJ decision on foot of a ruling by the Slovenian courts is worth noting. While various aspects of Irish law whereby the scope of compulsory motor insurance was sought to be restricted (e.g., the exemption that applied to motorcycle pillion passengers) have been rendered redundant by the flow of EU motor insurance directives, the Road Traffic Acts[6] still only impose the obligation in respect of the use of mechanically-propelled vehicles "in a public place".

"Public place" is defined as:

> "(a) any public road, and
> (b) any street, road or other place to which the public have access with vehicles whether as of right or by permission and whether subject to or free of charge".

Under the motor insurance directives, each member state is required to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. It is also provided that "the extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures".

Noctor and Lyons[7] previously queried whether, having regard to this wording, member states such as Ireland and the United Kingdom are free under European law to exclude the requirement of compulsory insurance from use of vehicles in certain areas of its territory, e.g., entirely-private places.

The doubt expressed by Noctor and Lyons is perhaps underlined by the decision of the ECJ in the *Vnuk*[8] case in September 2014. In that case, a man was knocked off a ladder by a trailer attached to a tractor in Slovenia. The accident happened on private property, a farm. The Slovenian courts, relying on that point, and also the fact that the tractor was being used "as a machine" as opposed to a means of transport, found in favour of the motor insurer, which maintained that the accident was a case of employer's liability. However, the ECJ invoked Article 3 of the Sixth Motor Insurance Directive,[9] which defines a vehicle as "any motor vehicle intended for travel on land and propelled by mechanical power" to hold that the concept of "use of vehicle" covers any use of a vehicle that is consistent with the normal function of that vehicle.

The *Vnuk* decision could be interpreted as suggesting that the Road Traffic Acts are inconsistent with European law in this regard, and that compulsory motor insurance must be required in respect of the use of vehicles anywhere "on land" or, to put it another way, that it is function and not location that should be determinative of whether there has to be an obligation to insure.

Article 26: the "public policy" rule

The question arises as to whether or not a court can decide not to apply a foreign law if its application would result in a denial of redress in breach of fundamental rights, or in discrimination as between primary and secondary victims. Article 26 of Rome II, the "public policy" rule, provides that "the application of a provision of the law of any country specified by this regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum".

Is it possible for a judge to hold that, if it is established that the law of the country where the accident occurred does not guarantee at least a fair award, then the application of that law should be refused as being incompatible with the "public policy" (ordre public) of the forum?[10]

In a case concerning an Italian citizen killed in Austria,[11] the Italian Supreme Court of Cassation declined to apply an Austrian law under which awards for non-pecuniary (bereavement) damages to "secondary victims" were denied. It relied on Article 26. The Court determined that Italian law should apply so that the family members living in Italy could bring claims for their loss, on the basis that an aspect of the constitutional protection of the fundamental rights of the individual under Italian law is that those family members should receive full compensation.

Given that national courts are unlikely to rule against their own constitutional values, this is potentially an inherent limitation on the implementation of EU measures that may have to be recognised in judicial decision making.[12]

Conflicting rules

An interesting issue has arisen when an accident is connected to an EU member state which is a party to the Hague Convention on the Law Applicable to Traffic Accidents (hereafter "Hague Convention").[13] Consider the example of a road traffic accident which occurs in Spain and involves a car driven by a French national and carrying a French resident passenger (the plaintiff) that is struck from behind by a Spanish bus driven by a Spanish driver and as a result of which the French passenger (the plaintiff) sustains severe head injuries.

For the same reason that the plaintiff in *Kelly v Groupama* could claim in Ireland on foot of his accident in France, our French plaintiff in this case can bring his claim in France. Nevertheless, a standard analysis would suggest that the French court should apply Spanish law as the law of the country in which the damage occurred. However, French damages being more attractive to the

plaintiff than the Spanish equivalent, the plaintiff will seek to have French law applied.

Under French law, as we have seen, the driver of a vehicle "involved" in an accident can be made liable even if he has not been guilty of any negligence, and thus the plaintiff sues his own driver in France. He then seeks to have French law applied on the basis that Spanish law, which would be applied under Article 4(1), is displaced by Article 4(2), since both he and his driver were habitually resident in France at the relevant time. But this argument is met on the basis that, as both France and Spain are signatories to the Hague Convention, that it and not Rome II should be determinative of the law to apply and that, unlike Rome II, the Hague Convention has no escape clause (whether related to the habitual residence of the parties or "all the circumstances of the case") from the application of the law of the country where the accident occurred. Rome II contains a compatibility rule in Article 28, which states that:

> "1. This regulation shall not prejudice the application of international conventions to which one or more member states are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.
> 2. However, this Regulation shall, as between member states, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation".

The straightforward view would be that the Hague Convention was not one "concluded exclusively" between two or more member states, as non-EU states were also parties to it. On the other hand, as both countries concerned are member states and Rome II was clearly intended to lay down conflicts of law rules to apply as between member states, could Article 28(2) be construed so as to mean that conventions (here the Hague Convention) should only oust Rome II when at least one of the countries involved is not an EU member state?

If Article 28 contained only paragraph 1, then clearly Rome II would not apply in the case we are considering. Both France and Spain were parties to the Hague Convention when Rome II was adopted. But, having regard to paragraph 2 of Article 28, the issue arises as to the meaning to be assigned to the phrase "conventions concluded exclusively between two or more" member states and, particularly, the adverb "exclusively".

On a literal reading of paragraph 2, as the Hague Convention was not concluded exclusively between two or more member states (numerous non-EU member states also having been parties to it), paragraph 2 cannot be invoked so as to avoid the effect of paragraph 1 and the application of Spanish law under the Hague Convention. Nevertheless, only the laws of EU member states (France and Spain) are relevant and one might consider that the object of Rome II was to apply the rules it laid down to all conflicts of law as between member states. In other words, conventions such as the Hague Convention should only displace Rome II where one of the countries involved is not an EU member state.

This, however, was not the view of the French Court of Cassation (supreme court equivalent) in a case mirroring the aforementioned Spanish accident.[14] The lower courts had determined that as both parties (the driver and passenger of the French car) were habitually resident in France, French law applied under Article 4(2). In order to avoid applying the Hague Convention, the French Court of Appeal had ruled that the Rome II Regulation prevailed over conventions entered into by member states (Article 28(2)). However the Court of Cassation set aside this judgment. It ruled that the Hague Convention having not been concluded exclusively between member states of the European Union, but equally by third states, Rome II did not take precedence over it, so that it did not affect that Convention's application.

Accordingly, under Articles 3 and 4 of the Hague Convention, when a traffic accident involves cars registered in different states, the law of the place of incident, here Spain, applies.[15]

Discussion on the meaning of the adverb "exclusively" is probably not over; there is room for discussion here and an eventual request for a preliminary ruling could be made, when the opportunity arises, to the ECJ.

References

1. [2002] IEHC 177.
2. *Florin Lazar, représenté légalment par Luigi Erculeo v Allianz SpA* C-350/14; [2015] ECR 00000.
3. Danaher, G. Accidents abroad and the assessment of damages. *The Bar Review* 2012; 17 (5): 109.
4. *Gillian Marshall v The MIB and ors; Christopher Pickard v The MIB;* [2015] EWHC 3421 QB and [2017] EWCA Civ 17.
5. *Pickard v Marshall and ors* [2017] EWCA 17.
6. Section 56 of the Road Traffic Act, 1961 (as amended).
7. Noctor, C., Lyons, R. *The MIBI Agreements and the Law (2nd ed.)*. Bloomsbury Professional. 2012; 16: footnote 14.
8. *Damijan Vnuk v Zavarovalnica Triglav* C-162/13.
9. 2009/103/EC.
10. *Jurisdiction and Applicable law in cross border fatal accidents in EU* 2013 Avv Marco Bona.
11. *Wiener Staedtische Versicherung AG, Liguria Ass. Ni S.p.A and Ors v B and Ors,* Supreme Court of Cassation, Third Division, August 22, 2013. No. 19405, President Giuseppe Maria Berruti, Rapporteur Enzo Vincenti, in CED Cassazione, 2013.
12. Arden, M. *Human Rights and European Law: Building New Legal Orders (1st ed.)*. Oxford University Press. 2015: 79.
13. The EU member states that are parties to this Hague Convention are: Austria, Belgium, Croatia, Czech Republic, France, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia and Spain.
14. *Société AXA France 1 Ard, Re;* unreported April 30, 2014 (Cass (F)).
15. Cuniberti, G. French Supreme Court rules on scope of Rome II Regulation. *Conflictsoflaws.net* 2014; May 5. Available at: http://conflictoflaws.net/2014/french-supreme-court-rules-on-scope-of-rome-ii-regulation/.

The introduction of multi-disciplinary practices could have a profound effect on the administration of justice.

The cost of the one stop shop

Brendan Savage BL

The Legal Services Regulatory Authority (the Authority) is currently engaging in a public consultation process in relation to multi-disciplinary practices (MDPs). When the process is complete, the Authority will make recommendations to the Minister for Justice and Equality regarding the establishment, regulation, monitoring and operation of MDPs in the State. The term 'multi-disciplinary practice' is defined under the Legal Services Regulation Act 2015 (the Act) as a partnership formed under the law of the State by written agreement, by two or more individuals, at least one of whom is a legal practitioner, for the purpose of providing legal services and services other than legal services. Partners of the type of MDP envisaged in the Act will be entitled to share fees and income, regardless of whether either or both partners are legal practitioners, and regardless of whether the services being provided are legal services or other services. Essentially, therefore, and should the Authority recommend that MDPs be permitted to operate, legal practitioners and non-legal practitioners will, for the first time, be entitled to share fees and income. Ownership and control of legal practices will, also for the first time, be shared between legal practitioners and non-legal practitioners. These are the defining characteristics of the pure form or fully-integrated model of MDP. Proponents describe how a relaxation of the rules that prohibit the sharing of fees and income between lawyers and non-lawyers will bring about greater innovation in the legal services market and lower costs. A number of examples are usually offered. Clients will benefit from the 'one stop shop' practice model, which is more convenient and cost-effective. MDPs will have access to a rich seam of non-lawyer investment, which will in turn allow for the scaling up of practices and the delivery of services via economies of scope. MDPs bring different professionals and experts together; this leads to increased innovation, which ultimately leads to new and different types of services being offered.

Not so simple

While the objectives and potential benefits are readily understood, the apparent simplicity of the one stop shop model belies both the truly-radical and largely-untested nature of the model, and the complexities and risks inherent in its defining features.

The radical nature of the MDP model envisaged under the Act becomes clear when one considers the operation of MDPs and similar models in other jurisdictions. The fully-integrated MDP model (unrestricted sharing of fees and ownership between lawyers and non-lawyers) is prohibited in the vast majority of states in the US. This is also the case in Canada. MDPs are prohibited in many of the smaller states in the EU and, where MDPs operate, they usually do so subject to limitations and conditions, which stipulate that the non-legal services must complement the primary legal service offered by the MDP. In Australia, practising barristers may not practise in MDPs. In England and Wales, MDPs (known as authorised bodies and alternative business models) operate within the confines of a necessarily multi-layered and complex regulatory framework.

There is a direct correlation between the comprehensive nature of schemes of regulation introduced in jurisdictions such as England and Wales on the one hand, and the clear potential for MDPs to do more harm than good on the other.

MDPs have the potential to lead to an undermining of both the independence of lawyers and public confidence in the independence of lawyers. Should MDPs be permitted to operate in the State, lawyers will not only owe duties to their clients and to the courts, but also to non-lawyer partners who may be subject to different professional codes and obligations, some aspects of which may not be capable of being reconciled with the core professional values of lawyers.

MDPs will add a layer of complexity to the issues of client confidentiality and privilege. Recent experience in England and Wales shows how the maintenance of legal privilege in situations where clients are advised by multiple professionals of different disciplines is not at all guaranteed.

Even if it is accepted that ways could be found to regulate through these risks, the concept of the one stop shop requires careful analysis. In the context of litigation, it is not clear how evidence obtained from engineers, doctors, architects or surveyors, who as partners in the MDP will be entitled to share in the fees recovered by the solicitor partner acting for the client, could be said to be independent evidence before the court.

A question also arises as to whether the grouping together of professionals with expertise in one particular area in an MDP could have any sort of positive outcome from a competition and costs perspective? In fact, a clear economic case for the introduction of MDPs in this jurisdiction is yet to be made.

The reality is that any potential gains and benefits that may follow the introduction of MDPs remain hypothetical and aspirational. This is to be contrasted with the fact that the risks and threats to the effective administration of justice posed by these models of practice are very real and readily identifiable.

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