THE BAR
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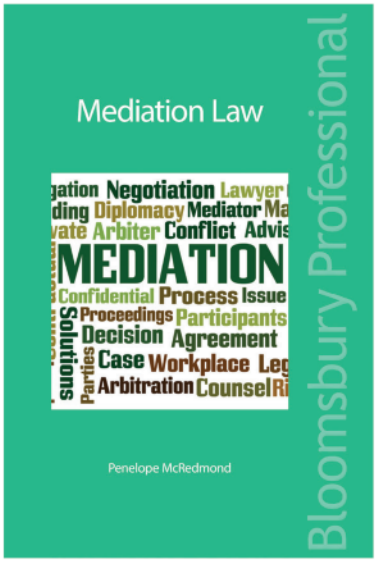
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

Volume 23 Number 3
June 2018

The Data Protection Act 2018



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By Penelope McRedmond

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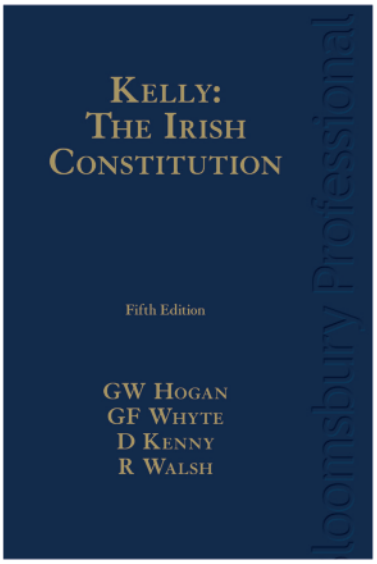

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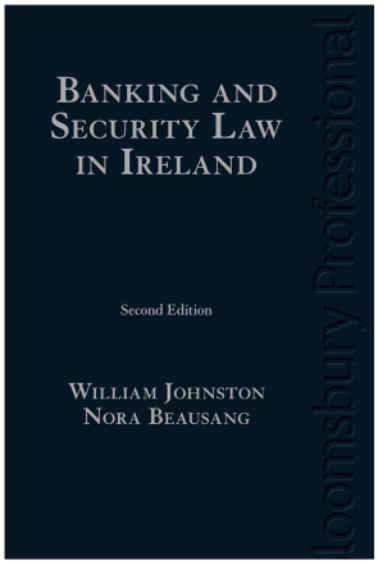

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By William Johnston, Nora Beausang

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Price: **€275**
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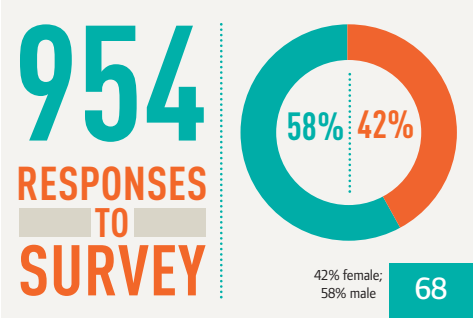

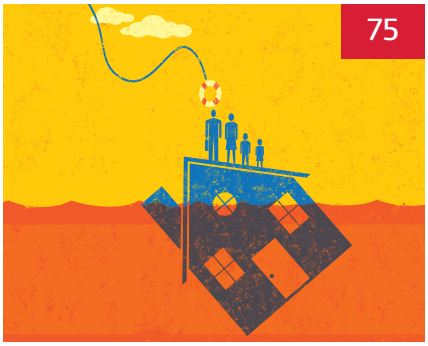

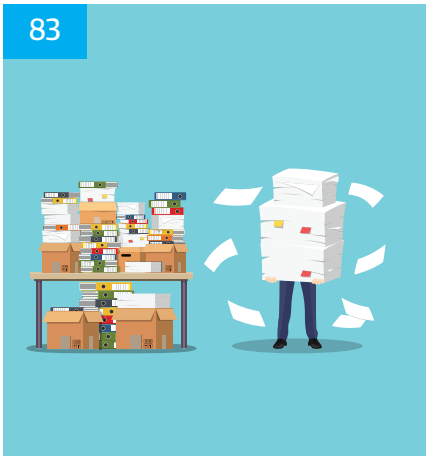

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Promoting Irish law

The Bar of Ireland continues to work to advance issues of importance to members.

Judicial appointments

The recent appointments to fill vacancies in the Court of Appeal are most welcome. However, while the Government made one new appointment to the High Court (congratulations to Tara Burns SC), the promotions to the Court of Appeal create a knock-on effect in the continued under-resourcing of the High Court, which needs to be urgently addressed. I would like to take this opportunity to congratulate George Birmingham on his elevation to the Presidency of the Court of Appeal. He now becomes the second highest judge in the land. Congratulations are also due to Gerard Hogan, nominated by the Government as Advocate General to the Court of Justice. That position assumes singular importance, given the imminent loss of the UK's permanent Advocate General, and the implications for the common law world.

The issue of judicial appointments remains live on our agenda and the proposal to establish an elaborate and expensive quango, promoted by one populist politician, appears to be moving closer. The Bar has made its position on the proposals clear on numerous occasions, and will continue to monitor developments as the Bill makes its journey through the Seanad.

Irish law abroad

The Bar, in conjunction with the Law Society, the leading law firms and the IDA, has presented a formal proposal to Government for the promotion of Irish law internationally. The proposal document is available on the lawlibrary.ie website. One very important aspect of the proposal involves a commitment on the part of all stakeholders to further develop Ireland's laws and legal system to make them even more effective, responsive and business friendly. It also requires an undertaking on the part of Government to ensure that the judiciary and the Courts Service are properly resourced, and a further commitment by the Government, Government agencies and the legal profession to work together to promote Ireland as a place to do business, eliminate any unnecessary barriers, and make Ireland an even more attractive place to transact legal business (including dispute resolution).

Biennial conference

The Bar of Ireland recently held its biennial conference in Málaga, on the related themes of defamation and privacy. A total of 163 attendees enjoyed a vigorous debate about the nature of defamation claims in Ireland. A full report on the event is contained elsewhere in this issue and feedback from attendees has been overwhelmingly positive.

Legal Services Regulatory Authority

The Minister for Justice and Equality recently appointed Sara Moorhead SC to the Legal Services Regulatory Authority (LSRA) to fill the vacancy arising from the resignation of Judge David Barniville. The appointment is most welcome as Sara has deep knowledge of the Act and will undoubtedly represent the profession well and ensure that the good relationship between the LSRA and The Bar of Ireland continues. A further consultation on the education and training arrangements for legal practitioners in the State is currently underway by the LSRA, and The Bar of Ireland will be making a submission to the Authority in mid June.

GDPR

With the GDPR finally upon us, I would like to express the gratitude of all members to The Bar of Ireland's GDPR working group and IT team, for the huge amount of work put in over the past year to assist members in complying with the new regulations. Of particular importance to members are the data-sharing agreements between solicitors and barristers, and it is anticipated that a standard model clause will be agreed this month with the Law Society and will be made available to members. Further information sessions are also being organised to assist members' understanding of the GDPR. In the meantime, if any member has a query relating to the Guidance published, please email gdpr@lawlibrary.ie to give the working group the opportunity to consider and respond. It is also anticipated that frequently asked questions will be published as a further useful resource for members.

Strategic Plan 2018-2021

A summary of the results of the member survey that was carried out in February 2018 is set out in an article within. A total of 954 responses were received and a series of five workshops took place throughout April and May to delve deeper into the results, which have fed into the development of our new Strategic Plan for the next three years. This plan will come before the Council of The Bar of Ireland at its meeting later this month for review and adoption, and will guide the direction of the organisation over the next three years. My thanks to all members and staff who have taken the time to make active contributions to the development of the plan.

Paul McGarry SC
Chairman,
Council of The Bar of Ireland

Tribute to a friend and colleague

Every board or committee has its unsung heroes. Deirdre Lambe was one such person. A true lady, combining charm, dynamism and simple good grace, she was a key member of the editorial board of *The Bar Review* for the last number of years. With her colleague Vanessa Curley, she ensured that the Legal Update was always complete and up to date for the benefit of our members. She took real pride in all her endeavours and we are bereft to have lost her in such an untimely fashion. Our heartfelt sympathies go to her family and her countless friends and colleagues.

The recent high-profile rape trial in Northern Ireland has highlighted a number of issues regarding the conduct of such trials. However, one area that has not received sufficient attention is the issue of disclosure. Our authors examine how late disclosure has caused the collapse of recent rape trials in the United Kingdom, and how new interventions are required in this jurisdiction to ensure timely and complete disclosure that respects the rights of both the accused and the victim.

The new General Data Protection Regulation (GDPR) affects every person in this State and we look at the new legislation in this area and evaluate how it will give rise to new rights of action in the courts. Finally, we look at a recent Supreme Court decision regarding the statute of limitations in property damage cases, and hope that it will provide much-needed clarification in this area.

Eilis Brennan BL
Editor
ebrennan@lawlibrary.ie

Appointment to judicial office

The Judicial Appointments Advisory Board would like to remind applicants that applications for judicial appointment can be submitted to the Board at any stage throughout the year. All valid applications submitted to the Judicial Appointments Advisory Board will remain valid for the duration of the calendar year in which they are submitted.

Bar Benevolent Society

The annual collection for the Benevolent Society of The Bar of Ireland is now underway. The Bar Benevolent Society provides temporary financial assistance to members of the profession and their families who are experiencing financial hardship. Its work is done on an entirely confidential basis. Please make what contribution you can to the Bar Benevolent Society. Contributions should be sent to:

- John Doherty BL, The Distillery Building, 145-151 Church Street, Dublin 7 – DX No. 81 6201;
- Oonah McCrann SC, The Law Library, Four Courts, Dublin 7 – DX No. 81 6419;
- Finbarr Fox SC, The Law Library, Four Courts, Dublin 7 – DX No. 81 5205; or,
- Adrianne Fields BL, The Law Library, Four Courts, Dublin 7 – DX No. 81 6215.

Members wishing to make a donation by way of EFT are asked to contact John Doherty directly for the relevant IBAN and BIC information.

GDPR guidance for members published

The EU GDPR guidance note for members is now available to download from the members' section of The Bar of Ireland website.

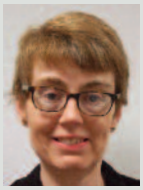
It comprises a guidance note document and a series of appendices, which provide templates and policies required to support members' compliance activity.

The guidance note and appendices have also been emailed to all members.

The top ten key points arising from the guidance are:

1. Understand what constitutes "personal data" (see guidance point 3.1D).
2. Understand what constitutes "special categories of data" (see guidance point 3.1F).
3. Be sure that you know what constitutes a data breach and how you should respond (see guidance point 3.1A and template provided).
4. Draft your data protection policy from the template and notes provided (see guidance point 4).
5. Review your sources of information and complete the data mapping template and notes provided (see guidance point 7).
6. Decide on your data retention policy using the template and notes provided (see guidance point 8).
7. Encrypt your computers and backup devices – contact the IT Helpdesk for advice.
8. Use your lawlibrary.ie account to ensure that your email and data files are stored in a GDPR-compliant system.
9. Ensure that you store your printed files in an appropriate manner.
10. Identify those who provide services to you using data provided by you (invoicing, fee collection, dictation, etc.). Issue them with a data processor agreement for completion.

Understanding legal databases part 1: Why am I getting different results from different databases?

By Magalie Guigon and Ruth Fay

As legal researchers, the volume of information available electronically can be overwhelming. There is always a doubt at the back of one's mind that something important may be missed. This article aims, firstly, to put barristers' minds at rest on this score, and secondly to explain why searching different databases, or the same database at different times, may harvest wildly divergent results.

Algorithms

The answer lies with algorithms. The important thing to remember about algorithms is that they are human, not technological constructions. Authorship, editorial and even Western cultural biases are built into the system. Depending on which database you choose, you may be directed towards more value-added content or to deeper, secondary sources: "Every database has a point of view".[1]

The simple search box – a very blunt instrument

Most databases offer a simple Google-style search box on their home page. They are often referred to as federated style search boxes as they search across the entire content of the database. True federated search engines search across the content of multiple databases. They have their uses, particularly if you are starting a search and are short of 'clues'. It's what's known in librarian parlance as a "quick and dirty" search. You will get a broad range of multiple results to your search query.

Research shows that many law professionals begin their search using Google rather than the subject-specific, usually commercial databases that provide far superior search results.[2] The search facilities of a commercial database are also far superior, although many database users avoid using the advanced search option that allows a targeted method of approaching a search problem resulting in more meaningful search results.

Experts in the field of teaching legal research and technology have highlighted the knowledge gap that exists among legal practitioners and law students in how best to employ technology when conducting their research. Linda Niedringhaus stresses the need for practitioners to take professional responsibility for ensuring that their research is "competent, efficient and complete".[3] Younger, so-called 'digital natives' are not immune as technology has been designed to be increasingly user friendly. This can fool many into feeling that they are undertaking sufficient research while gravitating towards the simple search box on the landing pages of their chosen database. However, they could easily choose a far more efficient and accurate strategy by employing the advanced search features.

The importance of understanding your tools

To achieve good search results, it is important to know a little about how individual databases work. Going back to our comments on algorithms, databases are designed and programmed by humans and as such designs differ. Questions such as 'what section of the database am I searching?', 'what terms does the database prefer?', 'do I need to include search operators in my search to link concepts?', or 'is it enough to input the words as I would in speech?' are all important.

Natural language v search operators

The power and precision of search engines are constantly developing and improving. Natural language searching is improving to return more and more relevant search results; however, in a professional, in-depth search context, it is important to return precise search results. The use of search operators provides this precision. A little understanding of how search operators work in your chosen database can empower your research immensely.

Search operators are based on Boolean logic. These search operators, or connectors, are specific words (for example, AND, OR, NOT) and symbols (for example: !, *, ?, /). Using these changes how the database handles your search terms. Use of even one simple search operator, or well-placed inverted commas or parentheses, can make your search results much more precise.

Natural language searches operate differently. They give you no control over how the database handles your search terms, leaving it entirely in the hands of the preferences set in the database's algorithm. Natural language searches usually contain excessive recall, in other words multiple results.

How do I get better?

1. Choose your sources wisely.
2. Understand your chosen database.
3. Know the basic search operators.
4. Attend a library and information skills workshop.

Understanding legal databases: part 2, with practical advice on how to use the relevant databases, will appear in the July 2018 edition of *The Bar Review*.

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1. Nevelow Mart, S. The Algorithm as a Human Artifact: Implications for Legal [Re]Search. (2017). 109 Law Libr J. Available at: https://scholar.law.colorado.edu/articles/755.
2. Farquharson, M. Federated Searching – the process and the problems. *Legal Information Management* 2008; 8 (4): 277-279.
3. Niedringhaus, K.L. Knowledge & Competency: Closing the Legal Technology Gap. AALL Spectrum 2018; March/April.

From left: Ellen O'Neill-Stephens, Founder, Court House Dog Foundation; Jennifer Dowler, CEO, Dogs for the Disabled; Celeste Walsen, Executive Director, Court House Dog Foundation; and, Maria McDonald BL.

Protecting victims

How can our criminal justice system better protect victims of crime? How should cross-examinations be conducted to ensure that victims are not re-victimised in the courtroom? What impact will Brexit have on the implementation of the EU Victims' Directive on a cross-border basis? Should courtroom dogs and intermediaries play a role in supporting vulnerable victims and children in the courtroom? These are just some of the topics discussed at a Victims' Directive Conference held in April. Funded by the Criminal Justice Programme of the EU Commission, the day-long conference was co-hosted by The Irish Council for Civil Liberties, The Bar of Ireland and the Law Society of Ireland to discuss best practice in the implementation of the EU Victims' Directive. The Victims' Directive was implemented in Ireland on November 27, 2017, when the Criminal Justice (Victims of Crime) Act 2017 became law, establishing EU-wide minimum standards on the rights, support and protection of victims of crime.

A judicial view

Ahead of his participation at The Bar of Ireland Conference 2018, Mr Justice Robert Jay spoke to *The Bar Review* about the Leveson Inquiry, the difficulty of regulating the internet, and life as a High Court judge.

Justice Robert Jay originally intended to follow in his father's footsteps (Prof. Barrie Samuel Jay was a consultant surgeon at Moorfields Eye Hospital in London) and pursue a career in medicine, but found that his interests lay elsewhere. An interest in history and English led to a plan to read history at Oxford University, but this changed at the last minute to law, and thus began a career that took him to the Leveson Inquiry and ultimately to the bench as a judge of the High Court of England and Wales. Law didn't come easily at first: "I didn't find it immediately appealing. It took me a long time to begin to understand the legal method". However, it all came together "in time for the exams", and on being called to the Bar in 1981 he embarked, like so many young barristers, on a practice that encompassed a wide range of cases, from crime and family law to small personal injury claims and some commercial claims. As time went on he concentrated more on judicial review, public law, and larger personal injuries cases: "In the mid to late 1980s there were incredible amounts of work. Legal aid was still flourishing, and I acted for everybody – defendant insurance companies, plaintiffs on legal aid, plaintiffs who were funded by their trade union. There was far too much work to do, and it's difficult to say no – I think every barrister would tell you that".

He cites two successful cases as significant in his career. The first was a group action where he acted for the Ministry of Defence, who were being sued for failing to prevent, detect and treat post-traumatic stress disorder in soldiers. Covering the period from 1969-1995, soldiers involved had served in Northern Ireland, the Falklands, the first Gulf War, and in Bosnia, so there was vast detail to absorb, which was particularly interesting for a QC with an interest in history: "It was almost a uniquely fascinating case. It had everything: wonderfully interesting expert evidence, including psychiatric evidence; and, history, both the histories of the conflicts, and also of the understanding of psychological and psychiatric trauma. It had lots of legal interest and a huge amount of emotional/psychological interest. The experts in the case were intellectually extremely strong and taught me all I needed to know". In the second case, in true common law fashion, he acted for the claimants, citizens of the Ivory Coast who claimed to have fallen ill as a result of allegedly toxic waste deposits from an oil tanker: "The challenge of that case was primarily the scientific evidence, which was complicated because it had things like sulphur chemistry and environmental modelling. Also, I was leading the barristers' team and it was quite a challenging exercise".

Leveson

By the time the Leveson Inquiry (see panel) came around, Justice Jay had extensive experience, and the UK Government's Legal Department – then called the Treasury Solicitor – was his largest client. It is not surprising then that his was one of a number of names put forward to Lord Justice Leveson for consideration, and in November 2011 he found himself acting as lead counsel in this extremely high-profile public inquiry into the culture, practices and ethics of the British press. During the course of the inquiry, Justice Jay cross-examined leading figures in the British media, politicians and celebrities, and the decision to livestream the proceedings meant that he also acquired something of an unexpected media profile, not least for his erudite vocabulary: "[Televising the inquiry] was a good idea because people could make up their own minds; it wasn't mediated by the press, who after all were the subject matter of the inquiry. However, I don't think we foresaw quite how that would work in terms of the dynamic of the inquiry". In the eye of the storm, however, things look very different, and he says that after a while, they simply forgot about the cameras: "There was just too much to think about! One couldn't be self-conscious; [you had to concentrate] quite hard on what the witness was saying and what your next question might be – so you're not focusing on extraneous things like a camera". After many months of hearings, Lord Justice Leveson's report on part one of the inquiry made a number of recommendations, which have yet to be implemented. Part two was postponed pending criminal prosecutions concerning events at the *News of the World*, and it was announced earlier this year that it will not now take place. As campaigners on press regulation have recently been granted leave to bring judicial review proceedings regarding this decision, there's not much that can be said about that for now, but Justice Jay does endorse Lord Justice Leveson's report on part one of the inquiry, pointing out that its recommendations, which included a new independent body for press regulation with statutory underpinning, were partly inspired by the Irish model.

Challenges of modern media

Since 2012, when the Leveson report was published, things have changed radically for traditional print media. While it still retains the ability to hold the powerful to account, it does so in the context of rising costs and falling circulation: "They're all

Romantic

Justice Jay lives in London with his wife Deborah, who is a writer, and his daughter. When not writing judgments, he likes to cycle, and plays golf (although not as much as he used to). He also enjoys cooking and reading, and is very interested in music and opera, particularly Verdi, Puccini and Wagner.

struggling. Young people do not read newspapers. My daughter is 18 and her friends get all of their news on a smartphone – and they don't pay for it either!"

He feels that, despite these challenges, the essentials of print media's responsibilities to truthful reporting remain unchanged, although it can be helpful to put this in a historical context: "I think their responsibilities have remained constant since the 18th century, or the 17th century when the press started. People forget how much more scurrilous in many ways the press was in the 17th and 18th centuries – completely outrageous and of course there wasn't any regulation. The obligations remain the same and most journalists adhere to them, and want to". Essentially, while it faces significant challenges, traditional print media is still subject to a range of laws and standards. The bigger issue these days is what happens online. While it's no longer revolutionary to say that social media and online communication have irrevocably altered our concept of privacy, it's also true that society, and the law, have yet to come up with an adequate regulatory response. Justice Jay has particular concerns: "It's not just the absence of regulation, it's the power that social media seems to give people. People wouldn't say certain things to your face, but they'll put it online and say completely outrageous things, which really there's no justification for. Because it's such an instant form of communication, you lose sight of the fact that it's also an indelible form of communication. These are all things which are very concerning because all of the responsibilities that attach to journalism do not attach to people who are blogging or commenting informally. There's no discipline, there are no rules: they can do what they like". He acknowledges that applying the law of defamation in these instances is difficult, in particular as, up to now, Facebook and Google, etc., have relied on the fact that they are classified as content managers rather than publishers to avoid litigation. Once again, Justice Jay is reluctant to give a view on whether this should change as he may one day find himself adjudicating on just such an issue in court, but he acknowledges that if we are not to designate them as publishers, then regulation will remain challenging: "I think one has to take it in stages. There are a large number of systemic issues: stories, and thereafter dissemination of data which is private. I think the public is more concerned about that aspect than the aspects of what users are saying about other users or about the world at large online. That I think is the first question and I think it is being considered, or has been considered, in a number of cases".

Playing the role of judge

Justice Jay was appointed to the High Court of England and Wales in 2013, and says he enjoys life on the bench, not least because of the lack of pressure: "There's almost a complete absence of stress because there are no clients, few deadlines, and you are in control of what you do.

"And by the same token there's no adrenaline, which, if you can control it, can be intoxicating. Any advocate will tell you, if she or he is starting up in a case, full of adrenaline, addressing a jury in an important criminal case, or maybe addressing the court of appeal in a complex point of law, it is a wonderful feeling, particularly as your mind and your mouth begin to work in harmony and one is not racing ahead of the other".

Life on the bench is very different: "I'm not alone – I've discussed this with my colleagues and they all say the same. You don't have to psych yourself up. It has its own satisfaction and there is an element of performance because you're still playing the role of the judge, but it's a different sort of presentation".

Big data

The recent revelations about Cambridge Analytica's use of Facebook have introduced yet another layer of invasion of privacy, with the concept of companies mining data without knowledge or informed consent. On one level, Justice Jay feels this has limited importance: "It depends who you are and how sensitive you are. When I go on certain websites, they seem to know what I've been buying and so they target their advertising and tailor it to me, which isn't telepathy of course: they have ransacked my data.

"That's the only part of my data they're interested in – what I'm buying. If you've got unusual tastes or tastes you'd rather people didn't know about, then you proceed at your peril, because someone out there does know about it!"

Things get a little more worrying, however, when we consider the fact that we now know that our data can be used in order to influence the political process at home and abroad. Again, Justice Jay feels it's important to put things in a historical context: "It's not the first time this sort of thing has happened: targetting of particular groups, particular elections, operating in certain jurisdictions within a community, paid by the government to sow discord, disinformation and everything else for a political objective. In the past, political advertising was regulated to some extent – it still is regulated to some extent on the television. It's not particularly regulated in the traditional press, but online virtually anything goes".

So how can we deal with this? Justice Jay believes that only a collaborative approach has any chance of success, but even that has limits: "There could be a pan-European solution, imposed, or rather voted upon, by the traditional institutions of the EU. But realistically, people will be operating outside that, whether in the United States, the Russian Federation or China".

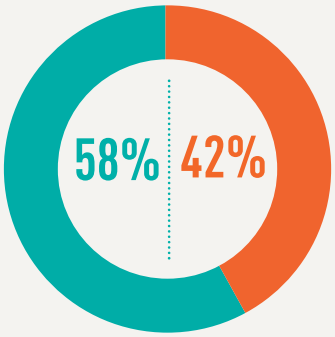
As yet, there has not been enough case law to indicate how the courts will deal with these issues, although Justice Jay points out that these days, virtually every defamation case involving the press will also be an online case because the publication will also be online, and in that instance the online material will probably be dealt with in the same way as the print: "Apart from Mr Justice Warby's case about Google and the right to forget, there hasn't been much of wide-ranging interest. I think in the next three or four years there's bound to be a lot".

The Leveson Inquiry

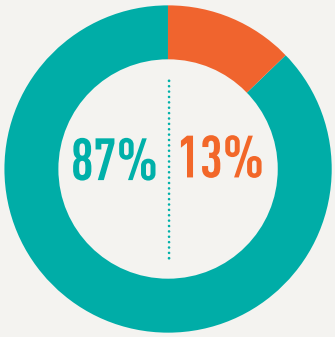
In 2011, in the wake of revelations regarding illegal phone hacking by journalists and employees of the *News of the World*, the UK Government announced that a public inquiry would be held into "the culture, practices and ethics of the press, including contacts between the press and politicians and the press and the police". Chaired by Lord Justice Leveson, the first part of the inquiry held public hearings from November 2011 until June 2012, and included testimony from senior politicians, celebrities, senior figures from the press, and victims of crime. The final report, published in November 2012, found that the existing Press Complaints Commission was not sufficient, and recommended a new independent voluntary body, which would have a range of sanctions available to it. The UK Government, under then Prime Minister David Cameron, did not enact the required legislation. In March 2018, it was announced that part two of the inquiry, which was to investigate unlawful and improper conduct in a number of organisations, including the police, would not now take place.

Bar survey shows increases in member engagement

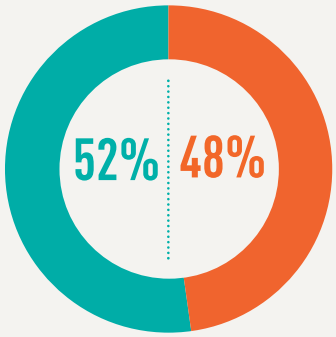
954 RESPONSES TO SURVEY



42% female;
58% male



13% senior counsel;
87% junior counsel



48% Circuit practitioners;
52% non-Circuit practitioners,
i.e., Dublin based

As The Bar of Ireland comes to the end of its current three-year Strategic Plan, a new membership survey provides vital feedback on members' views to help inform future direction.

Ciara Murphy
Chief Executive, The Bar of Ireland
Aedamair Gallagher
Research and Policy Executive,
The Bar of Ireland

Context of survey

The process to establish a new strategic direction for The Bar of Ireland over the next three years (October 2018 – October 2021) is underway. The new Strategic Plan is an opportunity for the organisation to reassess its priorities and to ensure that it is responding to the needs of members and to the challenges posed by an ever-shifting legal, social and economic landscape. Members' views are of utmost importance to the process and, in order to help the Council make decisions on priorities that are for the benefit of all members, feedback was requested through a membership survey in January 2018.

The results are crucial in ascertaining members' views on the services and benefits currently provided, and will enable the organisation to consistently innovate to increase its value and relevance to members and, above all, to ensure member retention. The results also reveal the most pressing issues and concerns affecting members today and into the future. This feedback is instrumental to the development of the next three-year Strategic Plan and we thank members for their engagement. A summary of the survey results is outlined below.

Who responded?

Of a total of 2,178 members, 954 responded to the survey, giving a response rate of 44%. This is a significant increase on the previous membership survey conducted in 2015, which informed the planning of the current Strategic Plan and which saw a participation rate of 33%. The 2015 survey posed similar questions and therefore provides a useful benchmark against which we can assess demographic and attitudinal shifts.

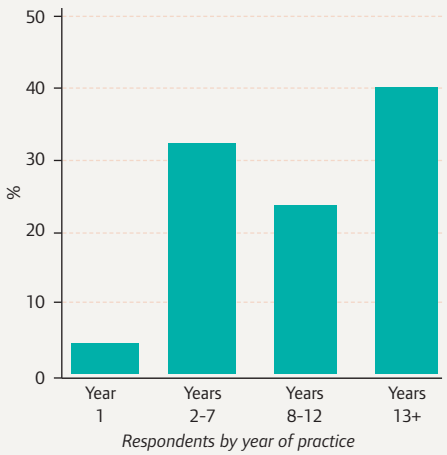
Practice area

The majority of respondents are in general practice (73%). The results also reveal a high number of practitioners in the area of general common law (63%), tort and personal injury law (70%), and commercial/chancery law (46%). Numbers practising in specialist areas such as criminal law and family law have remained relatively stable since 2015, with 33% practising in criminal law (no change) and 34% practising in family law (a 2% increase). An ability to cut the data in accordance with gender also demonstrates a higher number of female barristers working in family law (47% female, 24% male) and a higher number of male barristers working in commercial/chancery (55% male, 33% female).

Membership of Specialist Bar Associations also gives an indication of the number of barristers who practise or possess expertise in a specialist area or who would wish to develop such practice or expertise. The Employment Bar Association (EBA), the Irish Criminal Bar Association (ICBA), and the Family Lawyers Association (FLA) are well subscribed, with respective memberships of 35%, 29% and 22% among the respondents.

The value of membership

Some 46% of respondents are familiar with the value of membership. A paper published and distributed to members in July 2016 sought to assess and compare the cost of the basic minimum requirements to practise as a barrister outside of the collective structure, the Law Library, versus the cost of annual membership subscriptions. This comparison demonstrated for the first time the value for money arising from membership, with savings ranging from €10,961 per annum for a first-year junior counsel to €4,476 per annum for a senior counsel. Some 61% of respondents are of the view that membership represents value for money – a considerable 30% increase on the view expressed in 2015. While there is no perfect outcome to satisfy every individual member's expectation, this is at the very least an acknowledgement that significant strides in the right direction have been made. While the economies of scale achieved through the collective buying power of over 2,000 members are significant, one of the most valuable benefits of membership, which cannot be quantified in financial terms, is the culture of collegiality and



61% RESPONDENTS BELIEVE MEMBERSHIP REPRESENTS VALUE FOR MONEY

A 30% INCREASE ON 2015

89% RESPONDENTS PROUD OR VERY PROUD TO BE A MEMBER

81% OPTIMISTIC OR VERY OPTIMISTIC OVER NEXT 12 MONTHS

7% INCREASE IN PRIDE & OPTIMISM SINCE 2015

co-operation among the independent referral bar. This was a recurring response among respondents when asked: "what is the most valuable thing about your membership?" The provision of a recognisable identity within the profession was also frequently cited, corresponding with the 73% of respondents who 'agree' or 'strongly agree' that being professionally recognised as a member of the Law Library is essential in order to build a successful practice, a 9% increase on 2015.

Pride and optimism

Some 89% of respondents are either proud or very proud members of the Law Library, and 81% are either optimistic or very optimistic about their practice prospects over the next 12 months, representing a 7% increase in both pride and optimism since 2015.

Membership services and benefits

Members were asked to rate the importance of the various services and benefits delivered under four key areas:

- information and communication channels;
- library and information services;
- education and professional practice services; and,
- on-site services and facilities.

Information and communication channels

Some 73% of respondents either 'agree' or 'strongly agree' that The Bar of Ireland communicates enough with them – a 7% increase on 2015.

The current Strategic Plan has delivered significant service improvements for members in terms of information and communication channels. The streamlining of member communications has been a key objective of the current plan and has involved, for example, the development of an effective and engaging weekly e-zine that collates and communicates key information about upcoming events, recent news, and the activities of the Council and its committees. It is clear that this has had a positive impact on the membership, with 77% of respondents regarding the weekly e-zine In Brief as being 'important' or 'very important', a 37% increase in value since 2015. Efforts to refresh *The Bar Review* have had a similar effect, with 84% of respondents citing its importance, a 10% increase in value since 2015.

A number of new and improved information and communication channels were introduced throughout the implementation of the current plan. Many of these innovations have received high ratings of 'important' or 'very important', for example the members' section of the website (82%), the Directory of Membership Services and Benefits (61%), the Annual Report (72%), the noticeboards (73%) and the 'What's on this week' posters located across the various Law Library sites (64%).

Library and information services

Providing timely access to a relevant and comprehensive collection of legal information, and connecting members with the support and expertise that is available among library staff, has been a key objective of the current plan. A range of service improvements have been made throughout the implementation of the current Strategic Plan, and a significant uplift in the value placed by members has been observed across all library services. Maximising the availability of online services is of clear importance to members.

Some 96% of respondents rated Barrister's Desktop as being 'important' or 'very important', a 19% increase in value since 2015. Access to legal databases scored a resounding 99% in terms of its importance and value to members, a 2% increase in value since 2015. Access to physical services is equally important, with 98% of respondents rating the Law Library collection, and 95% rating the library information desks as either 'important' or 'very important', representing respective increases in value of 4% and 13% since 2015. Access to library personnel is also highly regarded, with 85% of respondents who 'agree' or 'strongly agree' that The Bar of Ireland has helpful employees.

Throughout its implementation, the current Strategic Plan has delivered new and improved library and information services, such as *Dlí Nua* – the fortnightly Library e-zine – and 'Info-Point', which ensures that members are kept up to date on recent library acquisitions and current legal developments in several distinct areas of practice such as: administrative law (including judicial review); criminal law; company law; employment law; family law; practice and procedure; property law; and, tort law. These innovations have attracted strong ratings, with 49% of respondents rating Dlí Nua and 66% rating Info-Point as either 'important' or 'very important'. Other new and improved initiatives such as the self-issue kiosk facilities, which ensure 24/7 access to the Law Library collection, are highly valued (75% of respondents rated these as either 'important' or 'very important').

Education and professional practice services

Some 79% of respondents either 'agree' or 'strongly agree' that The Bar of Ireland is the best source of continuing professional development (CPD) and training for the profession.

Access to a wide range of informative education and training events and resources is imperative to ensure that members keep abreast and meet the highest standards of competence and professionalism required under CPD obligations. The provision of CPD in an accessible, flexible and convenient manner is a key facilitator in that regard, and has therefore been a key objective of the current Strategic Plan. The development of a new CPD space in the Gaffney Room, Distillery Building, provides state-of-the-art facilities including CPD live webcasting. The webcasting service has been positively received by members, with 89% of respondents rating the service as 'important' or 'very important'. The online archive of CPD recordings and papers is of similar import with a very high rating of 95%. Significant shifts have been observed in the value attached to the provision of education and training since 2015. Some 83% of respondents cited the provision of advocacy training as being either 'important' or 'very important', a staggering 38% increase on 2015, and 95% of respondents cited the provision of other CPD and training opportunities as being 'important' or 'very important', representing an increase of 36%.

On-site services and facilities

Some 73% of respondents 'agree' or 'strongly agree' that The Bar of Ireland provides the professional facilities and services needed to practise as a barrister – an 11% increase on 2015. Providing suitable infrastructure that is fit for purpose and enables members to practise efficiently and effectively has been a key objective of the current Strategic Plan. Services such as the DX postal service, desk space, photocopying and printing, cybersecurity protection, Wi-Fi and internet access rate very highly among members in terms of their importance (90%+). Some 89% of respondents attached high importance to the @lawlibrary.ie email address and encrypted data storage facilities. With the advent of the GDPR in May, a greater awareness of the need to be GDPR compliant has likely caused the 22% increase in the value attributed to such services since 2015. Some 93% of respondents further cited the importance of the IT helpdesk – a 15% increase on 2015.

With regard to financial services, 63%, 69% and 68% of respondents cited banking, insurance, and life assurance and specified illness cover, respectively, as being 'important' or 'very important'. A 12% increase was furthermore observed on the value placed on the Barristers' Fee Collection Service, with 69% of respondents rating it as either 'important' or 'very important'.

In terms of physical space, office facilities, dining facilities, and meeting rooms received ratings of 78%, 77% and 72%, respectively, in terms of their importance, with 92% of respondents acknowledging the importance of reception and security services. The Dublin Dispute Resolution Centre (DDRC) is of slightly lesser import to members, with 53% of respondents regarding it as 'important' or 'very important', but has nonetheless increased in value by 12% since 2015.

Some 67% of respondents cited access to social networking events as an important aspect of membership, a 13% increase on 2015. Such opportunities help to strengthen collegiality and expand members' professional networks, and appear to be of greater import to younger members, with 85% of first years and 78% of years 2-7 attributing an 'important' or 'very important' score, as opposed to 56% of respondents in years 13 plus.

Council activities

Members were asked to agree or disagree with a series of statements made in relation to activities overseen by the Council of The Bar of Ireland in terms of both internal and external perceptions. The same series of statements were asked in the survey undertaken in 2015, and across every category there has been an increase in the number of members stating that they 'agree' and a decrease in the number of members stating that they 'disagree':

- 13% increase in the belief that The Bar of Ireland represents the profession well;
- 2% increase in the belief that The Bar of Ireland responds to queries/requests in a timely manner
- 11% increase in the belief that The Bar of Ireland is very well run and organised;
- 11% increase in the belief that The Bar of Ireland provides the facilities/services needed to practise; and,
- 9% increase in the belief that being professionally recognised as a member is essential in order to build a successful practice.

A primary objective of the current Strategic Plan is to proactively represent and promote members of The Bar of Ireland to a wide network of stakeholders including Government, the business community, the voluntary sector, the media and the general public. Members of the Law Library, as independent and professional advocates, play a vital role in safeguarding the rule of law and ensuring the effective administration of justice. As such, it is vital that The Bar of Ireland, as the representative body, makes an active contribution to public debate and to promote reform of law and policy where it perceives it to be necessary. Some 93% of respondents regard lobbying and representation activities on behalf of the profession as being 'important' or 'very important', and 64% 'agree' or 'strongly agree' that The Bar of Ireland represents the profession well, an increase in value of 13% since 2015. Throughout the 2016-2017 legal year, nine submissions and five position papers were produced through the work of a number of committees and working groups. There were also appearances by representatives of the Council before various Oireachtas and Seanad committees. Such fora present valuable opportunities for The Bar of Ireland to reinforce its reputation as an expert and authoritative voice on all legal matters, and it is an activity clearly valued by the membership, with 90% of respondents attributing a score of 'important' or 'very important' to the promotion of the profession to enhance its reputation and expertise. Significant strides have also been made in terms of proactive media engagements, which help to raise the public profile of The Bar of Ireland and reach a wider audience.

Seeking out new practice development opportunities on behalf of the profession is also very important to members (90% important/very important) as is the provision of professional guidance, information and knowledge to support the maintenance of high professional standards (94% important/very important). Some 64% of respondents feel that The Bar of Ireland responds to queries and requests in a timely and effective manner, a 12% increase on 2015. New initiatives driven by the newly established Performance and Resilience Committee such as Consult a Colleague, which supports members encountering difficulties at work, are well regarded, with 75% of respondents attaching a score of either 'important' or 'very important'. Some 57% of respondents furthermore 'agree' or 'disagree' that The Bar of Ireland is approachable if they are in difficulty.

Challenges, opportunities and suggestions

The most prevalent challenges cited by respondents include:

- the potentially adverse impact of Brexit on the Irish economy and the potential increase in UK-based solicitor firms relocating to Ireland dominating legal advisory services in the Irish market;
- the Legal Services Regulation Act 2015 and its impact on the independent referral bar – many respondents cited the threat of new models of service provision such as legal partnerships and multidisciplinary practices to the professional standards, ethos and values of the independent referral bar;
- maintaining a distinct identity in the provision of legal services and the pre-eminence of barristers as court practitioners and advocates in the wake of increasing and encroaching competition;
- difficulties associated with fee recovery, exacerbated by the absence of an appropriately structured fee collection system, which contributes to non-payment and exploitation of the Young Bar;
- an under-resourced Courts Service resulting in significant delays and inefficiencies;
- GDPR implications for members' practices;
- the exclusion of barristers from tendering for State work that is otherwise within their competence and expertise; and,
- enduring negative portrayals/misrepresentation of the profession in the media resulting in poor public perception.

Significant opportunities were cited by respondents, including:

- promoting Ireland as a centre for international legal services and an alternative forum for international dispute resolution in the wake of Brexit;
- a growing economy;
- promoting and upholding the professional standards of the independent referral bar in response to a changing legal landscape and new practice models under the Legal Services Regulation Act 2015;
- promoting the independent referral Bar as the centre of excellence in advocacy;
- opportunities arising from an increasing move towards alternative dispute resolution including arbitration and mediation and tribunals of inquiry; and,
- opportunities to positively influence the reform of the Courts Service to ensure greater efficiencies in the administration of justice.

Next steps

The membership survey is a crucial step in the strategic planning process and has provided valuable insight into the current state of the organisation. Following analysis of the survey results, a series of five facilitated workshops, comprising both members and staff, was undertaken to further develop the findings, particularly the suggestions for new supports and services, that will form the basis of the next Strategic Plan. It will then be a matter for the Council of The Bar of Ireland to agree the Strategic Plan 2018-2021 in June 2018.

Deirdre Lambe – a tribute (April 14, 1965 - April 14, 2018)

Deirdre Lambe was a wonderful colleague and friend. She was caring, patient and generous with her time. Deirdre had a smile for everyone.

Deirdre joined The Law Library in September 1988. It was a time of change not only within the legal profession but also within the Law Library. New staffing arrangements had been agreed and the first automated library system had been introduced by the then Librarian, Jennefer Aston. Although Deirdre had trained as a primary school teacher in St Patrick's College, Drumcondra, libraries, and specifically the Law Library, was her true calling. Deirdre trained in Trinity College Dublin for her library qualification and her knowledge of libraries, the law and legal resources was superb. Within the Library, Deirdre's expertise was library systems, their maintenance, development and progression. Deirdre witnessed the transition from print to online digital resources, and she helped the Library steer its path through the many twists and turns in that journey.

While Deirdre's expertise within the Library was related to the hardware and software of the profession, Deirdre was a people person. The many tributes paid to her by so many members and colleagues, inside and outside the Library, are a testament to her kindness and generosity. Deirdre was a member of the Editorial Board of this publication. She never missed a deadline and was always a good-humoured member of the team.

Deirdre led a very full and fulfilling life outside the Law Library. She was Secretary to Na Fianna GAA Club and worked tirelessly on its behalf. She lobbied on behalf of Na Fianna on the Metro North light rail project and her participation was acknowledged by the condolences extended to her family and Na Fianna during the Dáil debates on the subject.

Deirdre, however, was dedicated to her family. Nothing came before her husband Pat O'Dwyer and their two wonderful children Conor and Anna. She was a family person and her mother, Kathleen, her brother John and her extended family meant so much to her. Our thoughts and sympathies are with them.

Deirdre is sadly missed by everyone she touched; however, her memory will live on.

Nuala Byrne

Defamation Nation 2018

Delegates at The Bar of Ireland conference in Málaga were persuaded out of the sun by a range of eminent speakers on the conference theme, 'Defamation Nation'.

The conference's first session looked at defamation and privacy online and in the media. From left: Mr Justice Robert Jay; Vincent Crowley, Chairman, Newsbrands Ireland; Eoin McCullough SC; and Mary Rose Gearty SC.

This year's conference comprised three fascinating sessions, and after a warm welcome from Chairman of the Council of The Bar of Ireland, Paul McGarry SC, Session 1, 'Defamation and Privacy Online and in the Media' got underway, ably chaired by Mary Rose Gearty SC.

Eoin McCullough SC discussed section 26 of the 2009 Defamation Act, "the defence of fair and reasonable publication". Section 26 sets out that in a defamation action, the defence must prove that any statement was in good faith; in the public interest; not in excess of what was reasonably sufficient; and, fair and reasonable. He argued that this section of the Act made little practical difference, as it is very difficult to persuade a jury that all four tests are met. He also discussed protection of sources. In general, journalists will not be asked to reveal their sources, which creates difficulties for plaintiffs.

Vincent Crowley, Chairman of Newsbrands Ireland, looked at the impact of defamation actions on the media in Ireland. Newspaper revenue has fallen by 57% in the last 10 years, and circulation by over 50%. In tandem with this, between 2010 and 2015, Newsbrands members have spent €30 million defending defamation actions, and he described this as a challenge to democracy that jeopardises press freedom. Trial by jury, excessive awards, and lack of liability for user-generated content are key challenges that Newsbrands Ireland wants addressed. Vincent argued for the abolition of juries in defamation cases. At the very least, he argued strongly that juries should have no role in determining quantum, citing the "massive" awards of damages here in comparison to other jurisdictions. On the subject of user-generated content, he said that Google, Facebook *et al.* must be held accountable for their content in order to create a level playing field.

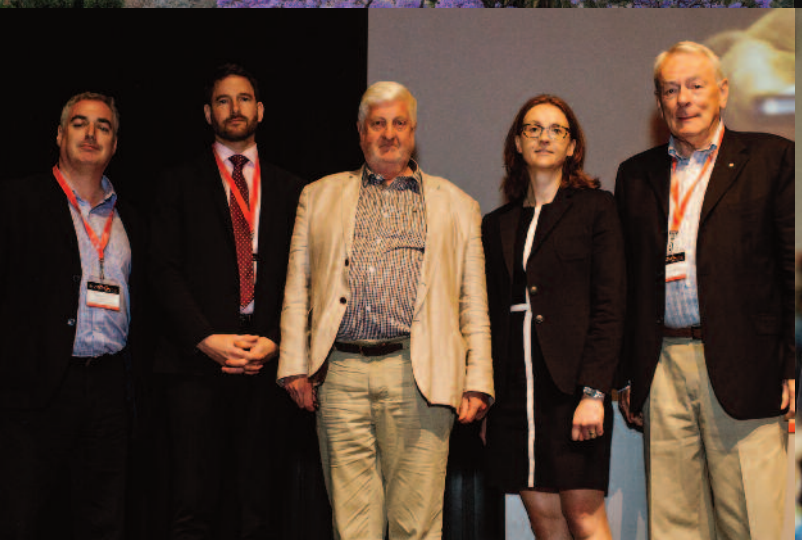
Mr Justice Robert Jay was lead counsel at the Leveson Inquiry, and he addressed regulation of the media in a post-Leveson world. For Justice Jay, the challenges to regulation centre around the global reach of the internet and the sheer economic power of companies like Google and Facebook. He said that it is difficult to read the traditional tools of common law across to the internet, as Facebook, Google, etc., are not regarded as publishers. In addition to this, the global character of the internet and the rapidity of transmission of information, create particular challenges; for example, why injunct a newspaper if the information is already available online? He referred to a number of current and recent cases dealing with issues like the right to be forgotten, and the removal of offensive or defamatory content. He also discussed Germany's attempt to address the problem by extending its laws on hate speech/incitement to social media. He finished on a note of caution: as the internet spirals almost out of control, how will it be subjected to the rule of law?

The presentations were followed by a question and answer session, where the discussion ranged across issues such as the rights of a person acquitted in a criminal trial, but who has been identified during the trial, and the implications for the relationship between the media and the judiciary if judges give both judgment and damages in defamation cases.

This sporting life

Session 2, 'Sports cheating allegations and the law', was chaired by Gordon Jackson QC. Susan Ahern BL told delegates that recent months had seen "an acute period of cheating", from the report of the UK House of Commons Select Committee, which used parliamentary privilege to make candid comments about some of the



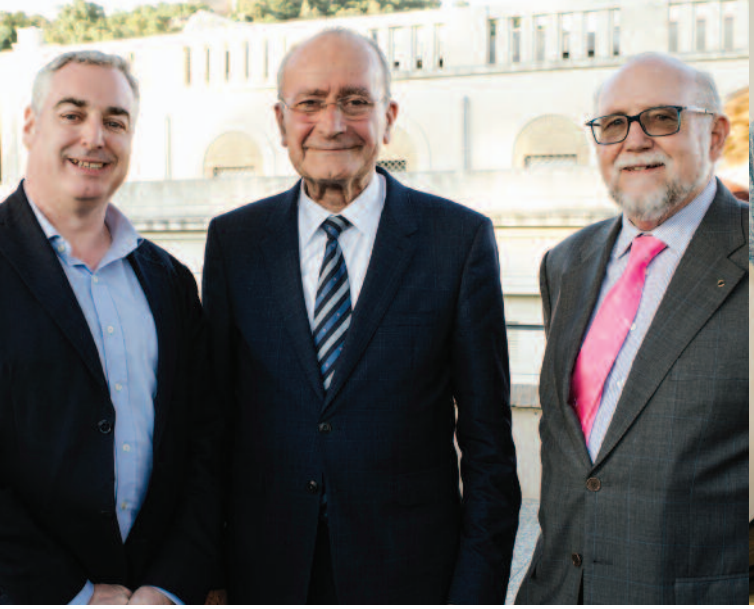


Clockwise from top left: The 2018 Bar of Ireland Conference took place in the Museo Picasso in Málaga and a variety of beautiful locations around the city. Top right: The gala dinner was held in the fabulous Museo Automovilístico. Chairman, Council of The Bar of Ireland, Paul McGarry SC. From left: Chairman, Council of The Bar of Ireland, Paul McGarry SC; Sean Cottrell, CEO, LawInSport; Gordon Jackson QC, Dean, Faculty of Advocates, Scotland; Susan Ahern BL; and, Dick Pound QC Ad. E

main actors in UK sport, through scandals in rugby, cricket, basketball and tennis. She discussed the influence of interests such as sponsorship and broadcast revenue, and the impact of technology on both sports equipment and on betting.

Susan finished by asking what can be done to address what she called the integrity crisis that is affecting sport. Her recommendations were that the values of ethics and integrity must be embedded in all areas of sport; whistleblowers must be protected; and, there must be proper regulation and enforcement by people with high integrity.

Dick Pound was the first President of the World Anti-Doping Agency (WADA), and he outlined the history of that organisation from its foundation in 1999 as a response



Above left (from left): Chairman of the Council of The Bar of Ireland, Paul McGarry SC; Mayor of Málaga, Francisco de la Torre; and, Jose-Maria Davo Fernandez, Secretario de la Junta Provincial en Asociación Española contra el Cáncer (aecc). Above right (from left): Liam McCollum QC, Chairman of the Bar of Northern Ireland; Orla O'Donnell, Legal Affairs Correspondent, RTÉ; Dr Mary Aiken; Chairman of the Council of The Bar of Ireland, Paul McGarry SC; and, Michael McDowell SC.

to the Festina scandal in cycling. He outlined the WADA's work to establish the World Anti-Doping Code, which took effect in 2004 and brought consistency to anti-doping rules across jurisdictions.

Dick discussed the testing system in and out of competition, arguing that stringent out-of-competition testing is necessary, although expensive and complicated, because sophisticated drug regimes now occur out of competition. Regarding investigations into athletes, he said that the initial process is confidential, but with mandatory disclosure of guilty findings. He is in favour of publicity once the work is done as a means to show that people are being punished, and hopefully to act as a deterrent.

He finished by reiterating the importance of protecting whistleblowers, who were crucial to the recent investigations in Russia among many other cases.

Finally, Sean Cottrell, CEO of LawInSport, spoke on balancing transparency and accountability with the athlete's right to privacy. Sean argued that commercialisation has changed sport irrevocably, and regulation and legal structures have not developed in tandem. He spoke about the challenges for athletes in seeking justice from a system that he said could be extremely arbitrary. He cited the case of soccer player Mamadou Sakho, who was banned from competition by UEFA and FIFA in 2016 for ingestion of a substance which subsequently turned out not to be on WADA's banned list, and argued that athletes in this situation can find it very hard to seek redress, especially where a ban has led to considerable loss of earnings in a career with a very short window of opportunity.

In the question and answer session that followed, issues raised included how prepared WADA is to deal with genetically engineered athletes (Dick Pound pointed out that "genetic tweaking is not as easy as you'd think!"). Susan Ahern pointed out that there is reason to be optimistic, as 95% of sport is amateur, and we need to have that ethos feed back into professional sport, which is, after all, a relatively new phenomenon.

Law in cyberspace

The final session of the conference looked at the impact of technology on human behaviour, particularly in relation to crime. Chair Orla O'Donnell of RTÉ introduced cyberpsychologist Dr Mary Aiken, who gave a sobering presentation on the possible impact of cyberspace, and how people behave there, on human behaviour, and on how crime is committed, investigated and prosecuted. Mary argued for the recognition of cyberspace as a specific environment, where human behaviour changes, and where anonymity and online disinhibition have enormous implications. She said that when technology interfaces with a "base human disposition", the effect is amplified. She questioned those who defend online anonymity, wondering if the freedoms it affords outweigh the dangers it creates.

Mary presented an interesting example of the different typologies on online and offline criminal behaviour by discussing the crime of stalking. Stalking is traditionally a one-on-one crime, usually committed by men, and is labour intensive, as the perpetrator goes to great lengths to catch a glimpse of the victim. Cyber stalking, however, can target multiple victims simultaneously, can access the victim's entire life, and has seen an increase in female perpetrators. Mary asked the question: is this the same behaviour, or a new evolution? She also wondered how we legislate (if we legislate) for this? What does *mens rea* look like mediated through technology?

In terms of 'real world' crime, she expressed her unease at criminal prosecutions that hang on evidence of pings from mobile phone towers, which she said can be increasingly easily hacked and manipulated. She also spoke about the implications of technology for the detection and prosecution of crime, such as algorithms that could be used to wade through the huge amounts of data involved in, for example, a cyber bullying case. Mary's presentation was followed by a panel discussion with senator and barrister Michael McDowell SC and Liam McCollum QC, Chairman of the Bar of Northern Ireland.

Michael McDowell referred to the vast volumes of material that can now constitute evidence in proceedings, and said that Mary's work highlighted the difficulties we face in a changed, disinhibited culture. Validating evidence will be a problem, and we will have to rethink our perceptions of what can or cannot be proven. He said that there were huge implications for jury trials in all of this, and his opinion was that we will have to trust juries more, and rethink what information they should have.

Liam McCollum spoke of significant cases in Northern Ireland, such as the Belfast rape trial, and played down fears of the impact of social media on these trials. He said that ultimately the legal system dealt well with these challenges and that case was decided purely on the evidence.

Oral O'Donnell asked whether law enforcement had the confidence to deal with this rapidly changing situation and Mary Aiken said that police forces are increasingly swamped, and that automated, machine intelligence responses will be needed.

Other topics discussed included implications for jurisdiction, and the evolving nature of criminal behaviour.

LEGAL UPDATE
THE BAR OF IRELAND
The Law Library
The Bar Review, journal of The Bar of Ireland
Volume 23 Number 3
June 2018

A directory of legislation, articles and acquisitions received in the Law Library from March 1, 2018, to May 2, 2018.
Judgment information supplied by Justis Publishing Ltd.
Edited by Deirdre Lambe, Vanessa Curley and Clare O'Dwyer, Law Library, Four Courts.

AGRICULTURE

Statutory instruments

Animal health and welfare act 2013 (commencement) order 2018 – SI 127/2018

Animal health and welfare (livestock marts) regulations 2018 – SI 128/2018

ARBITRATION

Library acquisitions

Charman, A., Du Toit, J. *Shareholder Actions (2nd ed.)*. Haywards Heath: Bloomsbury Professional, 2017 – N263

Piers, M., Aschauer, C. *Arbitration in the Digital Age: The Brave New World of Arbitration*. Cambridge: Cambridge University Press, 2018 – N398

ASYLUM

Asylum, immigration and nationality – Art. 8 of the European Convention on Human Rights Act 2003 – Leave to appeal – Point of law of exceptional public importance – [2018] IEHC 104 – 26/02/2018

Azeem v The Minister for Justice and Equality No.2; V.D. (Zimbabwe) v The Minister for Justice and Equality No.2

Asylum, immigration and nationality – Order of certiorari – S. 16 of the Irish Nationality and Citizenship Act 1956 – Certificate of naturalisation – Irish associations through blood relationship – Unlawful decision – [2018] IEHC 152 – 23/03/2018

Bortha (A Minor) v The Minister for Justice and Equality

Deportation – Judicial review – Revocation – Appellant seeking revocation of deportation order – Whether High Court was correct to refuse leave to seek judicial review – [2018] IESC 16 – 08/03/2018

D.E. v The Minister for Justice and Equality

Asylum, immigration and nationality – Denial of subsidiary protection – Issue of passport – Deportation order – [2018] IEHC 131 – 08/03/2018

G.E.O. (Nigeria) (an infant) v The Minister for Justice & Equality

Deportation – Revocation – Judicial review – Applicants seeking to appeal against High Court order – [2018] IESCDET 51 – 10/04/2018

Igbosonu v Minister for Justice and Equality

Immigration and asylum – Judicial review – Deportation – Applicant seeking leave to seek judicial review – Whether there was a failure to comply with s. 3(1) of the Immigration Act 1999 – [2018] IESC 18 – 13/03/2018

K. v The Minister for Justice and Equality

Asylum, immigration and nationality – Order of certiorari – S. 15 of the Irish Nationality and Citizenship Act 1956 – Certificate of naturalisation – S. 56 of the Road Traffic Act 1961 – Irrational decision – Ground of good character – [2018] IEHC 200 – 23/03/2018

Kareem v The Minister for Justice and Equality

Asylum, immigration and nationality – The European Communities (Free Movement of Persons) Regulations 2015 – Exclusion order – The European Convention on Human Rights (ECHR) – Judicial review – [2018] IEHC 96 – 08/02/2018

Lingurar v The Minister for Justice, Equality and Law Reform

Deportation – Constitutional position of the unborn – Constitutional interpretation – Appellants seeking revocation of deportation order – Whether the first appellant was required, as a matter of law, to have regard to the position of the third respondent while unborn as a factor to be taken into account in the deportation revocation application under consideration – [2018] IESC 14 – 07/03/2018

M. v The Minister for Justice and Equality

Asylum, immigration and nationality – S. 5 of the Illegal Immigrants (Trafficking) Act 2000 – Marriage of convenience – Art. 40 of the Constitution – Deportation order – Judicial review – Ex turpi causa – [2018] IEHC 95 – 30/01/2018

M.A. (Pakistan) v The Governor of Cloverhill Prison; M.A. (Pakistan) v The Minister for Justice and Equality

Asylum, immigration and nationality – The Refugee Act 1996 – Arts. 40 and 41 of the Constitution – Family reunification – Refugee status – Naturalised citizen – Art. 14 of Qualification Directive – [2018] IEHC 113 – 26/02/2018

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

Criminal Law (Recruitment of Children to Engage in Criminal Activity) Bill 2018 – Bill 27/2018 [pmb] – Deputy Anne Rabbitte

Gambling Control Bill 2018 – Bill 26/2018 [pmb] – Deputy Anne Rabbitte, Deputy Jack Chambers and Deputy Jim O'Callaghan

Health (Pricing and Supply of Medical Goods) (Amendment) Bill 2018 – Bill 33/2018 [pmb] – Deputy John Brassil

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Property damage

Property damage in *Brandley v Deane* – no longer doomed from the start

Anita Finucane BL

Brandley v Deane[1] has revived the question of when a cause of action accrues under s.11(2)(a) of the Statute of Limitations Act 1957, as amended, in property damage claims.[2] Prior to *Brandley*, a cause of action accrued in property damage cases from the occurrence of the defect, which was treated in previous judgments, discussed below, as synonymous with the occurrence of the damage. This often led to a view that buildings in property damage cases were "doomed from the start",[3] as the structural damage often occurred at the time of construction, but only became apparent to the unsuspecting homeowner when the six-year statute had expired. *Brandley* reconciles a number of decisions in this area and establishes that a cause of action accrues from when the damage manifests.

Accrual of a cause of action pre *Brandley*

Section 11(2)(a) of the Statute of Limitations 1957, as amended, provides that (save in personal injury actions) no action in tort is to be brought after the expiration of six years from the date on which the cause of action accrues. There is no definition in the 1957 Act as to when a cause of action accrues, with the result that a number of Superior Court decisions have had to decide whether the action accrues when the defect occurs, or when the damage manifests.

Hegarty v O'Loughran [1990] 1 IR 148 was, and remains, the leading authority on the accrual date in a cause of action in tort. The personal injury in *Hegarty* was facial disfigurement caused by a negligent nasal operation on the plaintiff in 1974, which subsequently deteriorated. The plaintiff gave evidence that she became dissatisfied with the results of the operation in 1976. The plaintiff initiated proceedings outside the then three-year time limit in 1982. The court found that the plaintiff's case was statute barred on the basis that the plaintiff was aware in 1976 that the operation had not been successful. Consequently, having brought proceedings in 1982, she was outside the time limit to bring proceedings. Three principles emerged from *Hegarty v O'Loughran*.[4] Firstly, a cause of action accrues when a complete and available cause of action first comes into existence and damage has occurred. Finlay C.J. described the completion of a tort as follows:[5]

"A tort is not completed until such time as damage has been caused by a wrong, a wrong that does not cause damage not being actionable in the context with which we are dealing. It must necessarily follow that a cause of action in tort has not accrued until at least such time as the two necessary component parts of the tort have occurred, namely, the wrong and the damage".

The second principle established in *Hegarty*, and the decision which future jurisprudence has grappled with most, is that the damage must have "manifested". This reflects the view that the occurrence of damage and manifestation of damage are not always coincident. Unless and until the plaintiff is in a position to establish by evidence that damage has been caused to him or her, his or her cause of action is not complete and the period of limitation does not commence to run. Applying these principles to *Hegarty*, the damage occurred following the negligent operation in 1974. However, the plaintiff was not aware that the operation had been unsuccessful until 1976 (the date of manifestation) and did not initiate proceedings until 1982. Accordingly she was statute barred.

The third principle involves the court's distinction between manifestation of damage and the discoverability of damage, and the court's finding that the latter was not relevant to the question of when a cause of action accrued. It is this principle that was strictly interpreted in subsequent decisions, discussed below, which held that the discovery of the damage is irrelevant in property damage cases. In *Hegarty v O'Loughran*, the court rejected the plaintiff's argument that a cause of action only accrued when the plaintiff discovered that the damage was caused by the wrongful act that was the subject of the complaint. The court held that since the fraudulent concealment provisions of s.71 of the Act of 1957 provided that, in the case of fraud, time did not begin to run against a plaintiff until the fraud was discovered or could, with reasonable diligence, have been discovered, by implication, in cases where there was no allegation of fraud, time began to run whether or not the damage could have been discovered.[6] In a practical sense, this meant that a cause of action could still accrue prior to the point at which a person discovered, or could with reasonable diligence have discovered, that the injury was caused by a wrongful act. The fact that *Hegarty* was a personal injuries case was never deemed determinative when the established principles came to be applied to property damage cases. Notwithstanding that, certain judgments expressed sympathy for its harsh application to homeowners who could only ever know their property had been damaged after having discovered the defects.[7]

Shortly after *Hegarty*, the Statute of Limitations (Amendment) Act 1991 introduced a date of knowledge test in personal injury actions that would address

the situation of an injured plaintiff unaware that their injury was connected to a wrongful act.[8] The date of knowledge test, which in passing came to be known as the "discoverability test", was provided for in s. 3 of the Statute of Limitations (Amendment) Act 1991. However, torts not involving personal injury were excluded from its parameters and, accordingly, *Hegarty* remained the leading authority on the question of when a cause of action accrued in property damage cases. The first case to apply *Hegarty v O'Loughran* to a property damage case was *Irish Equine Foundation v Robinson*.[9] In December 1979, the plaintiff retained the first to sixth defendants to act as architects and the seventh defendant to act as their engineer for the purposes of designing and supervising the construction of an equine centre. A certificate of practical completion was issued in March 1986, and a final certificate was issued in November 1987. Water started leaking through the ceiling in 1991 and the plaintiff issued proceedings in January 1996. The plaintiff brought a claim in negligence for pure economic loss arising from the defectively designed roof, and relied on the fact that manifestation of the damage had not occurred until the leak had occurred in 1991, to argue that they were within time.[10]

Geoghegan J., applying *Hegarty v O'Loughran*, rejected that argument and stated as follows:

"I think, therefore that *Hegarty v O'Loughran* must be taken as authority for the view that prior to the 1991 Act, the cause of action for personal injury did not arise until the injury was manifest but it did then arise irrespective of whether it ever occurred to the party injured or could ever have reasonably occurred to the party injured that it resulted from the negligence of somebody else".

This meant that in *Irish Equine*, the cause of action had accrued when the damage was manifest, which was soon after the roof was constructed, and not when the damage had become apparent to the plaintiff. The court went on to note that if experts had been retained just after the roof was constructed, they would have reported that the roof was defectively designed. This was so, notwithstanding the plaintiff's ignorance of any structural problem with the roof until the leak had occurred. The practical effect of *Irish Equine* was that a person buying a home was required to look behind the advices of the construction professionals they engaged as to the structural correctness of their home. As an aside, *Brandley* attempts to add clarity to *Irish Equine* by pointing out that it was an economic loss case and not a personal injury case. Accordingly, the tort was complete when the economic loss had occurred. In economic loss cases, the date of defect and the date of damage are often the same. While this is rightly reconciled in *Brandley*, the distinction might have been less clear in *Irish Equine* than *Brandley* suggests.

The next decision to address the accrual of a cause of action in a property damage case is *O'Donnell v Kilsaran Concrete Ltd*.[11] In that case the plaintiffs entered into a contract with the second defendant to build a dwelling house in May 1987. An architect's certificate of practical completion was issued in March 1988. In 1991, cracks appeared in the outside walls. The area was re-plastered and no further difficulties arose until 1997, when the architect consulted a civil engineer after cracking in the plaster in the same area was discovered. Unusually, this cracking was unrelated to the 1991 episode and was due to the presence of a certain mineral in the concrete block. The engineer was satisfied that these cracks were of "recent origin", but was unable to express any opinion on the 1991 cracking. In June 1999, the plaintiffs claimed damages for a breach of contract and negligence against the defendants.

The court took the view that the most recent cracking/damage, which the plaintiffs relied on, had manifested in 1997, and accordingly the case was not statute barred. Herbert J. concluded at p.191 of the judgment as follows:

"In the present case, I am satisfied on the evidence that the damage only came into existence not long prior to October 1998, or in the terminology used by Geoghegan J., was not manifest until then. It is not necessary for the court to express an opinion on the vexed question of 'discoverability', because in this case the damage having come into existence not long prior to October 1998, it was drawn to the attention of Mr Lawlor in May 1998 and by Mr McLoughlin in October 1998 and the plenary summons was issued on the 4th June, 1999, well within the limitation period".

This decision is difficult to reconcile with *Irish Equine* when one considers that the engineering evidence in that case suggested that the bricks were defective from the outset, including the bricks implicated in the second instance of damage, which brought the action within time.

In *Murphy v McInerney Construction Limited,*[12] the plaintiffs purchased a second-hand property in Powerscourt, Co. Waterford, in 1997, in reliance on a structural survey prepared by the second defendant. The first-named defendant was responsible for constructing the house in 1987. The plaintiffs were not aware that in 1996, structural works had been carried out to mend structural defects in the home. The plaintiffs did not discover the defects until 2000 when a further inspection was carried out in respect of the property. The plaintiffs issued proceedings for negligence and breach of contract in 2004. The question the court had to determine was whether the negligence proceedings were within the six-year timeframe where the latent defect had been discovered after the damage had manifested. Dunne J. found that the proceedings were statute barred. The damage was not of recent origin and occurred in 1996. Dunne J. took the view that, even if the defect was not discovered until 2000, time began to run from when the damage happened and not from when it is discovered:[13]

"I have to say that having regard to the various decisions to which reference has already been made, I find it difficult to come to any conclusion other than that the question of a discoverability test simply does not arise. It is quite clear from the authorities referred to above that a discoverability test does not avail a plaintiff when dealing with a plea that a claim is statute barred under Irish law".

The decision summarises an extensive body of case law, before finding that in cases involving latent defects, the cause of action accrued from the date of damage.

Brandley v Deane

Mr Brandley and WJB Developments Limited, the developers and plaintiffs, initiated proceedings against the defendants on November 30, 2010, claiming damages for breach of contract and negligence arising from the construction of two houses in Co. Galway. The first-named defendant, Mr Deane, was the supervising consulting engineer who certified compliance with planning permission and building standards. The second-named defendant, Mr Lohan, was the groundwork contractor whose work included the foundations of the houses.

In essence, the plaintiffs alleged that the wrong type of stone had been used in the foundations, resulting in cracking and ultimately unsafe houses. The following dates were agreed between the parties for the purposes of establishing the statute issue:

1. March 2004: the date the foundations were completed.
2. September 2004: the date the first defendant issued the Certificate of Compliance with planning permission.[14]
3. January/February 2005: the date the houses were completed.
4. December 2005: the date the plaintiff observed cracking on the outside walls.
5. November 30, 2010: the date the plaintiffs issued the plenary summons.

The courts had to determine whether the six-year limitation period ran from the time of the defect, i.e. when the foundations were installed, or from when the plaintiffs discovered the damage in December 2005. The second defendant brought an application seeking the trial of a preliminary issue on the statute of limitations before Kearns P., who decided that the case was statute barred.[15] Kearns P. cited the judgment in *Murphy v McInerney Construction Limited* (2008) IEHC 323, which "firmly excludes a discoverability test as being the relevant starting date". On that basis, since the defect had occurred in 2004 when the foundations were installed, the plaintiffs were out of time by only a matter of months.

The Court of Appeal

Ryan P. reversed the High Court's decision. He took the view that negligence by itself, without the accompaniment of damage or loss, is not actionable because the tort or the cause of action was not complete.[16] Ryan P. stated at para. 15:

"It is clear that negligence by itself without the accompaniment of damage or loss is not actionable. The plaintiffs did not suffer damage at the time when the defective foundations were installed. When the defective foundation was put in, the only complaint that the plaintiffs could have had was that the foundation was defective. They had not suffered any damage at that point, there was merely a defective foundation but that is not damage of a kind that is actionable in tort".

The court reasoned that the fact that the defendants might have identified the defects and remedied them was an illustration of the absence of loss at that point (March 2004) and the unavailability to the plaintiffs of any right of action there and then. Ryan P. opined that the defendants pitched the beginning of the period of limitation at too early a point, which did not take account of the requirement that damage actually be suffered by the plaintiff in order to complete the cause of action. The defendants appealed the decision.

The Supreme Court

In a lengthy judgment, McKechnie J. discussed the five commencement points for the purposes of triggering the clock:

a) when the wrongful act is committed (even without damage);
b) when damage occurs (the date the loss happens);
c) when damage is manifest (the date it was capable of being discovered and proved even if there was no reasonable or realistic prospect of that being so);
d) the date of discoverability (the date when the damage could or ought with reasonable diligence to have been discovered); and,
e) the date on which damage is in fact discovered.

McKechnie J. dismissed (a) the date of the wrongful act, (d) the date on which the damage was discoverable, and (e) the date of actual discovery, as irrelevant dates for limitation purposes. He held that the date of manifestation is the critical date, as per *Hegarty v O'Loughran*, i.e., when it was capable of being discovered by the plaintiff.[17]

Latent defects as distinct from damage

Brandley resolves the dispute of whether the cause of action accrues in property damage cases from the date the defect occurs or from when the damage manifests, holding that the latter statement was correct. *Brandley* makes clear that where the loss pleaded is property damage, the statute will run from the manifestation of the damage.

While in theory this could be seen as importing a discoverability test of sorts into the area of property damage, the decision makes clear that it is not actual discovery of the damage that causes the action to accrue, but rather that the damage was capable of being discovered.

In *Brandley,* only when the cracks occurred in December 2005 did the 'damage' occur, and therefore whether time ran from when the damage occurred or from when it was manifest was not in fact central to the resolution of the appeal, since in either case the plaintiffs would have succeeded.

Accordingly, McKechnie J. concluded that the respondent plaintiffs were entitled to succeed and that the cause of action in negligence was not complete until the damage caused by the defects was manifest.

Brandley also makes clear that the completion of a cause of action will depend on the cause of action as pleaded. In *Brandley*, the damage was pleaded as property damage, which manifested subsequent to the defect. However, as McKechnie J. noted, the damage pleaded in *Irish Equine* was economic loss. In *Irish Equine*, Geoghegan J. made clear that the economic loss (i.e., the damage) arose immediately when the defectively designed roof was constructed and possibly even at an earlier stage.[18] McKechnie J.'s decision in *Brandley* distinguished *Irish Equine* on the facts because the loss pleaded in *Brandley* was property damage and, accordingly, the tort in negligence was not complete until the damage was manifest.[19]

Conclusion

Brandley has likely addressed what Herbert J. described as "the vexed question of discoverability"[20] in property damage cases. However, the practical consequences of the decision will be difficult to assess since the question of when damage is capable of being discovered in a property damage scenario is not always clear. The following principles will hopefully be of assistance to practitioners dealing with statute of limitations issues in property damage cases:

- the cause of action must be complete, and damage must exist, for the cause of action to be complete;
- when the cause of action is complete will depend on the cause of action and the loss as pleaded;
- property damage can be, and often is, distinct from or later than the date of defect in property damage cases; and,
- the physical damage must be manifest for the cause of action to accrue, which is to say that it must be capable of being discovered in the sense of being provable.

References

1. *Brandley v Deane t/a Hubert Deane and Associates* [2014] IEHC 610; [2016] IECA 54; decision of Mr Justice McKechnie in *Brandley v Deane* [2017], unapproved, delivered on November 15, 2017.
2. Section 11(2)(a), the Statute of Limitations Act 1957, as amended by s3(2) of the Statute of Limitations (Amendment) Act 1991.
3. *Pirelli General Cable Works Limited v Oscar Faber and Partners* [1983] 2 WLR 6.
4. [1990] 1 I.R. 148.
5. [1990] 1 I.R. 148, p.152.
6. The Court followed *Cartledge v. E.F. Jopling & Sons* [1963] A.C. 758.
7. See for example Geoghegan J. in *Irish Equine Foundation v Robinson and ors* [1999] I.R. 442, p.447: "In my view, it is at least arguable that the nature of personal injury damage is so different from the nature of damage resulting from defects in a building that the concept of an injury becoming manifest as being relevant to the commencement of the limitation period may only be applicable to personal injury cases but I accept that the opposite can also be argued. I find it quite unnecessary to decide this point and that being so, I do not think that I should decide it".
8. The Statute of Limitations (Amendment) Act 1991.
9. *Irish Equine Foundation v Robinson and ors* [1999] I.R. 442. Hereafter "Irish Equine".
10. Interestingly, the Court held it could nonetheless decide the statute of limitations issue *in vacuo*, even where a larger dispute existed as to the recoverability of damages for pure economic loss.
11. *O'Donnell v Kilsaran Concrete Ltd* [2001] 4 I.R. 18.
12. *Murphy v McInerney Construction Limited* [2008] IEHC 323.
13. [2008] IEHC 323, p. 18.
14. The first defendant gave evidence in cross-examination, however, that he had not seen the stone going in and did not inspect the foundations that were opened and closed and accepted he carried out an inadequate investigation.
15. High Court Judgment of Kearns P. delivered on the March 2, 2016.
16. This echoes Fennelly J.'s statement in *ACC v Gallagher* 2012 [IESC] 35 that a cause of action does not accrue when there is a mere possibility of loss.
17. *Brandley v Deane* (SC), para. 107 (v).
18. *Irish Equine Federation v Robinson* [1999] 2 I.R. 442, at 449 (Geoghegan J).
19. *Brandley v Deane* (SC), para. 95.
20. *O'Donnell v Kilsaran Concrete Ltd* [2001] 4 I.R. 183.

Data Protection Act 2018

New data protection legislation will almost certainly increase the amount of litigation in this area in the coming years.

Eoin Cannon BL

The Data Protection Act 2018 was signed into law in order to give practical effect to the EU General Data Protection Regulation (GDPR) in the Irish jurisdiction. This article aims to outline the functions and powers of the new Data Protection Commission (DPC) and the implications of the new Act on practitioners in relation to the pursuance of claims and complaints in court by way of enforcement actions, injunctive relief, claims in tort law and criminal prosecutions.

While the GDPR does not re-invent the wheel with respect to the key tenets of data protection law, it does give increased powers to the DPC to investigate claims where data privacy rights are alleged to have been breached, and for individuals to pursue claims, either personally or via an interest group in the courts.

The Data Protection Commission

For the purposes of the supervisory function outlined in the Act and the GDPR, the Act establishes the new DPC,[1] transferring all powers, staff, actions, liabilities, rights, property and assets from the office of the current Data Protection Commissioner. The Commission will be independent and will self-regulate, and the office will consist of no more than three commissioners appointed by the Government, with one commissioner appointed Chair of the Commission. The Commission will be the supervisory authority with respect to the GDPR and to Directive 2016/680, which relates to the protection of natural persons' personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, also covered in the Act.

Enforcement of the GDPR

A person may make a complaint in respect of processing of their personal data, and on foot of this complaint an inquiry may be undertaken by the DPC.[2] Should the DPC not proceed with an inquiry in relation to the complaint made, the complainant may seek to force the Commission to investigate via application to court.[3]

The current trend towards mediation is referred to in section 109, which allows for the Commission to take whatever steps it considers are appropriate in order to facilitate an amicable resolution of a complaint should it be felt that this is possible. In this situation the complainant may have their complaint dealt with in a private way, which could suit a controller/processor of data. However, data controllers should be aware that the DPC has a general power of investigation, which may be invoked even if the complainant withdraws the complaint. An inquiry into data processor/controller activities may be investigated by the DPC in conjunction with the data protection authority in other states subject to the GDPR. This envisages a situation whereby an entity that controls or undertakes processing of personal data in a number of different states may be investigated. In this scenario, one data protection authority may take a lead role in the investigation and subsequently make a decision, which the other supporting bodies may adopt.[4]

An action in the courts

Regardless of the complaint made to the DPC, the complainant may seek to bring a data protection action against a controller or processor who has infringed the relevant enactment, which shall be an action founded in tort.[5] The reliefs that may be pursued in such an action are twofold: one may seek an injunction or declaration or, secondly, compensation for damage suffered as a result of an infringement of the relevant enactment. Such an action may be taken by a not-for-profit body, as outlined in Article 80 of the GDPR. Proceedings may be heard in the Circuit Court or High Court. A data protection action may not be brought against a public authority of another state.

Enforcement of the Directive

If a complaint is made by a data subject with respect to their rights under the Directive, the action may be taken by a body or organisation on their behalf.[6] This body may provide the service on a not-for profit basis, operating in the public interest, working in the area of data privacy rights. The Commission may examine such an issue on the basis of a complaint made to it, or of its own volition. As well as the right to complain to the DPC, the data subject may apply to the Circuit or High Court for either compensatory or injunctive relief with respect to the breach of their rights under the Directive.

While the GDPR does not re-invent the wheel with respect to the key tenets of data protection law, it does give increased powers to the DPC to investigate claims where data privacy rights are alleged to have been breached, and for individuals to pursue claims, either personally or via an interest group in the courts.

Investigations by the Commission

The Commission may conduct an inquiry and direct an authorised officer or officers to conduct an investigation and furnish a report regarding same, to be carried out on notice to the controller or processor concerned.[7] An authorised officer in the course of such investigations has quite wide-ranging powers, including the power to require a person to provide them with documentation and/or records. A person may be ordered to attend the authorised officer in order to give this documentation to the Commission. As part of this process, the authorised officer may demand that the person answer questions under oath. Should a person refuse to comply, the authorised officer may apply to the Circuit Court seeking an order to compel the person to comply with the requirements of the authorised officer in the manner sought.

Once an investigation has been concluded by the authorised officer, a draft report is prepared for the Commission, which may accept the findings and issue a punishment by way of a decision. If the Commission decides that a decision is not appropriate, it may decide that further investigation is needed into the matter, and may seek further documentation for these purposes or conduct an oral hearing. The data controller or processor may appeal this to either the Circuit or High Court under section 150 of the Data Protection Act.

Authorised officer

Authorised officers may, with consent or by way of warrant, search and inspect the processing activities of a data controller.[8] An authorised officer may apply to a judge of the District Court for a warrant on the basis that there are reasonable grounds to suspect that it is necessary for the authorised officer to attain the warrant in order to fulfil their functions. The warrant shall be for 28 days and this time period can be extended on further application to the District Court. Under the Act, the authorised officer has a number of other powers, which it may exercise in the course of its function. In general, the Act sets out that any form of non-compliance, impedance or misleading of an authorised officer, or lying to an authorised officer in the course of an investigation, will on indictment attract a penalty of five years in prison and a fine of €250,000.

Demand for the production of documents

As part of their role, the authorised officer may demand the production of documents or records relating to processing, which may be inspected there and then, removed or secured for later inspection; copies may also be made for this purpose. Further, the authorised officer has the power to require a person to state where documentation is, should it not be available at the time of request. The authorised officer may in effect take charge of any computers or other machinery in charge of data processing in order to conduct their inquiries, or they may compel relevant members of staff of the processor to aid them in this regard, including giving the authorised officer any relevant passwords and making documents legible to the authorised officer.

Information notice

The Commission, via an authorised officer, may require a data controller or

processor, in writing by way of 'information notice', to provide information relating to processing activities, to be furnished to the Commission within a period of 28 days. This request may be appealed by the controller/processor to the Circuit or High Court within 28 days of receiving the 'information notice'.[9] Should there be an urgency in respect of the information sought via the information notice, an authorised officer may seek the information after seven days of the notice being served.

Enforcement notice

In certain circumstances a data controller or processor may be served with an enforcement notice requiring them to undertake certain steps within a required time period, and failure to comply with same may result in the Commission issuing an administrative fine on the controller or processor. Criminal proceedings may also be brought in relation to the failure to comply with this notice.

Power to require a report or data protection audit

An authorised officer has the power to require a report, including related documents, for the purposes of effective and proper monitoring of processing activities. The Commission may also carry out an audit of processing activities as per Article 58(1) of the GDPR.[10]

Application made to the High Court

Section 134 of the Act outlines how the DPC may apply to the High Court for an order suspending all processing by a data controller or processor, or restricting them from transferring personal data abroad in situations where it deems that there is an urgent need to act in order to protect the rights and freedoms of data subjects. This in effect could shut down the commercial operations of a company should the application be granted by the High Court. While much has been made of the fines that may be imposed under the GDPR, it is this provision that could have the most dramatic effect in that it could halt the running of a business in one fell swoop. An application for interim relief with respect to the restriction of processing may be applied for by the data protection commissioners on an ex-parte basis, if the situation is sufficiently urgent.

Further, should the suspension be temporary, aside from monetary loss accompanied with the restricted or suspended processing, there is also a risk of reputational damage to any business where such an order is sought. The modern day consumer is more aware of their data privacy rights and any application made in a court forum could negatively affect the 'brand' in question, raising questions as to whether the business is able to fulfil the services it purports to provide.

The Commission may also apply to the High Court seeking an order determining whether the level of protection or safeguards in place in another territory to which personal data is transferred, is adequate with respect to both Art 45(2) of the GDPR and Art 36(2) of the Directive, and whether the standard data protection clauses are fit for purpose in this regard.[11] A court may order the destruction or erasure of personal data connected to the crime where a person is convicted of an offence under the Act.[12]

Administrative fines

Section 141 of the Act outlines the fines that can be imposed by the Commission in relation to breaches of data privacy law.[13] In imposing fines, the Commission shall act in accordance with Article 83 of the GDPR, which outlines the headline-grabbing fines that the GDPR has sanctioned, i.e., a fine of up to €20 million or 4% of worldwide turnover, whichever is the higher. Article 83 is instructive in outlining what factors should be taken into consideration in determining the seriousness of the breach of data protection, thus determining the level of fine to be imposed.

A court may order the destruction or erasure of personal data connected to the crime where a person is convicted of an offence under the Act.

Of note is that a special consideration has been given for public authorities and public bodies in the Act, and the amount they can be fined is capped at €1,000,000. To give this some context, the first draft of the Act stated that public authorities or bodies would not be subject to fines at all, which was the cause of some controversy. The fining of one public entity by another within the same state may be regarded as counterproductive as a use of state funds. However, it is submitted that this is merely a distraction from the real issues at play. What is of real danger to a public authority or body, moreover the state itself, is an order seeking to stop all processing by said organisation, which could have untold ramifications for the functioning of the state. In this context, the fining of such state bodies may be a welcome avenue for the Commission to take in order to make an example of such a body.

Any fine of up to €75,000 may be appealed to the Circuit Court and anything above that to the High Court. Any appeal is to be made within 28 days of the decision[14] and if there is no such appeal, then the Data Protection Commissioner shall apply to the Circuit Court to confirm the decision it has made, which the Court shall do, unless the Court sees good reason not to do so. The Commission may publish decisions relevant to the provisions laid out in the Act.[15]

Offences relating to individuals

It is an offence under the Act for a data processor, or someone working on their behalf, to knowingly or recklessly make an unauthorised disclosure of personal data.[16] The same goes for a person who has no relationship with a processor, who obtains and discloses personal data, or who sells or offers to sell personal data. All offences carry a criminal sanction, if found guilty on indictment, of up to five years in prison and a fine of up to €50,000.[17] Another aspect that may alarm persons working within an entity that controls data, is that if the body corporate is found to be in breach of data privacy legislation, the persons who are responsible for the decisions surrounding a breach may face criminal sanction under section 146 of the Act, along with the body corporate itself, and with the same sanctions applying.[18] The Commission shall prosecute summary offences under the Act, and may seek an order for costs and expenses in relation to the prosecution against a guilty party.

Conclusion

The growth in awareness of individuals' rights, along with the increased options available to enforce these rights by way of the Data Protection Act, means that it is inevitable that there will be increased litigation in this area in the years to come. Such litigation will take many different forms, whether in the field of enforcement by the Commission, criminal prosecutions, or injunctive or tort-based actions. Much will depend on the vigour of the DPC in enforcing the rights and freedoms that are set out in the text of the GDPR, and indeed the level of resources made available to it to that end. Unlike the legal framework existing pre GDPR, there will now be scope for individuals to pursue actions through the courts. Much of this type of litigation may be led by public interest groups in the field of data privacy rights.

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Delay and disclosure: disaster?

Issues around delays in disclosure and insufficient resources could have serious ramifications for the criminal justice system here.

Mary Rose Gearty SC
Dr Miriam Delahunt BL

Introduction

The Irish Criminal Bar has been waiting for the disclosure bomb to go off ever since the boxes of sometimes unpaginated, often unread material started arriving into the Law Library from solicitors, with often nothing more than the cheerful covering letter: "Disclosure herewith. We await your advices". Instead of going off in the Courts of Criminal Justice, or in Clonmel Circuit Court, the explosion occurred in Croydon. It was quickly followed by several aftershocks, all of which emanated from the same two combined sources: an exponential increase in the volume of disclosure available in any given case; and, insufficient resources in the existing system to properly evaluate this information. Both of these factors arise in this jurisdiction also.

In this article, we look at the collapse of criminal trials in the United Kingdom due to the late disclosure of relevant information, and we evaluate the real risk that similar problems could arise in Ireland. The most serious ramifications are for those accused of criminal offences and the victims of such offences, and the problems can be avoided by a combination of measures, suggested in this article.

The English cases

The rape trial of a 22-year-old student was halted in Croydon Crown Court on December 14, 2017, due to disclosure at the opening of the trial of text messages between the complainant and her friends, which suggested that there had been consent to the sexual intercourse that was the subject matter of the trial. Had the material been reviewed pre trial, it is likely that the case would not have been prosecuted at all.[1]

A rape trial collapsed in Snaresbrook Crown Court in January 2018 when it emerged that images from the defendant's phone of him and his alleged victim, apparently cuddling in bed, had not been found or disclosed. The 28-year-old accused had been under investigation for a year and half, and his defence team recovered the photographs from his phone after it had been returned to him by police investigating the allegation.[2]

Perhaps one of the most chilling lines in the newspaper reports of reviews that followed the above cases, was the revelation that in London alone, 600 rape cases are being re-assessed by prosecutors and detectives.

Delay and disclosure – why are they linked?

The failures in the English cases referred to have been attributed to the large volumes of disclosure involved, coupled with cuts to the resources available to the Crown Prosecution Service.[3] This mirrors the situation in this jurisdiction, where the scale of material available to investigators has increased at the same rate, and where large cuts have been made both to the criminal legal aid fees followed by, as required by the parity rule, cuts to the prosecution fees for barristers in the order of 28.5%-69% throughout the period 2008-2011.[4] In

summary, barristers are now operating at fee levels similar to those which applied in 2002. Such fee levels bear no relation to the complexity and volume of work now required where surveillance evidence, multi-faceted forms of detailed electronic evidence, section 16 statements, extensive disclosure material of all descriptions, videotapes of interviews and of interviews with child complainants, and a myriad of new evidential and procedural rules, must be mastered by counsel in criminal cases. The focus of this article is on disclosure, in particular. However, it is worth noting that the problems created by the reduction of fees generally has been consistently raised as a contributing cause in commentary on the recent failings of the English criminal justice system.

The sheer volume of disclosable materials available in a given case has increased exponentially in the last decade. With the rise of the smartphone since 2007, it is now possible to obtain an extraordinary amount of detail from a single phone connected with any investigation. The ubiquity of the computer in every office has produced similarly vast quantities of searchable material in most investigations. This is a feature that is most evident in sexual offence cases. Any complainant who has been a client of a State department such as the HSE or Tusla, is usually named, and perhaps quoted, in numerous records. The potential for relevant evidence, i.e., evidence that may undermine the prosecution case or assist the defence case, must be explored. Increasingly, that burden is being carried by the barristers briefed in such cases. The same problems have arisen in the UK, but in circumstances where the criminal legal aid cuts were even more severe than those imposed here. Experience here suggests that the failure to pay lawyers adequately or at all for the task of reviewing disclosure lies at the heart of the recent disastrous events in England and Wales. The long-term effects of failing to attract competent and able lawyers, investigators and medical personnel into the criminal justice field are clear when one considers the current crisis in the medical profession generally.

We describe events in England as disastrous, and the word is used advisedly. Failure to disclose, or late disclosure, of relevant evidence clearly affects accused persons in the most serious way, particularly if they have been in custody awaiting trial. It also affects the complainant and other witnesses. Naturally, an adult witness will be disappointed, often further traumatised, by a delay, particularly if he/she is the complainant in a sexual case. However, the negative impact on a child or a witness with an intellectual disability is even greater. Further, the ability to recall events will be hampered by the passage of time, and the risk of increased stress and trauma caused by that failure is significant. It is not just the fact that the trial is delayed, but living with the uncertainty surrounding the timing of the trial is extremely difficult for all involved, whether they are the accused or a witness in the case. In respect of child complainants in particular, Children at Risk in Ireland (CARI) has noted:

"[Delays] can have a very significant impact on young people, their families and support systems. In some cases, trials have been delayed on more than one occasion. This can be re-traumatising for a child who has gone through the emotional and practical process to ready themselves for giving witness testimony. It can also be re-traumatising when children and their families have readied themselves for the experience to be near an end".[5]

At a recent conference, Eve Farrelly of CARI described details of particular cases that highlight these effects. She described a nine-year-old boy reporting a crime, and the case being adjourned on five different occasions. She reported that he was 14 years old when he finally gave evidence. In another case, a 14-year-old child reported an intrafamilial offence. After three adjournments, she was 19 years old when she gave her evidence. One of the adjournments sought was to obtain counselling notes in relation to the complainant.[6] While these examples comprise anecdotal evidence rather than statistical data, they are not very unusual, in our experience.

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Delay in the system

The general issue of delay has been consistently highlighted as one of the main difficulties in cases involving sexual offences.[7] The Courts Service noted in 2016, in the latest available report, that waiting times for a rape trial in the Central Criminal Court have been reduced from 18 months to 13 months.[8] Waiting times for a Circuit Court trial range from three to six months in certain areas, to 12 to 18 months in others.[9] The report states that in Dublin, the average waiting time for a trial for the Circuit Court was nine months. At present, however, in Dublin, trial dates are being given for dates as long as 20 months away. Waiting times are lengthy within our criminal justice system without any adjournment of a trial date. However, other factors may result in the trial being delayed. The Courts Service notes that:

"Delay in the hearing of cases can occur for reasons outside the control of the courts and the Courts Service, for example the unavailability of a witness or vital evidence, or because parties or their legal practitioners are not ready to proceed. This gives rise to adjournments which can have a major impact on the time taken to complete the hearing of a case and on the number of cases which can be disposed of in a court sitting".[10]

The right to disclosure

The furnishing of disclosure to the defendant is an obligation enshrined in the right to a fair trial under Article 38.1 of the Constitution of Ireland. The defendant has a right to all relevant evidence, both inculpatory and exculpatory,[11] and the Director of Public Prosecutions has an obligation to disclose to the defence, relevant material which "might help the defence case, help to disparage the prosecution case or give a lead to other evidence".[12]

In *The People (Director of Public Prosecutions) v Sweeney*,[13] the Supreme Court made it clear that, unlike in civil proceedings, there is no mechanism to obtain discovery against parties who are not involved in criminal proceedings. The issue must be approached by obtaining consent from the complainant, insofar as any confidentiality in the material, almost invariably, is for the complainant to waive. There may also be issues involving personal data regarding other parties in the

same material, and there are also problems when the therapeutic value of any medical records is adversely affected by disclosure. The DPP and the HSE have worked together to create a memorandum of understanding to overcome this.[14] However, this is not a public document and the DPP does not keep records as to how many trials have been adjourned or impacted due to failure to disclose or late disclosure. In our experience, this factor is often stated as the reason why a case has to be adjourned. On any given Monday in the Central Criminal Court, as many as two of the five or six cases listed can be delayed for this reason. The delay can range from one or two days to several months, depending on whether the material is imminently available or is awaited with no immediate prospect of receipt.

The Supreme Court has stated that to create a disclosure procedure through the courts would be to usurp executive powers, and it expressed the hope that legislation would be forthcoming that would solve the problem.[15] In December 2014, the Irish Law Reform Commission published 'Disclosure and Discovery in Criminal Cases',[16] a report that outlined the difficulties regarding third-party disclosure in criminal proceedings. The Commission even suggested draft legislation. However, the only measure on the statute books at present has not yet been commenced. This is S.39 of the Criminal Law (Sexual Offences) Act 2017, which deals with third-party disclosure in relation to 'counselling notes', thus neglecting many of the common sources of disclosure such as medical and social welfare records. The limitations of the provision are significant and it is not anticipated that it will resolve most of the issues involved.[17]

Pre-trial hearings

A parallel proposal that pre-trial hearings be placed on a statutory footing through the Criminal Procedure Bill (last revised in April 2015), could help to reduce delay in the trial process. However, to date, that has not happened and it is uncertain whether that proposal will have any teeth. As mentioned above, late disclosure from a third party (such as, for example, the HSE) often leads to the requirement for an adjournment to allow both prosecution and defence lawyers to review and/or redact it in advance of the trial. This late review of large volumes of sensitive evidence causes huge strain on practitioners and, when done under significant time constraints, must increase the likelihood of errors. The situation results in uncertainty for judges, practitioners, defendants and complainants alike. In some cases, extra counsel are drafted in on an emergency basis to review large volumes of documents in order that the trial may continue but again this is done on an ad hoc basis – and is far from ideal. It appears that reduced resources was a factor in the disclosure failures at the trials in England mentioned above, and it would be naïve to underestimate the potential for similar errors in this jurisdiction.

Consequences of delay in third-party disclosure

The delays caused by lack of a transparent, effective and expedient means of delivering third party disclosure are significant. In particular, the uncertainty and resulting stress on the complainant and defendant, where a trial is delayed due to late or non-disclosure is both unjust and a violation of the rights of both parties. Most significant of all is the possibility that there will be a failure to identify relevant material before the trial, or at all. This is the nightmare scenario for every practitioner due to the devastating effects it could have on accused persons or victims of crime, and the resulting damage to the integrity of, and public trust in, the system of justice. The current system depends on the co-operation of various agencies, some of which are operating memoranda of understanding agreed with the ODPP. It is difficult to obtain details of same and there may be distinctions between the memoranda as they apply to different agencies. What is certain is that the different agencies interpret their duties differently. It is still relatively common to read a refusal to disclose material due to data protection concerns or a stated duty of confidentiality. Sometimes, it is clear that the body in question (although this more often applies to a private body rather than a State body) asserts a privilege that is clearly that of the complainant, which has of course been waived as no such disclosure is ever sought in the teeth of a complainant's refusal to consent to same. Finally, in this respect, we have observed redactions in documents that clearly demonstrate a lack of understanding on the part of the disclosing body as to what is or is not relevant. In some instances, a trial judge must review the material to determine what is disclosable, but this can only be done when the trial is assigned to that judge. As such, material is often only made available immediately before the trial, and this often delays the start of the trial.

Fees and keeping accounts

There is a further issue raised by the fact that there is much confusion as to how fees for such work are paid. In February of 2016, the Council of The Bar of Ireland made representations to the ODPP about the fees in all criminal cases, but with a particular emphasis on work that was not being paid for adequately, or at all. This led to a revision of the fee structure regarding disclosure, which was confirmed in writing in June 2017. However, the payment of fees must be specifically sought and approved, and must then be measured by calculating the hours spent reviewing the material. This is only applicable on the prosecution side of the case, insofar as it is not automatically the case that the defence will have the same volume of material to review. However, anecdotally, while it may be administratively cumbersome to persuade the Department of Justice (paymaster in the Legal Aid context) that the work has been done and that the payment is due, once the Director confirms that the prosecution has been paid and that a similar volume of work was required on both sides, defence counsel usually receive an equivalent payment.

There remains a transparency problem, however. The procedures by which the DPP decides whether an "enhanced fee" is paid in a particular case are not apparent, and the decision appears to be made on a case-by-case basis. In addition, there may be communication difficulties between the ODPP and the Department of Justice on this matter. It is widely reported that many junior counsel already briefed in a case have worked to review large volumes of disclosure before trial without charging for extra hours unless they are called to work extremely unsocial hours or where the disclosure is kept off site and a specific disclosure review visit must be made. This has consequences for defence barristers if the Department receives no confirmation of a special payment from the ODPP.

Practitioners should note two obvious measures, which should be adopted in this regard. The first is to keep strict account of the volume of disclosure required in every case and ensure that a request is made for a disclosure

payment or the retention of a disclosure junior in cases involving large amounts of disclosure. Guidelines from the ODPP would be most welcome, as that office is best placed to advise counsel in relation to which cases are appropriate cases for a disclosure payment based on an hourly rate, or a documentary junior. Until such guidelines are made available, a good rule of thumb is to assess the amount of paper involved, first of all, by file or box-load. Once a second box is received, this is clearly an appropriate case in our view. Depending on contents, two lever arch files may also qualify, particularly if the notes are handwritten and difficult to decipher. There is an element of judgment in all such cases. We understand that negotiations in this regard are taking place and acknowledge the ongoing support from the ODPP in relation to matters raised with her office on behalf of the Bar.

The second measure we suggest is that counsel must keep an accurate record of time spent reviewing disclosure. Our experience is that barristers in criminal practice, perhaps due to the fixed fees in criminal cases, are slow to charge for the extra work involved in disclosure matters and often underestimate the hours of work done. These accounting matters are issues that must be addressed by practitioners.

Further solutions?

It would be of significant assistance if the reasons advanced for any adjournment were better documented by the ODPP and/or the Courts Service. Detailed and constructive reviews of the progress of trials and resulting feedback to practitioners would inform as to the main reasons for delays and help to eliminate those issues. There is no doubt that the very fact that such records will be published, in itself, may raise standards of practice across the system, from lawyers to Gardaí and counsellors; the prospect of being the main cause of delay in the criminal system and being identified as such may act as a powerful incentive to all involved in bringing a criminal trial to a conclusion.

Legislation that provides for pre-trial hearings is already in the pipeline, as set out above, and is urgently needed. The disclosure provisions that relate only to counselling notes and that confine the process to such notes must be revised. The various bodies that maintain records, which are potentially the subject matter of disclosure requests, must co-ordinate their responses, ideally (in the case of State bodies) with the continued assistance of the ODPP. The identification of a consistent method whereby disclosure can be obtained and reviewed in good time before a criminal trial, and the allocation of adequate resources for this task, must be addressed.

We urge the Oireachtas and the ODPP to make further efforts to resolve these issues. The establishment of an effective process to facilitate timely disclosure is key to eliminating one of the major logjams in our criminal justice system. Full and fair disclosure ensures that the fair trial rights of every accused are respected, while also limiting the frustrating delays that increase the stress on vulnerable victims of crime. If timely and effectively resourced, it should prevent disaster in this jurisdiction.

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Listen to the voice of the child

Legislation is now in place setting out the right of the child to be heard in court proceedings, but practical and financial supports are sorely lacking.

Katie Dawson BL

The starting point in any discussion about the voice of the child in the Irish courts is the Constitution. Since Article 42A came into effect on April 28, 2015, the Constitutional rights of children must be considered even more closely by the court in reaching decisions in respect of guardianship, custody and access.

The language used here is important. In so far as is practicable, a court shall ascertain the views and wishes of the child and give due weight given their age and level of maturity. This is a mandatory requirement, in every case, and unlike other provisions governing children's interactions with the legal process, it is not qualified by any best interest welfare test.

There is no prescribed age below which a child's views and wishes are not ascertainable. Some judges have considered that a child below six or seven could not express a view directly, but guardians ad litem (GAL) and child psychologists can, and often do, speak to children younger than that in childcare cases. Nor does it include a requirement to consider if it is in fact in the best interests of that child's welfare to ascertain their views. I can see a number of scenarios where it might not in fact be appropriate to ask them. If the child's parents have reached an agreement in respect of access or custody, should a child be involved in the court process?

By contrast, if the parents have a particularly acrimonious relationship, asking a child's views and wishes might put them in an invidious position of being asked to take sides, which would not be in the best interests of their welfare.

As we look at the Child and Family Relationships Act 2015, we see that the voice of the child is to be ascertained, but the question remains how this is to be done. In England and Wales, this would be done by CAFCASS (the Children and Family Court Advisory and Support Service). Regrettably, there is no Irish equivalent and this is a deficit requiring urgent redress. What is the purpose of this amendment, if in practical terms the cost of obtaining a professional to ascertain their views is beyond the means of most parents?

Section 28 of the 1964 Act (as amended by the 2015 Act) allows for the appointment of a GAL, similar to section 26 of the Childcare Act 1991. However, this has not yet been commenced. I can certainly see private family law cases where the appointment of a GAL would be of material benefit but again, the question of who would pay for this is a real consideration.

Two basic options for addressing this issue are:

- have the judge interview the child in chambers or in the absence of the parties to the proceedings; or,
- have the child interviewed by a suitably qualified professional who can prepare a report for the court.

It is all very well to enshrine the rights of children in our Constitution, including the right to be heard, but practical mechanisms must be put in place to implement this.

This issue, among others relating to family and childcare law, was addressed by the Council of The Bar of Ireland in a detailed submission to the Legal Aid Board in February 2018.

Should the Irish State provide and/or fund a service like CAFCASS whereby the views and wishes of a child can be ascertained and conveyed? It is a challenge for any judge to be satisfied in terms of the criteria set out in section 31 of the 2015 Act in respect of factors to be considered, without the assistance of a professional report.

Questions about what is in the best interests of the welfare of a child are often better answered by a professional who has interviewed parents, extended family and the child in a child-centred way, rather than in a lengthy hearing in courts already buckling under the pressure of a heavy caseload.

Where possible, children should not find themselves in court and they should be shielded from the acrimony of their parents' disputes. For some children, having to attend court to speak to a judge will be frightening and confusing.

With all due respect to judges they, like legal practitioners, are not trained child interviewers. If there are concerns about parental alienation, or allegations of abuse, they are not necessarily best placed to determine if the views and wishes a child expresses are genuinely held.

For many people who find themselves before the court, and who struggle to even pay the legal aid contribution of €150, the cost of any Section 32 report is prohibitive and beyond their resources. There remains a hierarchy of rights in terms of access to justice. Money, or lack thereof, acts as a barrier to justice. It is not enough to legislate for the voice of the child to be heard; the State must ensure that this can be practically implemented in every case.

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

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- 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
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- The claim is not statute barred
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