THE BAR
REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

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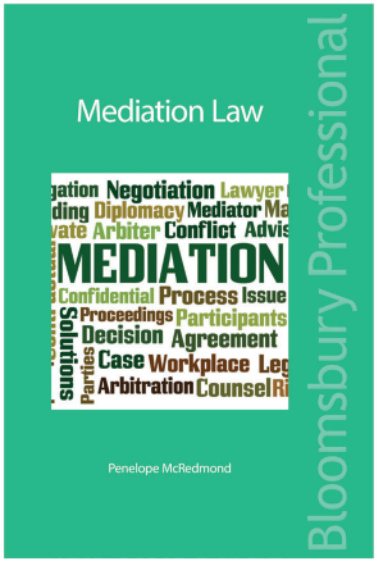
July 2018

At the receiving end

COMING SOON...



NEW TITLE

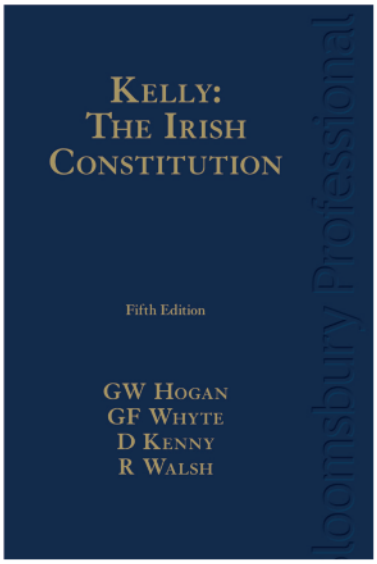
Mediation Law

By Penelope McRedmond

This is the first Irish title to bring together the laws from many different disciplines and apply them to mediation. It examines the many procedural and technical issues facing mediators and covers the changes introduced by the Mediation Act 2017 in detail.

For more information on what areas are examined search 'mediation law' at bloomsburyprofessional.com/ie/

Price: **€155** Available: July 2018



NEW EDITION

Kelly: The Irish Constitution

5TH EDITION

By Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh

This seminal work, recognised as the definitive commentary on Ireland's fundamental law, provides a detailed guide to the structure of the Irish Constitution. The book is entirely up to date up to and including the 36th Referendum and covers all relevant case law, including *Kerins v PAC* and *O'Brien v Clerk of Dáil Éireann*.

For further information on what is new to this edition and to purchase a copy, search 'irish constitution' at bloomsburyprofessional.com/ie/

Price: **€325** Available: October 2018

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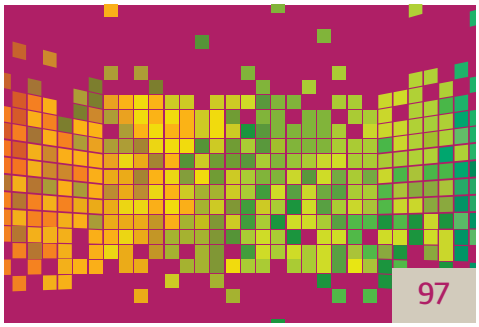

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Group strategy

In his last column as Chairman, PAUL McGARRY looks back on his two years in office and ahead to the challenges and opportunities facing Irish law.

The Council recognises that a modern and dynamic profession requires to evolve in the context of the market for legal services. In recent years, we have developed a marketing strategy for the Bar that emphasises excellence and integrity. One key element is the encouragement of members with specialist knowledge to come together. The Council has provided assistance and resources to a range of Bar associations in areas like employment, construction, professional discipline and EU law. Over the past year, these have been joined by the Sports Law Bar Association, and a recently formed collection of practitioners in the area of planning and environmental law. These groups organise events and exchange ideas and information for the benefit of their members. As they promote themselves, so too is the Bar identified as the place for specialist advocacy and legal skills in these areas. The continued support for these groups is a key strategy for the Bar in the coming years. Other issues of importance to members are identified in the three-year strategic plan for the profession, details of which are contained in this edition of *The Bar Review*.

Submissions to Government

In recent months we have continued to engage with, and make submissions to, Government about a range of issues, including legal aid fees, insurance costs, substantive law changes, civil justice reform, and the operation of the Legal Services Regulation Act. The Government has just launched an urgent review of clinical negligence claims, about which we will also make detailed submissions.

The Legal Services Regulatory Authority (LSRA), although not yet fully functioning, is a new challenge confronting the profession. If there were apprehensions in relation to the implementation of the legislation, its establishment within the legal landscape has been broadly positive to date. The primary complaint we have is with the slow pace with which it has been able to fulfil its remit. The Council is keen to see resources made available at the earliest opportunity to enable the LSRA to establish provisions in relation to professional discipline. Similarly, we have long advocated for the commencement of the provisions relating to legal costs. We are hopeful that the latter will be up and running later this year.

Promoting Irish law

The impact of Brexit on the Irish economy cannot be understated. However, through an initiative led by the Bar in conjunction with the solicitors and IDA Ireland, we are glad to see that the Government is committed to supporting a plan to promote Irish law. In this regard, I wish to pay tribute to Patrick Leonard SC, who has demonstrated an unwavering commitment to the project. The strategy emphasises the need for additional resources to improve supports for the judicial system. We will be hearing a lot more about this in the autumn.

Thanks and well wishes

As this is my final column as Chairman, I want to take the opportunity to again recognise and acknowledge the importance of well-being in our profession. Practice at the Bar is often difficult, and for some it brings unique stresses. Over the last two years, work commenced on a programme to help members who may be encountering difficulties at work. This initiative was led by Mary Rose Gearty SC, who has demonstrated great leadership and is the inspiration behind many activities, including the Consult a Colleague service. I am most grateful to her for her support during my term on the Council and in particular, over the last year in her capacity as Vice Chair.

Congratulations to our newly elected Chairman, Míchéal P. O'Higgins SC. Míchéal has made many contributions to the work of the Council over the past number of years and I have no doubt that the Council is in safe hands.

Any contribution as Chairman over the last two years could only have been realised with the help of a huge number of people, including our fantastic cohort of professional staff. The advice and assistance of previous chairs has been immense. It has been a great honour to work with so many committed members of the Council and its committees and working groups, who have given generously of their time for the benefit of all. If the collegiality of the profession is measured by the number of members that assist the Council, then I am very optimistic about the future for the Bar.

I remain deeply humbled to have been given the opportunity to serve as Chairman.

Paul McGarry SC
Chairman,
Council of The Bar of Ireland

Buyer beware

Most of us never read the small print and that can be a fatal mistake when it comes to the law on negligent misstatement. In *Walsh v Jones Lang LaSalle*, the majority of the Supreme Court availed of the opportunity to revisit and clarify the tort of negligent misstatement generally. The effect of the majority judgment is that the small print contained in a disclaimer can serve to negative any liability for major errors elsewhere in the sales brochure. We analyse the judgment and its clear message of "buyer beware".

We also look at Personal Insolvency Arrangements (PIAs) and how they interact with the appointment of a receiver who is appointed on foot of a default in a mortgage loan. It is clear that during any protection period under the insolvency arrangement, a creditor is precluded from taking action under a loan. However, uncertainties arise as to what is the effect on a receiver. This question has not yet been considered in a judgment of the courts and our authors explore the issues arising.

In a feature in this edition, we thought it might be fun to do a survey and see how some of our colleagues fared in their very first case as a barrister. We share with you a cross section of the replies. Hopefully, they will give you a laugh as you head off on summer vacation.

Happy holidays.

Eilis Brennan BL
Editor
ebrennan@lawlibrary.ie

PELGBA planning on success

The Planning, Environmental and Local Government Bar Association (PELGBA) was launched on July 10 with a distinguished lineup of speakers including: James Connolly SC, Association Chair; The Hon. Mr Justice Frank Clarke, Chief Justice; Eoghan Murphy TD, Minister for Housing, Planning and Local Government; Seamus Woulfe SC, Attorney General; Dr Áine Ryall, UCC; and, Eamon Galligan SC. The Chief Justice welcomed the launch of the Association and called for clearer legislation in the area. The purpose of the PELGBA is to foster discussion and debate on planning, environmental and local government law through the holding of regular seminar and conferences. Membership of the PELGBA is open to all members of the Law Library. See www.PELGBA.ie (under construction) for further details.

From left: Seamus Woulfe SC, Attorney General; The Hon. Mr Justice Frank Clarke, Chief Justice; Dr Áine Ryall, UCC; James Connolly SC; and, Eoghan Murphy TD, Minister for Housing, Planning and Local Government.

CPD on Circuit

A number of extremely well-received CPD events have taken place recently to meet the needs of barristers on Circuit around the country.

A combined need for CPD hours provided locally, along with the opportunity to meet local solicitors, led to the organisation of two fully booked events in Cork and Ennis.

Over 75 barristers and solicitors gathered in Ennis in June to hear speakers Marguerite Bolger SC, Kate Egan BL and Anita Finucane BL, followed by a recorded webcast of a recent ethics lecture. In Cork in July, 100 barristers and solicitors signed up to hear speakers Sarah Daly BL, Lorna Madden BL, Eamon Shanahan BL and Colman O'Donnchadha BL in a three-hour CPD event followed by a wine reception. In fact, the 50 assigned solicitor tickets were snapped up within two hours, with almost the same number on a waiting list.

The Western and Midlands Circuit CPD took place in Galway Courthouse with an attendance of 60, with five CPD hours provided by ten speakers, including Nuala Jackson SC, Paul Gunning BL, Kevin Byrne BL, Claire Bruton BL and library staff. The South Eastern circuit ran a CPD event in Waterford with an attendance of 47 barristers for a two-hour seminar with speakers Mark Tottenham BL on missing heirs and next of kin, and Jordan Fletcher BL on recent changes to the examination of children or complainants in sexual offences.

Thanks is owed to the local circuit liaison officers for their tireless work in organising these events, and to the speakers who give of their time and expertise.

It is hoped that many more similar events will take place across the circuits in the next legal year as there is clearly a demand for them and feedback has been excellent.

Understanding legal databases part 2:

Still haven't found what you're looking for?

In the June issue, our article 'Why am I getting different results from different databases?' highlighted the need to:

- Understand in general how databases work:
  (i) They have search algorithms built into them that operate differently from database to database. The algorithms are written by humans and have built-in bias.
  (ii) They may be designed differently. The search terms or built-in thesaurus will most likely differ between the databases. The search operators or link terms may operate differently. Does the database support natural language? How developed is it in using natural language searching?
- Understand when it is appropriate to use a natural language search and when it is appropriate to include search operators in a search query.
- Understand what the simple search box does and when it is more appropriate to use the advanced or what are essentially the focused search options.

Here are some examples to illustrate how the results of the same or similar searches may differ across a set of well-recognised legal databases.

Making the unmanageable manageable

In our search we are looking for case law in the criminal context where delay and the right to a fair trial are an issue. We search across three of the most popular legal databases: Lexis Nexis; Justis; and, Westlaw IE. Using the keywords *criminal*, *delay* and *right to fair trial*, we compare results across the three databases. It would be reasonable to expect fairly similar results; however, the variance may be surprising. We then take simple steps to improve the quality of our search. Following these steps or principles results in more effective searching. **Figure 1** shows, working down through the different types of searches, how applying different search strategies results in improved or more targeted search results.

SEARCH 1 – searching at its wildest!

This search is carried out on all three databases using the same terms: *criminal*, *delay* and *right to fair trial*. The 'Quick/Single' search box is used in each database. This means that everything in the database is searched, although we are only looking for case law. There is no attempt to filter our search by including any search operators such as AND, OR or NOT. Phrasing is not used by including inverted commas in the search string.

Magalie Guigon

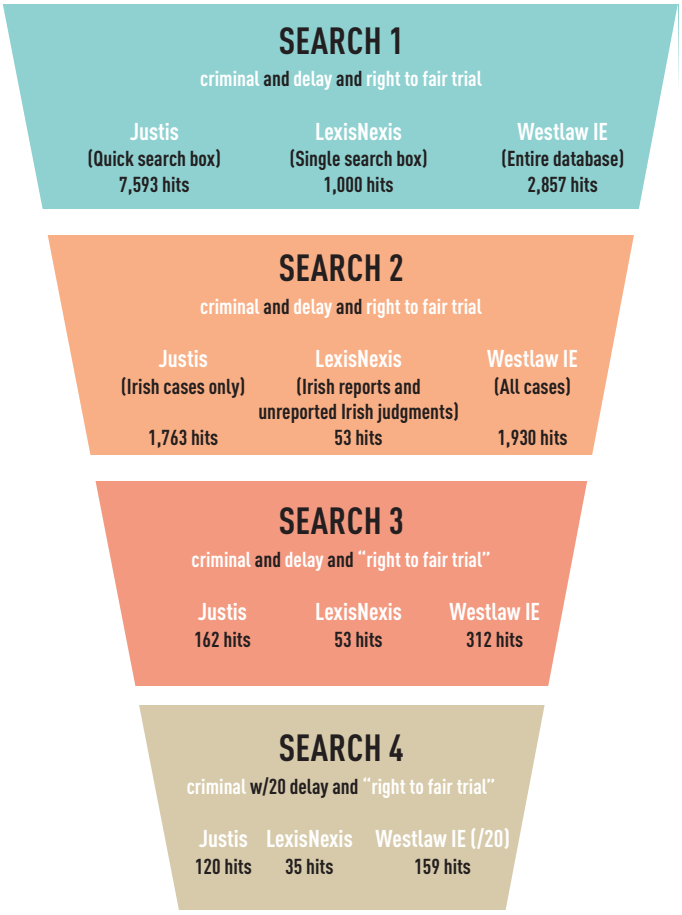


FIGURE 1: How we searched.

Aim: to show that using the single search/quick search box is rarely the best option, except when looking for a broad set of results across all material types. Hits will be high and it would be difficult to identify a specific item. In our experience, it is unusual for a researcher to require such a broad search.

Advice: at a minimum, select the type of material sought. Ask: is it a case, an article, a piece of legislation or something else?

SEARCH 2 – choosing your sources: limitations are good!

This search is carried out and the sources used are limited to Irish case law where the database supports this limitation. The same sources are not available on all databases; it depends on licensing and copyright restrictions:

i. on the Justis database we narrowed the search to Irish cases only;
ii. on Lexis Nexis, we narrowed the search to Irish Reports and Unreported Irish Judgments; and,
iii. on Westlaw IE, a general search of Irish case law is not supported – other sets of reports are included, such as the European Human Rights Reports.

Aim: to show that choosing your sources can greatly influence the outcome of your search.

Advice: know what content is contained in the database and how it is structured.

SEARCH 3 – quotation marks

We have retained the limits set in search 2 above (i.e., Irish case law) and have simply added double quotation marks around "right to fair trial" to indicate that we are searching for a phrase.

Aim: to highlight the importance of quotation marks and search grouping. Our results are significantly lower, except on Lexis Nexis. This is because phrase searching in Lexis Nexis is implicit, and therefore it is unnecessary to use the quotations. As soon as two words are beside each other they are treated as a phrase – hence there is no change in the results from Lexis Nexis when comparing search 2 and search 3.

SEARCH 4 – the power of connectors

Again, we have retained the search criteria used in searches 2 and 3, and have now added a proximity operator between *criminal* and *delay*. The proximity operator means we want to search where one term occurs within a specified number of words from the other. In this case we used w/20, meaning we want to search where *criminal* appears within 20 words of *delay*.

Aim: to demonstrate that proximity operators allow the user to broaden a search beyond a phrase and to capture material where the search terms occur within a specified distance from each other, such as within the same sentence or paragraph. Operators provide more control over the search parameters.

Advice: use connectors when searching. Understand how connectors work. Also known as Boolean logic (AND, OR, NOT), when you are comfortable using connectors in your searching, you may never want to go back to natural language searching.

How do I get better?

- Choose your sources wisely;
- know the basic search operators; and,
- attend library training

We have only given you a flavour of how to improve your online searching here. Other things to consider are to always keep in mind relevant terms, possible alternative terms that might be useful, and also decide if you need to use wild cards or root expanders. While all of this may seem a little daunting, there are only two first steps you need to master to improve the efficiency and accuracy of your research. Firstly, it is helpful to have a little knowledge on which databases would be the best starting point for your research. For example, which resource is the best for Irish unreported judgments, or reported judgments from England and Wales? Secondly, it is helpful to have some knowledge of how each database makes use of search operators and connectors. To assist members, the Law Library has produced two concise and easy-to-use documents that outline the content and search operators employed in our key databases. Scan the QR codes below with your smartphone to download a copy (Barrister's Desktop credentials are required).

Guide – Know Your Sources

Guide – Operators: Searching Made Simpler

Attend a Law Library training event

We run a range of training events within the library. Delivery of our information skills programme takes a variety of formats:

- daily drop-in clinics provided by qualified information professionals;
- weekly clinics, open to all and advertised across all internal communications media;
- one-to-one training on demand – a member may set up an appointment and we will work to their schedule;
- lecture-style delivery to small and large groups on specific topics, advertised and bookable in advance;
- vendor-led training on a specific resource, usually delivered in a lecture-style format;
- training events delivered on Circuit, which may be part of a broader training event;
- induction training delivered to new entrants; and,
- training delivered remotely through Skype.

To find out more, contact Magalie Guigon, mguigon@lawlibrary.ie.

New Council of The Bar of Ireland

Congratulations to the members of the Council of The Bar of Ireland 2018/2019 on their election. Special congratulations to Mícheál P. O'Higgins SC, who has been elected Chairman of the Council.

Inner Bar Panel

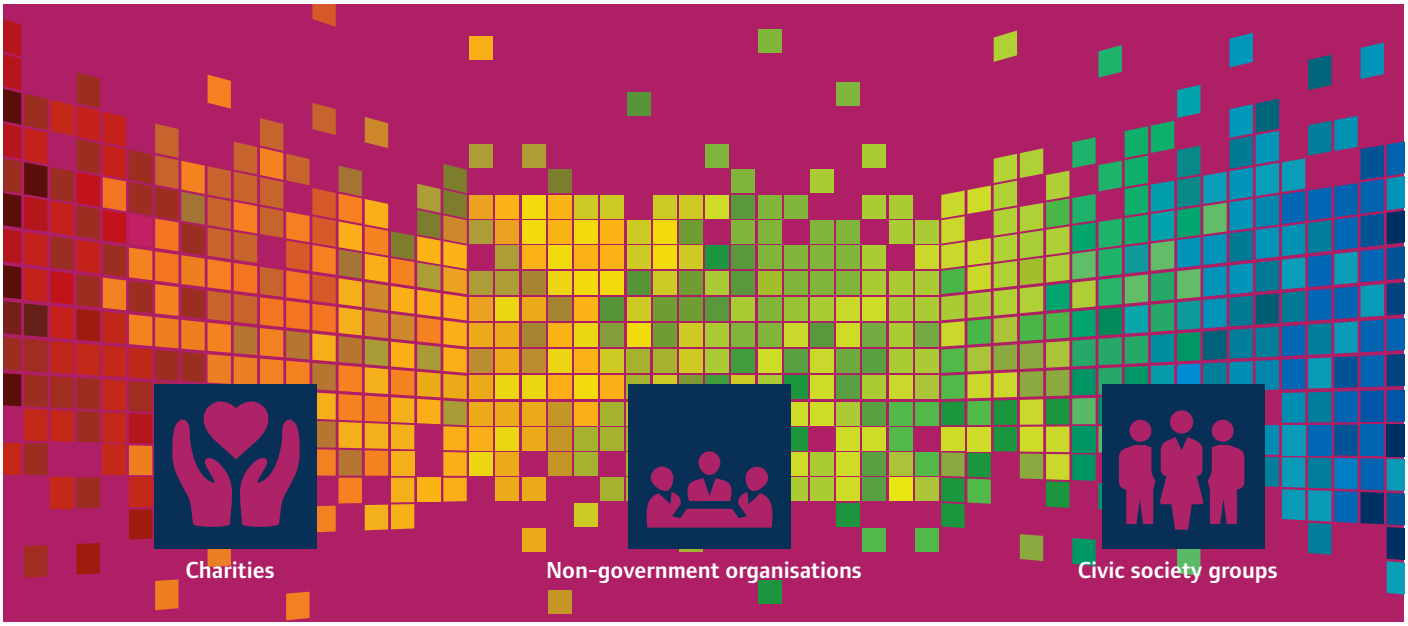
Bernard Condon SC
Thomas Creed SC
Conor Dignam SC
Mary Rose Gearty SC
Sean Gillane SC
Paul McGarry SC
Maura McNally SC
Barry O'Donnell SC
Mícheál P. O'Higgins SC
Seán Ó hÚallacháin SC

Outer Bar Panel

Rachel Baldwin BL
Garrett Cooney BL
Moira Flahive BL
Paul George Gunning BL
Dara Hayes BL
Claire Hogan BL
Maura King BL
Darren Lehane BL
Tony McGillicuddy BL
Joseph O'Sullivan BL

The Voluntary Assistance Scheme – a year in review

It's been a busy and successful year for the Bar's Voluntary Assistance Scheme.



Sonja O'Connor BL,
VAS Co-ordinator

The Voluntary Assistance Scheme (VAS) is the pro bono scheme of The Bar of Ireland. VAS arranges for barristers to provide voluntary legal assistance to charities, NGOs and civic society organisations, and to individuals that they represent.

Over the past legal year, we have arranged for barristers to provide voluntary legal assistance in 49 matters. Most of these matters were non-contentious and involved a barrister providing legal advice in relation to a particular issue arising for the organisation or for their client. We also provided assistance in a number of contentious matters and, in those instances, sought the assistance of a solicitor to work with counsel.

We are extremely grateful to all of the barristers and solicitors who have given so generously of their time to provide legal advice and assistance through VAS on a voluntary basis.

VAS has worked with many organisations throughout the years and this year we are delighted to have worked with the Money Advice and Budgeting Service (MABS), Citizens Information, the Irish Council for Civil Liberties, Justice for Magdalenes Research, the Adoption Rights Alliance, Family Carers Ireland, Galway Traveller Movement, Community Law & Mediation Coolock, St Vincent de Paul, the Migrant Rights Centre Ireland and the National Advocacy Service for People with Disabilities.

A range of legal issues

During this legal year, barristers have provided advice through VAS on a wide range of issues in the areas of employment, landlord and tenant, social welfare, housing, pensions, equality, probate, and debt-related issues. In addition, we have provided legal representation in a number of cases, many of which are ongoing, including possession proceedings, proceedings before the Workplace Relations Commission, and proceedings seeking judicial review of a decision of a Chief Appeals Officer on a social welfare appeal. VAS also organises events for charities, NGOs and civic society organisations. On January 25, 2018, VAS and the Charities Regulator hosted a joint seminar entitled 'Good Governance and The Law', with Helen Martin and Tom Malone from the Charities Regulator speaking together with Shelly Horan BL and Hugh O'Flaherty BL. We will host an advocacy workshop entitled 'Speaking for Ourselves' in late September 2018 to assist charities in developing their advocacy skills and enhance their capacity to communicate as an organisation.

Volunteer for VAS

We at VAS are hugely enthused by the number of barristers who have volunteered over the past year and we would encourage colleagues at every level, in all areas of practice and in all locations to consider volunteering. If you would like to volunteer with VAS, please send an email to vas@lawlibrary.ie, with the following details and you will be added to our database of volunteers:

- **name;**
- **contact details;**
- **year of call to the Bar;**
- **legal areas of practice;**
- **circuit; and,**
- **any previous voluntary experience (this is not a requisite factor to be considered for inclusion in the Scheme).**

Narrative and the Law

A new initiative from the Advanced Advocacy Committee has been the 'Narrative and the Law' workshop. This highly interactive workshop was run by Sandy Dunlop to help participants understand the importance of emotion in the matter of persuasion and how it is shaped by cultural story, image and myth, giving participants both insight into how red rhetoric works, as well as the skills to build this critical form of persuasion into their work.

The workshop was attended by 13 participants from both junior and senior levels at the Bar, and was delivered across two full days, one evening workshop and several individual consultations in between.

Launched at the Club

Non-Fatal Offences Against the Person: Law and Practice *by Éamonn O'Moore BL was launched at the Stephens Green Hibernian Club on May 30, 2018. Pictured at the launch are (from left): Barry Crushell, COO of Tully Rinckey Europe; Mr Justice Frank Clarke, Chief Justice of Ireland; and, Éamonn O'Moore BL.*

Chairman's Dinner 2018

The Chairman's Dinner took place this year in the King's Inns on June 21, hosted by Paul McGarry SC. Pictured attending the Dinner were (from left): Chairman of the Council of The Bar of Ireland Paul McGarry SC; Minister for Justice and Equality Charlie Flanagan TD; Attorney General Seamus Woulfe SC; and, President of the High Court, Mr Justice Peter Kelly.

Excellence in reputation, knowledge and services

The planning process commenced in January 2018 to draft the next three-year strategic plan for The Bar of Ireland. This work is now complete, with Council of The Bar of Ireland agreeing the final Strategic Plan 2018-2021 at its meeting on June 20, 2018.

A comprehensive strategic plan that identifies the long-term top issues, a focus on consistently improving the performance of the organisation, and a set of overall aims with a plan for how to achieve them, is crucial to strengthening the position of The Bar of Ireland. The plan is critical to increasing our value to members and maintaining our relevance to the profession in the changing legal landscape that is emerging since the enactment of the Legal Services Regulation Act 2015.

Understanding our current position and how members value the services provided was a key element of the planning process, and the member survey was crucial to this, the detail of which was shared in the last edition of *The Bar Review* (Volume 23 (3); June 2018).

An analysis of the results of this survey, combined with our understanding of the wider organisational context, operating environment, and the evolving opportunities and threats in the external landscape, allowed us to identify a number of key themes, which were then further explored by both members and staff through a series of five facilitated workshops across three broad headings of reputation, knowledge and services. Following this process and with due consideration to the operational capabilities of the organisation, core strategic choices have been made, which have culminated in the new strategic plan. This new plan seeks to build on the successful implementation of the current plan, which concludes at the end of this legal year, and which has delivered significant improvements for members, as evidenced by the results of the member survey. All members are encouraged to read the Strategic Plan 2018-2021 in full, and it can be found on our website – www.lawlibrary.ie. The Council and its committees look forward to working with the membership and, supported by the executive, to delivering this comprehensive roadmap over the next three years and beyond for the benefit of all Law Library members and the profession as a whole.

THREE STRATEGIC PILLARS

WHAT	REPUTATION	KNOWLEDGE	SERVICES
WHY	To provide leadership and representation for and on behalf of the profession	To enable access to information, expertise and advice, and uphold the highest standards of ethical and professional practice	To deliver valued and quality services for members in support of their practice
HOW	▸ Promoting the values of the independent referral Bar and the highly specialist skills of the profession ▸ Engaging in positive public relations to counter negative perceptions of the profession through engagement with relevant stakeholders ▸ Undertaking proactive research and policy development in the public interest	▸ Developing library and information services to ensure a modern, accessible legal library that embraces technological capabilities ▸ Improving communications to meet members' practice needs ▸ Maintaining and enhancing standards of professional practice and support ▸ Fostering excellence and enhancing the performance of members through best in practice education and training	▸ Capitalising on physical facilities and space for the benefit of all members ▸ Ensuring a reliable, accessible and secure ICT service ▸ Maintaining and developing appropriate financial services

Do you remember the first time?

What did you learn from your first case? A group of eminent colleagues tell their stories.

Matthew Holmes BL

My first year master once told me that there is no worse start to a career at the Bar than winning your first case. The celebrated English QC David Pannick began his book on advocates by saying that his first client was hanged![1] After a recent CPD event, a number of colleagues and I began to talk about our first ever case, and I was struck that the experiences ranged from mortifying to exhilarating. This prompted me to interview a number of colleagues, ranging from the most senior of seniors, down to current devils, about their first case and perhaps in doing so, learn a bit of the oral history of the Bar. I came across a number of interesting stories – unfortunately I have been sworn to secrecy on the most fascinating![2]

All interviewees were asked the same four questions. Unfortunately, due to space constraints, I cannot include all the interviews I conducted here.

One wag suggested that only barristers who won their first cases would be prepared to talk to me, but as always, the Bar is full of people who are as collegiate as they are prepared to spin a good yarn.

Chief Justice Frank Clarke

Called to the Bar 1973, Inner Bar 1985.

What was your first case about?

It was a family law maintenance case generated by FLAC.

Where was it heard?

In the Morgan Place District Courts, which is now part of the High Court. At the time there were a number of District Courts sitting there.

Did anything interesting happen?

In truth no; having identified everything that could go wrong nothing actually did, and it was a very straightforward application.

What did you learn from it?

I suppose [I learned] that from an outside basis, the courts can be a very intimidating place, but it is possible to make an application and get it through. I wasn't as intimidated in making applications going forward.

Eoghan Cole BL

Called to the Bar 2002.

What was your first case about?

On the civil side it was a motion within a liquidation in regard to whether a solicitor's lien survived the appointment of a liquidator. The point of law in question had not previously been the subject of written judgment. It was my master's brief (now Mr Justice Tony O'Connor). It went on for half a day and was probably considered a baptism of fire. A few days later Mr Justice Peter Kelly sent me a signed copy of his judgment in the DX, which I still have. I felt like a 'proper' barrister for the first time but it was probably a few years before I got back into this kind of case.

My first criminal case was listed for hearing over the Christmas break between Christmas Day and New Years' Eve, for some reason. I got the call a couple of days before the hearing, and I assume that no other barrister was answering the phone.

The client was charged with possession of heroin for sale or supply at his house. I turned up for the hearing very early and called out the name of the client from the body of the court assuming that he would come forward. Eventually, about 10 minutes before the court was due to sit, a person approached me in response. His clothes were dirty, his hair was lank and unkempt, and he did not appear to have slept indoors for a considerable period of time and I had no difficulty accepting him as my first client. I then had a frank discussion with him outlining the nature of the prosecution evidence. I advised that I could see no weaknesses in the prosecution case and suggested that a guilty plea was the only sensible course. He nodded his agreement and said that was his belief too. Pleased that I would not have to fight a hopeless cause I clicked my pen and suggested that he should tell me something about his personal circumstances. He began by saying: "Well I'm Garda Kieran O'Reilly and I'm prosecuting your client for possession of heroin with the intent of selling it or supplying it to another". It turned out that Garda O'Reilly had been working late in connection with what I can only imagine must have been a very successful operation by the (anti) Drugs Squad, hence his appearance. My client then arrived in custody. Thankfully he agreed with the consensus myself and the member of An Garda Síochána who was prosecuting him had arrived at. I remember stumbling through a guilty plea before the President of the District Court and the sentence imposed was made concurrent with what the client was already serving. Everyone left court happy, or in my case relieved. Before the hearing started the client told me not to be so nervous and afterwards he told me I'd be fine "next time".

Where was it heard?

Re Mack's Bakeries Ltd went on in Court 10 or 11, the Four Courts. The criminal case was in Dolphin House, which was then District Court 20.

Did anything interesting happen?

Some time later Garda Kieran O'Reilly went on to star in *Love/Hate* as an undercover member of An Garda Síochána, having previously revealed his obvious acting abilities during his consultation with me.

Did you learn anything from it?

You always learn something when you go to court but it's hard to express anything tangible without sounding pompous. What I do recall very distinctly from the civil case is how my opponent Michael Conlon, now SC, was the epitome of fairness and made no attempt to play on my obvious inexperience. He won the issue, as set out in a reserved judgment, which was later reported ([2003] 2 IR 396). I would certainly like to strive to meet that standard in how I get on with colleagues, however long they have been in practice.

Emer Delargy BL

Called to the Bar 2016.

What was your first case about?

My client called 999 asking for a lift home because he was drunk and had mental health problems. The guards arrested him for public intoxication and in the cells he kicked off, allegedly shouting that Jerry McCabe deserved what he got and assaulting a guard. He sustained injuries to his head, there was blood everywhere – it was pretty dramatic.

Where was it heard?

Killaloe District Court, which sits in a pub!

Did anything interesting happen?

I got two dismissals and a strike out. My client was convinced there was CCTV in the Garda station and I had to be brought to the station to verify that there wasn't.

What did you learn from it?

Cross-examination – I had to cross-examine 12 Gardaí! I also learned that what guards call a public area might not actually be one.

Kate Egan BL

Called to the Bar 2006.

What was your first case about?

It was a bail application at end of term, the same day as my first devil dinner. I don't remember the charges.

Where was it heard?

In the Bridewell District Court.

Did anything interesting happen?

I waited all day for the case to be reached, covertly texting about my increasing lateness. We got bail eventually but at that time, it was necessary to complete a form with the client in the bail office after the order was made, in order for him to

take up bail. I didn't know this. Off I went in a taxi. As it pulled up at Montague Street I got a call to say that the client hadn't been released, the judge had risen and he was now going to spend Christmas in custody. I turned the taxi around and managed to resolve the situation with the assistance of colleagues, but I'll never forget the stress of that call after finally getting away, thinking everything was fine! Talk about "the operation was a success but the patient is dead!"

Did you learn anything?
I learned that it's not over till it's over.

Fergal Foley BL

Called to the Bar 1969.

What was your first case about?
The first I remember doing was defending someone accused of breaking into the yard of a licensed premises and killing the guard dog.

Where was it heard?
In the Bridewell District Court.

Did anything interesting happen?
I learned a huge lesson. I asked the client if he'd been in trouble before and he said no. I put it to the Garda under cross-examination that he'd never been in trouble before and his response was: "I suppose so if you don't count the 17 previous convictions".

Did you learn anything?
He had 17 previous convictions, which had been dealt with by junior caution, fine, and suspended sentence. I learned that some people considered only a sentence to be trouble – which he got that day.

Patrick Gageby SC

Called to the Bar 1976, Inner Bar 1995.

What was your first case about?
My first case I have a big memory of is my first jury trial in 1979. The client was charged with entering a school during the day and indecently assaulting a girl who was sitting in a classroom by herself.

Where was it heard?
Dublin Circuit Court in front of a judge who shall not be named.

Did anything interesting happen?
The defence was that the accused had gone there to steal televisions just recently installed in the school and, surprised in the act, he had chatted up the girl to cover his unlawful presence, and in his nervousness had unintentionally touched the girl.

What did you learn from it?
There are traps everywhere. Every question counts. You have to put everything together yourself. I learned an enormous amount. Look around every corner, life is full of surprises – the accused was acquitted!

Siobhán Ní Chúlacháin BL
Called to the Bar 1999.

What was your first case about?
My first case was a judicial review for John Gilligan to stop a trial. I was led by my master, and I moved the application for leave on the last day of term – July 28, 2000.

Where was it heard?
It eventually made its way all the way to the Supreme Court.

Did anything interesting happen?
My first case made its way into the Irish Reports! Unfortunately, we were unsuccessful and the trial was allowed.

What did you learn from it?
That it's better to start from the bottom and work your way up than to start at the top and work your way down.

Katherine McGillicuddy BL
Called to the Bar 2005.

What was your first case about?
It was a bail application. The case was called before lunch but I wasn't instructed at that point. The Guard had to re-give his evidence after lunch.

Where was it heard?
In Court 8 in front of Judge Katherine Delahunt.

Did anything interesting happen?
I made the bail application, pointing out that the client's mother was very sick and that he could easily sign on as the Garda station was on his way to the methadone clinic. I called him to give this evidence, which he did. I asked him if he would come to court on each and every occasion and his response was that if his mother took a turn, he couldn't have that on his conscience. Surprisingly, the judge granted him bail but he was later refused in the District Court.

Did you learn anything?
That this guy was liable to say anything in the box. I should have asked a neater question.

Glenn Lynch
Called to the Bar 2017.

What was your first case about?
Possession of knives. They were big sacrificial blades with a ram's head on them!

Where was it heard?
Court 1 in the CCJ.

Did anything interesting happen?
The client had recently been carjacked and wanted security, which she thought came in the form of satanic ritual blades!

What did you learn from it?
The case was dismissed but the client expressed only dissatisfaction at having to wait all day in the court; clients might not always appreciate the work done.

Looking over these stories, and the others I collected, any barrister starting out on their first case can take solace that every other barrister was at one point where they are now. Some of the most established practitioners who now make judges quake in their boots were once wet behind the ears young practitioners entering the District Court for the first time. I was struck in particular here by how similar two of the cases – heard in the same court but almost 50 years apart – were. They show that the same mistakes that are being made now were also being made decades ago by some of our most esteemed colleagues. With time and effort anyone may rise to the same ranks!

I suspect a barrister starting his first case in 2118, perhaps for theft of a hover bike or using a teleporter while intoxicated, will face the same challenges as the new barristers of today and yesteryear.

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1. Pannick, D. *Advocates.* Oxford University Press, 1992.
2. I am very grateful to the colleagues who allowed me to pester them into talking about their first case – any errors or inaccuracies are mine. I am particularly grateful to the office of the Chief Justice for facilitating an interview with him about his first cases.

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.

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- 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*

PIAs and the role of the receiver

What is the impact of a personal insolvency protective certificate on the role of the receiver?


Emma Foley BL
Oonagh O'Sullivan BL

Introduction

Under the Personal Insolvency Act 2012, three procedures were created in an effort to alleviate the financial burdens faced by indebted individuals and to provide a legal framework to resolve their debt issues with their lenders. They are: Debt Relief Notices, Debt Settlement Arrangements, and a Personal Insolvency Arrangement (PIA). The aim of these procedures is to give a debtor the opportunity to restructure their debts and reach agreements with their creditors, and quite often avoid the bankruptcy process.

Of these three mechanisms, the PIA is the only procedure that directly relates to a secured debt, such as a mortgage. When a debtor decides to engage in the PIA process, one of the first steps is for the personal insolvency practitioner to apply for a protective certificate. While it is clear that a creditor is precluded from taking certain steps while the protective certificate is in place, uncertainties arise as to what is the effect on a receiver who is appointed on foot of a default in a mortgage loan during this period. Is such receiver also precluded from taking any enforcement steps during a protection period? This question has not yet been considered in a judgment of the courts and this article seeks to explore how this issue should be resolved.

The PIA process

A PIA will allow for a debtor's unsecured debts to be settled over a period up to six years. Any secured debts may be restructured under a PIA allowing for, *inter alia*, payment to be made over a certain period, the write down of certain negative equity and, in some cases, the debtor being released from a secured debt upon the termination of the PIA period. Chapter 4 of the 2012 Act governs the PIA process. A debtor will inform their personal insolvency practitioner who, pursuant to s. 93 of the Act, will apply to the Circuit Court for a protective certificate. The personal insolvency practitioner must also notify the Insolvency Service of Ireland as to the intention of the debtor to apply for a certificate and their intention to make a proposal for a PIA. The Insolvency Service will issue a certificate to state that it is satisfied that the requirements of s. 93 have been fulfilled. Once the Circuit Court has granted a protective certificate, the debtor gains certain stringent statutory rights over the specified debt as referred to in the certificate. According to s. 95, this protection period runs for 70 days initially, which can be extended by 40 days, and then by a further 40 days in certain circumstances. Section 96 sets out at (a)-(h) the statutory rights and various steps that the creditor is precluded from taking in relation to the specified debt during protected periods. These include initiating or prosecuting legal proceedings, recovering payment, enforcing a judgment or security, recovering goods or cancelling any pre-existing arrangement.

If a mortgagor defaults on a mortgage loan, the mortgagee will have a range of options available to them to enforce the debt, including the appointment of an out-of-court receiver.

Section 96 is similar in principle to that of the moratorium in the examinership process, created by s. 520(4) of the Companies Act 2014, in that certain measures cannot be carried out by creditors (or other specified parties) upon the appointment of an examiner. The operation of s. 96 is therefore quite clear: for example, a summary matter taken against a mortgagor who has defaulted on a loan but has been granted a protective certificate, will not be pursued until after the period of protection has elapsed. While this position is straightforward for a creditor in the form of a mortgagee, the operation of s. 96 is not as

straightforward when a receiver has been appointed by a mortgagee pursuant to a mortgage deed and deed of appointment as a method of enforcing a security.

Section 96 clearly states that it is a "creditor" who is precluded from taking steps while the protective certificate is in place. Section 2 defines creditor as "a natural or legal person to whom a debtor owes that debt or to whom the debtor otherwise has a liability in respect of that debt". This definition does not *per se* include a receiver. Therefore, it is unclear what effect, if any, a protective certificate has on a receiver, and whether such receiver is precluded from taking any enforcement steps during the protection period. This issue has not been determined by the courts but it is submitted that there are three general issues that should influence any consideration of the matter.

1. The agency relationship as defined by the receiver's appointment

If a mortgagor defaults on a mortgage loan, the mortgagee will have a range of options available to them to enforce the debt, including the appointment of an out-of-court receiver. This appointment will generally be on foot of the deed of mortgage and supplemental deed of appointment. A mortgagee may also appoint a receiver pursuant to ch. 3 of pt. 10 of the Land and Conveyancing Law Reform Act 2009 or s. 19 of the Conveyancing Act 1881, if the mortgage was created prior to 2009.

Section 108(2) of the 2009 Act provides that a statutorily appointed receiver is the agent of the mortgagor, who is solely responsible for the receiver's acts or defaults, unless the mortgage provides otherwise. Nevertheless, a "tripartite" relationship has also been recognised between the debtor, the creditor and the receiver, in particular by Denham J. in *Bula Ltd v Crowley*.[1] The deed of appointment may therefore define the relationship of the receiver as being an agent for the debtor as mortgagor, as well as the creditor as mortgagee, but this would have to be specifically set out in the deed of appointment. If a "tripartite" relationship is defined in the deed of appointment, a creditor could argue that, as the receiver is also acting as agent for the debtor, any enforcement steps that they take should not be construed as purely actions of the creditor, and therefore not fall foul of s. 96. However, even if a "tripartite" relationship is provided for in the deed of appointment, a court may have difficulty in accepting that the actions of a receiver, which directly contradict the debtor's statutory rights and interests protected by s. 96, could be construed as actions performed by the receiver in its capacity as the debtor's agent. After all, the role of the debtor in this "tripartite" relationship is that of an unwilling principal, in that the debtor has no say in the appointment of the receiver and cannot provide instructions to same, but is nonetheless bound by the receiver's actions. The creditor, consequently, would not be able to establish that a receiver, in performing an action precluded by s. 96, did so under the instruction of the debtor.

Nevertheless, one should also be mindful of the fact that the Supreme Court in *Bula* referred to the existence of a "tripartite" relationship and not a "tripartite" agency and, in light of this, on a strict interpretation of that decision, a receiver may not be considered an agent of the creditor, and only an agent of the debtor, and would, accordingly, not be precluded from continuing their functions while the protective certificate is in place.

2. The statutory interpretation of s. 96

If the actions of a receiver were not considered actions of a creditor and therefore not subject to s. 96, would this undermine the purpose of the 2012 Act? While the receiver has been given certain duties and responsibilities, these need to be balanced against the statutory rights of the debtor. Although the Act does not mention receivers, the adoption of a literal definition of the term "creditor" in s. 96 could frustrate the purpose of the Act. The 2012 Act aims to bring about a more nuanced way for a debtor to deal with their debts by way of financial arrangements in a bid to prevent them from resorting to bankruptcy. It has generally been accepted in this jurisdiction that the default position in interpreting a statute is to adopt a literal approach. If the adoption of a literal interpretation of the statute would undermine the purpose/intention of the legislature, then the courts may interpret using the

purposive approach. The purposive approach in statutory interpretation is concerned with the overall intention of the legislature and what it wishes to achieve, rather than a literal meaning of particular words and phrases contained within the provisions of the legislation. This is reflected in the Supreme Court decision of *O v M*,[2] in which Kenny J. rejected a literal interpretation of s. 19 of the Courts Act 1971, as it would have frustrated the purpose of that Act.

The Irish courts, however, have emphasised that the literal approach is the preferred method of statutory interpretation (see *McGrath v McDermott*).[3] Nevertheless, as highlighted by Gilligan J. in *Boyne v Dublin Bus/Bus Atha Cliath*,[4] the courts also seek to ensure that their interpretation gives effect to the purpose of the legislation.

The appointment of a receiver, once a protective certificate is in place, is clearly precluded by s. 96(1)(c) as it would be considered a step to secure or recover payment, and by s. 96(1)(e) as a step to enforce security. An interpretative difficulty seems to arise in circumstances where a receiver was appointed prior to the protective certificate being issued. If a strict understanding of the receiver relationship is maintained, i.e., that the receiver is not considered an agent of the creditor, the receiver could proceed to take actions that could have serious consequences for the specified debt while the protective certificate is in place. If the receiver is afforded a vast range of powers under the mortgage deed or deed of appointment, there is nothing to prevent a receiver, *inter alia*, selling a property, transferring title or collecting rent for the benefit of the creditor. These potential actions would undermine the function and purpose of the protective certificate and the aims of the 2012 Act, as they would fail to protect the debtor concerned. It is on that basis that the courts may be inclined to interpret the definition of "creditor" as including a receiver, so as to give effect to the intent of the legislature.

3. The receiver as a method of enforcement

As the appointment of an out-of-court receiver can only occur, in most instances, after there has been a default in the mortgage loan, the decision to appoint a receiver constitutes the creditor's first step in seeking to enforce the debt. It therefore follows that receivership is a method of enforcement.

Lightman J. in the Court of Appeal of England and Wales observed in *Silven Properties Ltd v Royal Bank of Scotland*[5] that it is indicative in the functions of a receiver that: "…his primary duty in exercising his powers of management is to try and bring about a situation in which the secured debt is repaid". If a receiver was appointed prior to the protective certificate being in place, it could be argued that, as the sole purpose of the receiver is to enforce a debt, the receiver should be prevented from taking any action or using the powers afforded to him or her, however nominal, as this would constitute a method of enforcement or a "step" as prohibited by s. 96. Furthermore, s. 96(3) also states that "no other proceedings and no execution or other legal process in respect of a specified debt may be commenced or continued by a creditor" except with leave of the court. This would suggest that it is irrelevant whether the creditor intends to appoint a receiver or has already appointed a receiver; both could arguably be considered an execution or legal process, which is prohibited during the period of protection. In order to maintain the status quo and honour the protective certificate, the reality in practice is that a receiver would effectively desist from any actions until the protection period had elapsed. Whether there is a legal requirement to do this, however, requires judicial consideration. It could be argued that requiring a receiver to desist from his or her actions could constitute an unwarranted restriction of the receiver's rights. There may therefore be merit in arguing at the leave stage that certain nominal managerial functions of the receiver be performed during the protection period, for example the collection of rent. This argument presents two potential difficulties. First, the protective certificate will indicate the "specified debt" concerned and this may include any rent flowing from the property as mentioned. Secondly, as the collection of rent is quite clearly for the benefit of the creditor and not the debtor, this could be construed as an action on the part of the creditor to secure or recover payment, contrary to the terms of s. 96. The court would thus be confronted by the practical difficulties highlighted above concerning agency and the potential frustration of the purpose of the protective certificate as created by the 2012 Act.

Conclusion

According to the procedures as set out in the Act, where a debtor has a protective certificate in place and a creditor has appointed an out-of-court receiver on foot of a default in a mortgage loan, the creditor should seek leave from the court pursuant to s. 96(3) before the receiver continues with any steps to enforce the debt. The receiver could then, in his or her capacity as agent for the creditor, seek to have the debt, over which he or she is appointed, released from the category of "specified debt" as defined in the protective certificate. Failure to do so could result in the receiver and/or creditor being held in contempt of court, if it is found that a receiver is precluded from continuing his or her functions during the protective period. However, this does not occur in practice, and although there is no strict legal requirement, receivers are often advised in light of s. 96 to automatically desist from taking any steps to enforce the debt until after the protective period has elapsed. While creditors retain a right to appeal pursuant to s. 97, and the restriction to enforce the debt is finite and limited to the statutory time limits, the practical implications of a protective certificate create considerable uncertainty as to how a receiver can proceed during a protected period. Judicial clarification is therefore required to settle this unanswered question as well as the outstanding legal issues regarding the nature of the agency relationship.

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LEGAL UPDATE

THE BAR OF IRELAND
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The Bar Review, journal of The Bar of Ireland

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

Civil Liability (Amendment) Bill 2018 – Bill 56/2018 [pmb] – Deputy Alan Kelly
Civil Liability (Amendment) (No. 2) Bill 2018 – Bill 57/2018 [pmb] – Deputy Louise O'Reilly
Emergency Homeless Accommodation and Direct Provision Independent Inspection Bill 2018 – Bill 60/2018 [pmb] – Deputy Eoin Ó Broin
Home Building Finance Ireland Bill 2018 – Bill 58/2018
Homeless Prevention Bill 2018 – Bill 54/2018 [pmb] – Deputy Denise Mitchell and Deputy Eoin Ó Broin
Insurance (Amendment) Bill 2018 – Bill 59/2018
National Monuments (The Moore Street Battlefield) Bill 2018 – Bill 50/2018 [pmb] – Deputy Peadar Tóibín
Údarás na Gaeltachta (Amendment) Bill 2018 – Bill 53/2018

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Broadcasting (Amendment) Bill 2018 – Bill 49/2018 [pmb] – Senator Fintan Warfield, Senator Niall Ó Donnghaile and Senator Paul Gavan
Data Sharing and Governance Bill 2018 – Bill 55/2018
Industrial Relations (Collective Action) Bill 2018 – Bill 43/2018 [pmb] – Senator Paul Gavan, Senator Niall Ó Donnghaile and Senator Fintan Warfield
Mental Health (Capacity to Consent to Treatment) Bill 2018 – Bill 51/2018 [pmb] – Senator Máire Devine, Senator Lynn Ruane, Senator Frances Black, Senator Grace O'Sullivan, Senator Joan Freeman, Senator Pádraig MacLochlainn, Senator Fintan Warfield, Senator Paul Gavan, Senator Rose Conway-Walsh and Senator Niall Ó Donnghaile

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Copyright and Other Intellectual Property Law Provisions Bill 2018 – Bill 31/2018 – Committee Stage
Criminal Justice (Corruption Offences) Bill 2017 – Bill 122/2017 – Passed by Dáil Éireann
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Judicial Appointments Commission Bill 2017 – Bill 71/2017 – Passed by Dáil Éireann
Markets in Financial Instruments Bill 2018 – Bill 36/2018 – Committee Amendments
Parental Leave (Amendment) Bill 2017 – Bill 46/2017 – Committee Stage – Report Stage – Passed by Dáil Éireann
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Criminal Justice (Corruption Offences) Bill 2017 – Bill 122/2017 – Committee amendments – Report amendments
Mental Health (Amendment) Bill 2017 – Bill 23/2017 – Report Stage
Planning and Development (Amendment) Bill 2016 – Bill 1/2016 – Committee amendments – Report amendments
Radiological Protection (Amendment) Bill 2018 – Bill 19/2018 – Committee amendments

For up-to-date information please check the following websites:
Bills and legislation – http://www.oireachtas.ie/parliament/
Government Legislation Programme updated May 2, 2018, to June 21, 2018 – http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

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Acta non verba

A recent Supreme Court ruling has implications for all actions involving the tort of negligent misstatement.

Jonathan S. FitzGerald BL

Introduction

In *Walsh v Jones Lang LaSalle Ltd*, the majority of the Supreme Court availed of the opportunity to revisit and clarify the tort of negligent misstatement generally and, specifically, to address the issue of disclaimers of liability. The majority judgment now firmly establishes the principle that a disclaimer of liability regarding the accuracy of information contained in a sales brochure can operate to prevent any duty of care arising. Moreover, in undertaking a full review of the tort and the effect of disclaimer, the impact of *Walsh* will reverberate through all applications of the tort of negligent misstatement.

Hedley Byrne – genesis of negligent misstatement

In 1964, the well-known case of *Hedley, Byrne & Co. Ltd v Heller & Partners Limited*[1] first established the right of a plaintiff to recover for loss incurred by him in reliance on the negligent misstatement of another. The Law Lords in *Hedley Byrne* set out the circumstances in which a duty of care will arise in the context of innocent but inaccurate statements that cause damage to the person who relies upon them (and the foundation for the tort of negligent misstatement emerged). McMahon and Binchy comment[2] that the law in the UK (and Ireland) has progressed upon the foundation statement of the law of negligent misstatement as formulated by Lord Morris:

"It should now be regarded as settled that if someone, possessed of a special skill, undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon that skill, a duty of care will arise… Furthermore, if, in the sphere in which a person is so placed that others could reasonably rely upon his judgement or his skill or upon his ability to make a full enquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise".[3]

However, the Law Lords also drew a clear distinction between liability for negligent acts and liability for negligent statements. While a duty of care in respect of statements could arise in principle, the effect of an explicit disclaimer (where the defendant had expressly stated that it was not assuming responsibility for its statement) prevented the essential special relationship arising between the parties.

Ultimately, the House of Lords determined that the disclaimer was a fact that was determinative in obviating the assumption of responsibility on the part of the defendant for its statement, therefore preventing the creation of a duty of care and a liability in negligence.[4]

In the decades to date, the law of negligent misstatement has developed in both jurisdictions. In the UK, in *Caparo Industries plc v Dickman*,[5] Lord Bridge stressed "the effect of any disclaimer of responsibility" on the part of the defendant[6] and further emphasised the necessity for the existence of a "special relationship" between the imparter of the inaccurate statement and the impartee.

In 2006, in *Wildgust v Bank of Ireland*,[7] the Irish Supreme Court engaged in a synthesis of the principles from *Glencar Explorations plc v Mayo County Council (No2)*[8] and the test as enunciated in *Caparo*. In this case, the statement was not made directly to the plaintiffs but to a person identified with them. This case involved a complex and unhappy set of facts pertaining to the liability of an insurance company for an incorrect answer from the plaintiffs' banker to an enquiry as to whether a premium for loan insurance had been paid. The Court ultimately held that the proximity test in respect of a negligent misstatement could extend to persons in a limited and identifiable class when the maker of the statement could reasonably expect, in the context of a particular inquiry, that reliance would be placed thereon by persons to act or not to act in a particular manner in relation to that transaction.

The issue of reliance was, perhaps, the dominant element of the judgments of Geoghegan J. and Kearns J. in the Supreme Court, where they found that there was a "special relationship" between the plaintiffs and the defendant in circumstances where, if the statement made was incorrect, it could cause damage to the bank and the plaintiffs who had a beneficial interest in the form of an equity of redemption in the policy. The Court then determined that the proper interpretation of the *Hedley Byrne* principles included a potential duty of care in negligent misstatement owed to more than just the person to whom the negligent misstatement was specifically addressed. Geoghegan J. expressed the view that the court's finding was only "a small extension" of the existing principles.

Walsh v Jones Lang LaSalle Ltd

It was in the above broad jurisprudential context in this jurisdiction that the long running litigation of *Walsh v Jones Lang LaSalle Ltd*[9] hoved into view. In this case, the defendant ("Jones") acted as the estate agent for the vendor of a commercial property located in Dublin. The plaintiff ("Walsh") contacted Jones, who provided him with a copy of the sales brochure (prepared by Jones) during Walsh's visit to view the property. The brochure contained specific measurement details of the floor area of the commercial property, which overstated the first floor area of the commercial property by some 20% as 10,463 ft.[10] A statement was contained within the brochure in very small print as follows:

"Whilst every care has been taken in the preparation of these particulars, and they are believed to be correct, they are not warranted and intending purchasers/lessees should satisfy themselves as to the correctness of the information given".

Walsh did not conduct his own measurement of the building and calculated his purchase bid(s) premised upon the anticipated commercial rent per square footage as stated in the brochure. Walsh's offer was accepted and he entered into a contract of sale with the vendor to purchase the property for a contract sum of £2,342,000.

After the completion date, Walsh discovered the inaccuracy in measurement and sued Jones in the High Court. His action was based, *inter alia*, on negligent misstatement, asserting an alleged failure on the part of Jones to take reasonable care in relation to the preparation and contents of the brochure. Jones pleaded in its defence that it owed no duty of care to Walsh and claimed that there was no special relationship between the parties where the disclaimer on the brochure expressly stated that the contents of the brochure were not warranted.

The High Court found in favour of the plaintiff and awarded damages in the amount of €350,000. The Court (Quirke J.) made a number of findings of fact, which can be summarised as follows:

i. The total rental income (which is frequently estimated by reference to the floor area) recoverable from a commercial property will often be the principal factor in the calculation of its value. Jones knew, or ought to have known, that Walsh would estimate the value of the property based on these measurements, giving rise to an inflated estimate of rent recoverable.

ii. Walsh had been generally aware of the disclaimer contained in the brochure but could not recall whether he had read it with any care.

iii. Jones held itself out as a company with particular skills and expertise. Walsh had noted that Jones had stated in the brochure that it had taken "every care" and that he relied upon the reputation of Jones as a firm of the utmost probity.

iv. None of the other 12 potential purchasers of the property carried out their own measurement surveys.

v. The brochure was expressly designed to attract the attention of potential purchasers, was an integral part of the tendering process, and had the explicit intent of maximising the price that potential purchasers would pay (and the fee that Jones would obtain).

vi. Walsh was among the limited class of persons at whom the brochure was expressly directed and had relied upon its contents when calculating his precise bid.

vii. The general and/or approved practice of purchasers in the Dublin commercial property market was not to conduct individual personal measurements of the floor area(s) of commercial properties prior to purchase.

viii. It was the common and accepted understanding in the Dublin property market that disclaimers in property brochures covered only minor discrepancies.

Premised on the foregoing findings, the High Court found that the relationship between the plaintiff and the defendant was sufficiently proximate to give rise to a special relationship. The Court further held that the presence of the

"waiver" within the brochure and its precise terms were insufficient to exclude the defendant from liability. If the defendant wished to reserve to itself the right to publish grossly inaccurate measurements, then there was an obligation upon the defendant to draw to the attention of prospective purchasers the fact that the seemingly precise measurements were likely to be wholly unreliable and should not be relied upon in any circumstances.

The High Court's decision was appealed to the Supreme Court, where Jones advanced the core contention that the High Court had failed to appreciate the legal import of the disclaimer contained in the brochure, which operated to negate the assumption of a duty of care by Jones to Walsh.

Sitting as a court of five, the Court split three to two, with the majority of O'Donnell J. and Laffoy J. (O'Malley J. concurring) finding in favour of Jones and allowing the appeal. Mac Menamin J. (McKechnie J. concurring) delivered the dissenting judgment.

The minority approach relied on the application of the principles from *Hay v O'Grady*.[11] At para 10, Mac Menamin J. stressed that the case was essentially a "fact case" and affirmed the principle that findings of fact, when supported by credible evidence, should not be disturbed by an appeal court. However, O'Donnell J. emphasised that the case involved important issues of law that should not be avoided, and stated (at para 18) that he was not willing to treat the case as one individual instance, which was capable of being decided on its own facts.

Laffoy J. identified the fundamental issue arising as one that had not been addressed by the Supreme Court before: "namely, to what extent a disclaimer of responsibility absolves a defendant supplier of information from liability for economic loss incurred by a plaintiff recipient of the information due to what would otherwise be negligent misstatement on the part of the defendant".

Both Laffoy J. and O'Donnell J. held that the High Court had erred in its analytical approach where it found a duty of care between the parties and, only then, looked to see whether the disclaimer was effective in excluding that liability. Furthermore, both judges considered the UK Court of Appeal case of *McCullagh v Lane Fox and Partners*[12] to be of particularly persuasive authority in relation to their findings that the disclaimer of liability operated to prevent a duty of care in negligent misstatement arising. This was despite the fact that the expression of the disclaimer in *McCullagh* was significantly more extensive and unequivocal than that contained in the Jones brochure.

In *McCullagh*, an estate agent had represented, both orally and in written particulars of the property, that the site occupied "0.92 of an acre". Subsequent to the purchase of the property, the plaintiff discovered that the plot site was only approximately half this size and sued the estate agent in negligence. The estate agents relied upon a disclaimer in their particulars document.[13]

In paragraph 52 of her judgment, Laffoy J. quoted with approval a statement at page 222 of Hobhouse L.J.'s judgment where he stressed that: "The relevance of the disclaimer is to negative one of the essential elements for the existence of the duty of care and negatives the assumption of responsibility for the statement". In relation to the issue of assumption of responsibility by the imparter of the statement, Laffoy J. referred to page 237 of his judgment, where he stated that the "right approach as is made clear in *Hedley Byrne*, is to treat the existence of the disclaimer as one of the facts relevant to answering the question whether there had been an assumption of responsibility by the defendants for the relevant statement".[14]

Laffoy J. determined that the High Court had failed to adequately consider the import of the disclaimer where Jones made it clear that the particulars in the brochure were not warranted.[15] Applying these principles, Laffoy J. stressed that the correct approach was to determine objectively, by reference to what a reasonable person in the position of Mr Walsh would have understood, and whether Jones had assumed responsibility for the accuracy of the information contained in the brochure. In so doing, the learned judge made limited references to the extensive inferences and findings of fact made by the High Court. Rather, she focused almost exclusively upon the language contained in the disclaimer. She noted the stark difference between the extensive and precise nature of the disclaimer in *McCullagh* as opposed to the less precise phrasing employed in the Jones disclaimer. However, she concluded that, when read objectively, the Jones disclaimer clearly conveyed the message that Jones was not assuming responsibility for the accuracy of the particulars in the brochure, and that it was for the intended purchaser to satisfy him or herself as to the correctness of the information. Thus, in the explicit denial of responsibility, a special relationship could not exist and a duty of care did not arise. Laffoy J. concluded that this interpretation excluded the finding of fact by the trial judge that the disclaimer referred only to minor discrepancies.

The judgment of O'Donnell J.

The judgment of O'Donnell J. is founded principally upon a granular analysis of the judgments in *Hedley Byrne* and *McCullagh*. He stressed at paragraph 20 that the "starting point of the analysis in *Hedley Byrne v Heller* [1964] A.C. 465 was that normally a party does not owe a duty in tort to another in respect of statements made by them". The learned judge stated that this is an important distinction. He noted that in the area of negligent actions "it can be said the starting point is normally 'duty of care unless', whereas for statements it is a case of 'duty of care only if'". He concluded that it was an error to characterise a disclaimer as an exemption clause (to exclude liability arising from an extant duty of care) and stated that the proper approach was to consider it objectively as part of the evidence as to whether a duty of care had arisen at all.

O'Donnell J. concluded that the High Court had erred in running together the analysis of a claim for a negligent act (incorrect measurement of the floor area of the property) and a claim for negligent misstatement (contained in the particulars of the property in the brochure) leading to the assumption that there existed a duty of care and, only then, looking to the disclaimer to consider whether it was sufficient to exclude that presumed duty of care.

O'Donnell J. held that the approach of the High Court was more appropriate to the consideration of an exemption clause that seeks to limit a contractual or tortious liability that was already extant. In his view, this approach in the context of negligent misstatement represented a significant departure from the *Hedley Byrne* principles, which mandated that a disclaimer should be first considered as part of the analysis of whether a duty of care in negligent misstatement arose in the first place.

Similar to Laffoy J., O'Donnell J. concluded that the disclaimer, when analysed objectively, operated to expressly disclaim the assumption of a duty of care to Walsh or to any other potential purchaser in relation to the task of furnishing accurate internal measurements of the property. Similarly, he did not make

significant reference to the findings of fact of the High Court in his objective analysis of whether a duty of care existed.

Minority dissent

As stated above, the strong dissent of Mac Menamin J. (with McKechnie J. concurring) relied heavily on *Hay v O'Grady* and the findings of fact made by the High Court. The second overarching element of the minority dissent is the consideration of the language of the disclaimer. Mac Menamin J. determined that if the disclaimer had been clear it would have operated to avoid liability under the *Hedley Byrne* principles. However, he distinguished *McCullagh*, on the basis that the terms of the disclaimer in that case "were crystal clear", unlike the ambiguous disclaimer in the present case. He concluded that, in the context of the High Court's findings of fact, the High Court had correctly held that the waiver carried with it a representation from a firm of the highest integrity that every care been taken in preparing the brochure, and that the information was given for a specific purpose, actually made known to the purchaser, in circumstances where Jones should have known that the information would be relied on, and acted upon. In those premises, Mac Menamin J. agreed with the conclusion of the High Court, that the remainder of the disclaimer[16] had no legal efficacy.

Commentary

The remarkable division in the three written judgments of the Supreme Court are, at first blush, difficult to reconcile. However, the strict adherence by the minority to the tenets of *Hay v O'Grady* may offer a guide to a workable synthesis of the judgments. The following tentative conclusions might be drawn from the Supreme Court's analysis:

i. In the law of negligence there is a necessity to distinguish between negligent acts and negligent statements.

ii. The Court's judgments in *Wildgust* do not justify a single unified approach to all cases of negligence and do not permit a court to approach a case of negligent misstatement on the same legal basis as any claim made in reliance on negligent acts.

iii. A claim in negligent misstatement must involve the assumption on the part of the defendant for the responsibility or risk to the plaintiff in the performance of a task in order for a "special relationship" to exist between the parties giving rise to a duty of care. This assumption can be implied.

iv. In the analysis of a disclaimer in the context of a claim for negligent misstatement, the disclaimer should not be interpreted as an exemption clause (i.e., designed to exclude and/or limit liability for an extant duty in contract or in tort), but rather should be examined as one of the facts relevant to determining whether there was an assumption of responsibility/risk by the defendant sufficient (e.g., "special relationship") to give rise to a duty of care in the first place.

v. This analysis is an objective process having regard to the words used and what a reasonable plaintiff would have understood at the time of the making of the statement and disclaimer.

vi. The existence of a disclaimer, even if the language contained therein is relatively weak, can serve to obviate the assumption of responsibility by the defendant for the relevant task, thereby negating the creation of a special relationship, which is one of the essential elements for the existence of a duty of care in negligent misstatement.

References

1. [1964] AC 465, House of Lords UK.
2. McMahon and Binchy. *Law of Torts (4th Ed.)*. Bloomsbury Professional, 2013, paragraph 10.75 at page 320.
3. *Hedley, Byrne & co. Ltd v Heller & Partners* [1964] AC 465 at 502-503.
4. *Hedley Byrne* was almost immediately adopted in Ireland in *Securities Trust Limited v Hugh Moore & Alexander Limited* [1964] IR 417.
5. [1990] 2 A.C. 605.
6. Op. cit. at page 620.
7. [2006] 1 IR 570.
8. [2002] 1 IR 84.
9. [2017] IESC 38.
10. No evidence was adduced at the trial of this matter as to how this error had occurred.
11. [1992] IR 210 at p 217: "If the findings of fact made by the trial judge are supported by credible evidence, the Court is bound by those findings, however voluminous, and apparently, we see the testimony against them. The truth is not the monopoly of any majority".
12. [1996] PNLR 205.
13. When compared to the somewhat enigmatic disclaimer set down in small print in the Jones brochure, the disclaimer in *McCullagh* was significantly more clear and "precise" in its terms as follows:
    "1. These particulars do not constitute, nor constitute any part of, an offer of contract.
    2. All statements contained in these particulars, as to this property, are made without responsibility on the part of Lane Fox or the vendors or leasers.
    3. None of the statements contained in these particulars, as to this property, are to be relied on as statements, or representations of fact.
    4. Any intending purchasers must satisfy themselves by inspection, or otherwise, as to the correctness of each of the statements contained in these particulars.
    5. The vendors do not make or give, and neither Lane Fox nor any person in their employment, has any authority to make or give any representation or warranty whatsoever in relation to this property".
14. See page 237 of the judgment.
15. See paragraph 67 of the judgment.
16. "…[the particulars] are not warranted and intending purchasers/lessees should satisfy themselves as to the correctness of the information given."

Rejuvenate juvenile justice

Guidelines could help our courts to sentence young offenders more consistently and more fairly.

Aoife McNickle BL

Introduction

This article will discuss the practical consequences of delay in prosecutions involving child offenders within the larger context of certain lacunae in the Children's Act 2001. While the 2001 Act (hereinafter "the Act") made radical changes to the manner in which children are treated within our criminal justice system, with the passing of time, it has become clear that there are still a number of shortcomings in the administration of juvenile justice. For instance, there is no provision for specialist training or accreditation for lawyers representing children, or specialist training in An Garda Síochána in relation to the appropriate investigation and interviewing of child suspects. There are no statutory procedures in relation to the trial of children on indictment comparable to the significant provision for such procedures in the Children's Court. Another statutory deficiency is the failure to provide for accused children who commit an offence as a child, but who reach the age of 18 during the currency of the prosecution and more particularly, before sentencing. There is no statutory guidance on how such cases should proceed so as to mitigate the effects of any delay in prosecuting children. The consequence of this is an ad hoc discretionary application of principles developed through case law, which can lead to an inconsistent approach to sentencing.

The 2001 Act repealed a system of paternalism, which involved significant use of borstals and industrial schools. The Act made comprehensive and extensive provision for all stages of juvenile justice.

Regardless of whether a child has reached majority at the time of sentencing as a result of prosecutorial delay, or because the offence was committed when the accused was nearly 18, the age and maturity of an accused at the time of the commission of the offence must be a weighty and significant consideration in a judge's mind at sentencing.

It introduced novel concepts such as the Garda Diversion Programme and elements of restorative justice, and drew a distinction between the welfare courts and the criminal courts dealing with child defendants. In particular, the Act introduced a number of specific beneficial provisions that apply to a child (defined as a person under 18) accused of a criminal offence, including, *inter alia*, the right to anonymity and a provision that detention must be considered as a sentencing option of last resort.[1] Most of these benefits no longer apply once a child turns 18.

Delay

The superior courts have often considered the issue of delay in the context of judicial review proceedings seeking an order of prohibition on grounds of delay.[2] This body of case law provides that each case will be considered on its own merits but that delay will not, in and of itself, be sufficient to warrant the granting of an order of prohibition. There needs to be a significant prejudice to the child, as well as significant culpability on the part of the prosecutor, before an order of prohibition will be granted. The superior courts have identified that the benefits accrued under the Act, and lost once a child turns 18, can often be mitigated at the discretion of the trial judge; for example, orders of anonymity to mitigate the loss of that right under Section 93 of the Act,[3] jury warnings[4] and structured sentencing.[5] However, some benefits simply cannot be mitigated, such as the loss of opportunity to make submissions under Section 75 of the Act to have the prosecution retained in the jurisdiction of the Children's Court.[6] In the absence of any guidelines, a wide measure of discretion is left to the sentencing judge, particularly in relation to the sentencing of an adult for an offence committed as a child.

Age and maturity

Regardless of whether a child has reached majority at the time of sentencing as a result of prosecutorial delay, or because the offence was committed when the accused was nearly 18, the age and maturity of an accused at the time of the commission of the offence must be a weighty and significant consideration in a judge's mind at sentencing.

The Court of Appeal considered this issue in *DPP v M.H.*,[7] and stated that the relative maturity of the accused at the time of offending is a mitigating factor and that the sentencing judge in this case had not attached sufficient weight to such age and maturity. This was a case involving rape and sexual assault charges on a child who was five and half years younger than the accused. The offending occurred throughout the period from when the accused was 16 years until he was 18 years old. The original sentence of nine years with three suspended was reduced to seven years with three suspended.

The same issue was again considered more recently by the Court of Appeal in *DPP v J.H.*,[8] which decided that the sentencing judge must assess the accused's level of maturity at the time of commission of offence so as to measure culpability. This was a case involving offences of sexual assault and oral rape on a child who was approximately four years younger than the accused. The accused was 15 years at the time of offending and 23 years at the time of sentencing. The complaint was made to the Gardaí over four years after the offence and the matter came for sentencing over three years after the complaint. The sentencing judge was dealing with a very different person in terms of age and maturity. The sentence originally given was one of four years with two suspended, which was reduced on appeal to 18 months with six months suspended (having identified the headline sentence as two and half years). The Court of Appeal acknowledged that while the sentencing judge did consider the defendant's age and maturity, sufficient weight was not given to those factors.

The case law surrounding mandatory minimum sentencing involving children convicted of murder establishes that a sentencing judge is not obliged to impose a life sentence … although it is open to the courts to impose detention for life if circumstances deem such appropriate.

The Court of Appeal was asked by the Appellant, in *J.H.*, to consider jurisprudence from the English courts when deciding the appeal. They considered and referred to, in particular, the judgement in *R. v Ghafoor*,[9] where the defendant was 17 at the time of the offence of rioting and had reached his majority at sentence. The England and Wales Court of Appeal held that the date of the commission of the offence is the operative date for sentence since it provides a fixed point in time directly referable to the accused's culpability when the offence was committed. Lord Justice Dyson, who delivered the judgement of the court, stated:

"The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence. It has been described as "a powerful factor". That is for the obvious reason that…the philosophy of restricting sentencing powers in relation to young persons reflects both (a) society's acceptance that young offenders are less responsible for their actions and therefore less culpable than adults, and (b) the recognition that, in consequence, sentencing them should place greater emphasis on rehabilitation, and less on retribution and deterrence than in the case of adults. It should be noted that the "starting point" is not the maximum sentence that could lawfully have been imposed, but the sentence that the offender would have been likely to receive".

In setting out this starting point, the Court of Appeal in *Ghafoor* noted that other factors may then have to be considered to raise or lower that starting point.[10] In another English case, *R. v N., D. and L.*,[11] the sentencing judge had to consider serious offending, including gang rape and false imprisonment of a 14-year-old girl, involving offenders aged 15, 16 and 17, respectively, and where one of those (N) had reached his majority by the time of sentencing. The Court of Appeal considered maturity to be at least as important as the chronological age. Maturity of a youth is a factor to which weight should properly be given during sentencing.[12]

There are examples of existing laws that already distinguish children from adults when it comes to specific sentencing provisions. The presumptive minimum sentence for an offence contrary to Section 15A of the Misuse of

Drugs Act 1977 applies to adults but not to children. Section 27(3C) of the Misuse of Drugs Act 1977 provides that: "Where a person (other than a person under the age of 18 years) is convicted of an offence under Section 15A or 15B of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person". Similarly, the case law surrounding mandatory minimum sentencing involving children convicted of murder establishes that a sentencing judge is not obliged to impose a life sentence in cases of murder committed by children, although it is open to the courts to impose detention for life if circumstances deem such appropriate.[13] In *State (O) v O'Brien*,[14] the Supreme Court held that the power to sentence a child to an indeterminate sentence must lie with the courts and not the Executive. Although this judgment was given under a different juvenile justice regime, as set out in the Children Act 1908,[15] these principles have carried through. Therefore, such a sentence would be available to a sentencing judge but the court must retain seisin of the matter by reviewing the sentence periodically. This is in contrast with the obiter view of the Supreme Court that the practice of imposing reviewable sentences on adult offenders was undesirable and should be discontinued.[16]

Sentencing guidelines

It is suggested by this author that in the absence of legislative principles relating to the sentencing of children and young adults, the gap could be filled by sentencing guidelines. In England and Wales, the definitive guidelines issued in 2017, 'Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery', set out a comprehensive set of considerations relating to the treatment of children in all courts, including the factors a court should consider over and above the usual factors that apply to adults, and how to approach the sentencing of children and those who have reached the age of 18 before sentence. It has incorporated the precedents set down by the various decisions discussed above. The principle from *R. v N., D. and L.* and *R. v Ghafoor* (that the maturity of a defendant at the time of offending is just as important as the chronological age) is set out in section 1.5 of the guidelines as follows:

"It is important to bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking behaviour. It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age, their emotional and developmental age is of at least equal importance to their chronological age (if not greater)."[17]

The Guidelines also deal, not only with those children who either plead guilty or are found to be guilty as a child and are later sentenced when they reach their majority, but also those children who turn 18 before such a finding of guilt is made. At sections 6.1 and 6.2, the guidelines provide as follows:

"6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old).
"6.2 In such situations, the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the the (sic) finding of guilt of the offence".

Guidelines in relation to the sentencing of children and young adults could assist courts in deciding on appropriate sentences with some level of consistency, but without being so prescriptive as to fetter the necessary discretion of the judge in relation to the specific facts of each case. This could address one of the deficiencies in the 2001 Act briefly identified in this article. On a more general level, while the 2001 Act has introduced many welcome changes to the administration of juvenile justice, there is a pressing need for continuing review of the Act to ensure further specific interventions to assist children who end up in conflict with the law.

References

1. Section 93 and 96 of Children Act 2001.
2. See *Patrick Donoghue v DPP* [2014] 2 IR 762; *G. v DPP* [2014] IEHC 33; and, *A.C. v DPP* [2008] 3 IR 398.
3. *McD v DPP* [2016] IEHC 210.
4. *Kearns v DPP* [2015] IESC 23, Dunne J. (23/03/2015).
5. *McD v DPP* [2016] IEHC 210.
6. *Forde v DPP* [2017] IEHC 799.
7. *DPP v M.H.* [2014] IECA 19 (Edwards J., 10/12/2014).
8. *DPP v J.H.* [2017] IECA 206 (Mahon J., 7/7/2017).
9. [2002] EWCA Crim 1857.
10. Ibid. Para. 32.
11. [2010] EWCA Crim 94.
12. Paragraphs 27 and 28.
13. *DPP v D.G.* [2005] IECCA 75, Murray C.J., May 27, 2005 – the court held that an indeterminate sentence is applicable to children if it contains a review element. A life sentence to be reviewed by the court 10 years later was imposed by Carney J. on G, who had committed the murder at age 15 years. See also *DPP v V.W.*, CCA July 13, 1998 and *DPP v Sacco*, High Court, March 23, 1998.
14. [1973] I.R. 50.
15. Repealed in its entirety by Schedule 2 of the Act 2001.
16. *DPP v Finn* [2001] 2 I.R. 25.
17. This is further reiterated at section 4.10 of the guidelines.

Independent judiciary must be defended

Recent judicial reform in Poland, and European concerns about the proposed reform in Ireland, highlight the need to protect an independent judiciary.

Paul McGarry SC

The Council of The Bar of Ireland issued a press statement in early June that drew parallels between threats to the autonomy and independence of the courts and judiciary in Poland as a result of judicial reforms, and the likely implications of the Judicial Appointments Bill currently under consideration by the Seanad. While the comparisons were recognised by many among the legal profession, they drew sharp condemnation from some Government representatives. Our concern for the administration of justice here has been vindicated by the anti-corruption Council of Europe body, the Group of States against Corruption (GRECO), which has now warned that the draft Bill is not in line with European norms. In a report published in early July, GRECO refers to the non-legal majority and the lay Chair, the key concerns expressed by the Bar in our submission on the draft Bill. GRECO is highly critical of the changes to judicial appointments proposed, and has expressed significant concerns about the composition of the appointments commission, with judicial members in the minority. These concerns derive in part from the fact that, under our Constitution, the executive appoints judges. GRECO believes that in such a scenario, strong legal and judicial involvement at the pre-selection stage is essential. An independent judiciary that citizens can trust as impartial guardians of the rule of law is critical to the administration of justice. The right of access to an independent court is one of the primary elements underpinning the rule of law and one that is guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. Any measures that impact on the functioning of the judiciary (whether in relation to their appointment or to increase their accountability, for example) must not interfere with their independence or undermine the tripartite separation of the legislature, the executive and the judiciary, which is fundamental to a functioning democracy. The recent judicial reform of 2016-2018 in Poland is therefore alarming in the extreme and has widespread implications for the whole of Europe. The addendum to the Fourth Round Evaluation Report on Poland adopted by GRECO at its plenary meeting in Strasbourg in June finds that amendments to the Laws on the National Council of the Judiciary, the Supreme Court and the Organisation of Ordinary Courts "enable the legislative and executive powers to influence the functioning of the judiciary in Poland in a critical manner, thereby significantly weakening the independence of the judiciary". What is of particular concern to GRECO is the cumulative nature of these amendments, which come on top of earlier reforms of the Constitutional Court and the merger of the office of the Prosecutor General with that of the Minister of Justice. Mass enforced resignation of Supreme Court judges, protests across the country, and a legal challenge by the European Commission are just some of the consequences of these reforms.

The Polish situation shows that changes that impact on the functioning of a nation's justice system cannot be considered in isolation; the total impact on the administration of justice must be fully considered by the legislature. The changes in Poland did not happen overnight; they are the result of incremental encroachment and small steps taken over time.

We are working hard to market Ireland as an English-speaking common law system embedded within the EU; the perception of an independent judiciary is essential to attracting legal services here. There is an opportunity now to learn from the lessons of Poland, and to heed the warnings of GRECO. Populist politicians are correct about the existence of a vested interest on the part of the profession. Our vested interest is in ensuring that judges continue to be appointed in a manner consistent with international norms.

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