THE BAR
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Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

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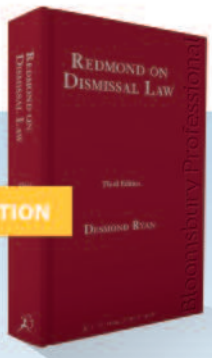
November 2017

Implementing the Victims' Directive:
a prosecutor's perspective

Bloomsbury Professional

Books publishing October-December2017



NEW EDITION

Redmond on Dismissal Law, 3rd edition

By Desmond Ryan

Redmond on Dismissal Law, 3rd edition explains the workings of dismissal law and all relevant legislation, and details the introduction of the new Workplace Relations Commission. It provides guidance for employers and employees on their respective rights and obligations.

Pub date: October 2017 **Price:** €225
ISBN: 9781780434988

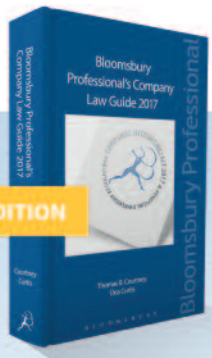
NEW SUPPLEMENT

Irish Planning Law & Practice Supplement, Consolidated and Annotated Planning and Development Acts 2000 – 2017

By The Environmental & Planning Law Unit of A&L Goodbody, Solicitors

Lays out a consolidated version of the 2000 Act, up to and including August 2017. It includes the changes wrought by the Planning and Development (Amendment) Act 2015 and the Planning and Development (Housing) and Residential Tenancies Act 2016.

Pub date: October 2017 **Price:** €320
ISBN: 9781784517878



NEW EDITION

Bloomsbury Professional's Company Law Guide 2017

By Thomas B. Courtney, Úna Curtis

The Companies (Accounting) Act 2017 makes over 100 changes to the Companies Act 2014. Taken with the Companies (Amendment) Act 2017 and the Beneficial Ownership Regulations 2016, it has introduced significant changes to company and accounting law and practice. This book will explain and contextualise the many changes for legal and accounting practitioners.

Pub date: October 2017 **Price:** €165
ISBN: 9781526505248

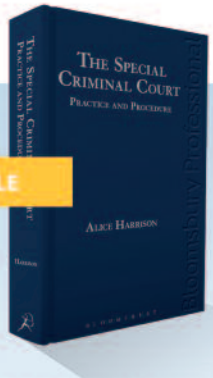
NEW EDITION

Road Traffic Law: The 1961-2016 Road Traffic Acts, 2nd edition

By Robert Pierse

This title sets out the annotated Road Traffic Acts from 1961 to 2016 and covers all relevant case law and Statutory Instruments. Included are references to litigation on intoxicants, dangerous driving and other areas of road traffic law. This title covers both practice and procedure and each section is fully annotated and cross referenced.

Pub date: November 2017 **Price:** €175
ISBN: 9781526502698



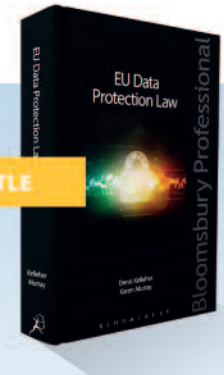
NEW TITLE

The Special Criminal Court: Practice and Procedure

By Alice Harrison

The Special Criminal Court: Practice and Procedure compiles procedural and evidential rules in a coherent and accessible way together with a comprehensive analysis of the offences typically tried before the SCC.

Pub date: December 2017 **Price:** €195
ISBN: 9781780439068



NEW TITLE

EU Data Protection Law

By Denis Kelleher, Karen Murray

EU Data Protection Law offers a comprehensive analysis of data protection law in the European Union focusing on the General Data Protection Regulations (GDPR). The book addresses the scope and jurisdiction of the GDPR, transfers outside the European Union, the principles of data protection, the lawfulness of processing and the processing of special categories of data.

Pub date: December 2017 **Price:** €175
ISBN: 9781784515539

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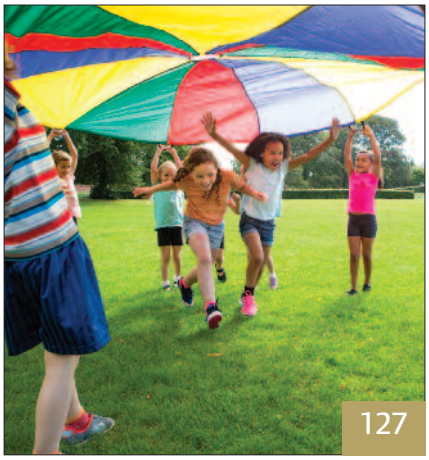

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Much to do

The Council has a busy year ahead working for members and dealing with the impact of new regulations.

Welcome back to the new legal year and a particularly warm welcome to our 89 new members, who came into membership of the Law Library in October. It was my privilege to welcome all our new colleagues during orientation day.

Council of The Bar of Ireland has a busy year ahead. The first meeting of the new Council took place in September, where a number of key areas of priority were identified.

Engagement with the LSRA

Engagement with the Legal Services Regulatory Authority (LSRA) will continue throughout the year ahead to ensure that the provisions of the legislation are implemented as smoothly as possible. The LSRA has recently appointed a permanent CEO, Mr Brian Doherty, who took up his position in mid September 2017. The Council has repeatedly expressed concern at the slow pace of progress to get the new office of legal costs adjudication established, and we continue to make representations in that regard.

Supporting junior and circuit members

Supporting junior members of the profession and members who practise primarily on circuit is another key priority for the Council. The survey of circuit practitioners undertaken earlier this year produced a comprehensive agenda to engage with the Courts Service on matters of concern to members, one of the primary users of the facilities of the Courts Service on a daily basis. The Council made a submission to the Courts Service in relation to the development of its strategic plan for the next three years and took the opportunity to highlight the issues raised by members on circuit. Jack Nicholas BL has agreed to chair the Circuit Liaison Committee over the year ahead, building on the sterling work carried out by Elaine Power BL.

The Young Bar Committee (YBC), under the leadership of Venetia Taylor BL, also has a full agenda over the year ahead to support and represent the views of our younger members. One-third of members of the Law Library are in practice for less than seven years and the Council is determined to do all that it can to support the endeavours of the YBC.

Professional fees

The Criminal State Bar Committee is anticipating that formal negotiations on professional fee matters will commence shortly now that the successor to the Lansdowne Road Agreement has been passed by the public service unions. This was the commitment given by the Department of Public Expenditure and Reform in consideration of the comprehensive submission made by the Council in March 2016, which called for a reversal of the deep cuts to professional fees applied during the period 2008-2014. In relation to civil legal aid, a submission on matters arising in that area has yet to be completed and submitted, and will be prioritised by the new Civil State Bar Committee for this term.

Investing in member facilities

Last year's Council undertook a lot of work to decide the approach to be taken by The Bar of Ireland to ensure that both the administration and individual members can comply with the new General Data Protection Regulation (GDPR), due to come into force in mid May 2018. Communications to assist members in understanding the need to comply with the provisions of the GDPR will continue. Significant investment in our IT infrastructure has been necessary and we are on schedule to meet the May 2018 deadline.

Opportunities to maximise the use of our property assets for the benefit of members continued over the long vacation. The old Sky Bar on the third floor of the Church Street premises has been refurbished, providing an additional 27 seats for members, together with a new modern café that overlooks Church Street. Pressure on seating is an ongoing issue and the Council aims to ensure that we can increase seating wherever possible. Over the last two years, we have been able to put an additional 47 assigned seats into the Church Street building, and these comfortably sit alongside the 93 offices, which are now approaching full occupancy.

Finally, I wish to commend the former Vice Chair of the Council, Séamus Woulfe SC (now Attorney General: read an interview with him on page 124) and our current Vice Chair, Mary Rose Gearty SC, for their work in launching the new Consult a Colleague helpline. This is a new service for members to access a panel of trained volunteer members who will be available to provide support and guidance for any member who is experiencing challenges in their professional life. Further information on the initiative is included in this publication.

Paul McGarry SC
Chairman,
Council of The Bar of Ireland

Insight and information

From the workings of the AG's office to the Victims' Directive, this edition contains interesting and important information.

In our first edition of the new legal year, our focus is on the new Attorney General, Séamus Woulfe. In our exclusive interview, we carry a unique insight into the daily life of the chief law officer of the State as he shares his perspectives on the challenges facing his office in the era of 'new politics' and Brexit.

Damages awards are always squarely in the spotlight when any discussion turns to rocketing insurance premiums. In this edition, an experienced High Court judge debunks the myth that this is as a result of inflated court awards. Mr Justice Kevin Cross drills down into the facts and figures, and concludes that awards have fallen, not risen, over the past number of years.

This time of year has its share of stresses for anyone who is self-employed. Taxes must be paid, pensions fed and in a profession that relies on projecting confidence and certainty, we frequently fail to fully recognise the extent to which stress weighs on our daily lives. Our closing argument discusses recent initiatives taken by the Council of The Bar of Ireland to encourage all members to avail of measures to improve our physical and mental health.

The Victims' Directive has had major ramifications for practice in criminal courts. The aim of the Directive is to focus on the rights of an injured party at every stage of the criminal process. We get the lowdown from the perspective of the Office of the DPP on how the Directive is having an impact in practice. And finally, a recent Supreme Court judgment has delved deep into the nature of the bullying claim. The plaintiff in that action lost her case but our writer explains that this is far from the death knell for bullying as a cause of action. In fact, the judgment of the Supreme Court clearly recognises this as a form of personal injury, and gives guidance on what is required to constitute a cause of action.

Eilis Brennan BL
Editor
ebrennan@lawlibrary.ie

John Philpot Curran commemoration

On Friday October 13, 2017, The Bar of Ireland and The Honorable Society of King's Inns held a commemoration dinner to celebrate the 200th anniversary of the death of John Philpot Curran (1750-1817) in The Honorable Society of King's Inns. Over 100 guests were in attendance to celebrate the life and work of John Philpot Curran, including Attorney General Séamus Woulfe SC, senior members of the judiciary and members of The Bar of Ireland. A wreath laying ceremony was also held on Saturday October 14 at the gravestone of John Philpot Curran in Glasnevin Cemetery.

Turlough O'Donnell SC, Jane McGowan BL and Amy Deane BL read excerpts from John Philpot Curran's speeches including 'Speech on the Right of Election of Lord Mayor of the City of Dublin' (1790).

Liam McCollum QC, Chairman of the Bar of Northern Ireland, and Mary Rose Gearty SC, laid a wreath at John Philpot Curran's grave in Glasnevin Cemetery.

Review of the administration of civil justice

The President of the High Court, Mr Justice Peter Kelly, following a request from Government, has recently established a review group to recommend reforms in the administration of civil justice in the State. The terms of reference of the group are to examine the current administration of civil justice in the State with a view to:

1. Improving access to justice.
2. Reducing the cost of litigation including costs to the State.
3. Improving procedures and practices so as to ensure timely hearings.
4. The removal of obsolete, unnecessary or over-complex rules of procedure.
5. Reviewing the law of discovery.
6. Encouraging alternative methods of dispute resolution.
7. Reviewing the use of electronic methods of communications, including e-litigation.
8. Examining the extent to which pleadings and submissions, and other court documents, should be available or accessible on the internet.
9. Identifying steps to achieve more effective outcomes for court users, with particular emphasis on vulnerable court users, including children and young persons, impecunious litigants who are ineligible for civil legal aid and wards of court.

The Government has requested that the following matters be taken into account by the review:

- The need to maintain a targeted and focused approach to the scope and delivery.
- The need to take into account work and initiatives already developed or underway such as the Law Reform Commission 2010 Report on Consolidation and Reform of the Courts and subsequent Department of Justice and Equality work thereon, and exiting provisions intended, following consultation with the Courts Service, for inclusion in the forthcoming Courts and Civil Law (Miscellaneous Provisions) Bill (e.g., electronic filing and statements of truth among others) and other legislation under preparation or pending commencement.
- Composition of the review body is critical and needs to ensure that a broad range of views is obtained, including relevant experts from within and outside the courts and Courts Service and the Department of Justice and Equality. Also, consideration should be given to obtaining expertise in the areas of business process and general management/efficiency.
- A mechanism should be considered through which other departments of State may contribute to the process in relevant areas.

The Government also requests that the review would address the below commitments made by Government in 2016 relating to the courts, and in particular to propose a basis on which the annual benchmarking study proposed in item (b) be implemented with effect from 2017:

"a) A modern legal system must be able to respond to the changing values and attitudes of our society, resolve issues and promote equality. Through the implementation of a progressive law reform programme we can strengthen our Constitution, rule of law and our justice system for the benefit of everyone.

b) We will commission an annual study on court efficiency and sitting times, benchmarked against international standards, to provide accurate measurements for improving access to justice; and,

c) We will propose legislation to reduce excessive delays to trials and court proceedings including pre-trial hearings".

The review group will consist of a representative of the:

- Supreme Court;
- High Court;
- District Court;
- Department of An Taoiseach;
- Department of Public Expenditure and Reform;
- The Council of The Bar of Ireland; and,
- Court of Appeal;
- Circuit Court;
- Small Claims Court;
- Department of Justice and Equality;
- Director General of the Attorney General's Office;
- The Law Society of Ireland.

The Chairman of the Council of The Bar of Ireland, Paul McGarry SC, has agreed to participate in the review group on behalf of The Bar of Ireland.

Visit from Texan delegation

The Bar of Ireland was delighted to welcome Senior District Judge Larry Gist, accompanied by a large delegation from Texas, to the Distillery Building on October 9. A special CPD session entitled 'Texas Hold'em: Sentencing Guidelines in Texas and in Ireland' was held, presenting a unique opportunity to contrast the criminal sentencing systems in the two jurisdictions. Among the legal issues discussed were: jury selection and service; prison and parole; criminal appeals; and, the Texas death penalty. Speaking alongside Judge Gist was long-time Texan prosecutor and criminal defense attorney David W. Barlow, with Mr Justice Patrick J. McCarthy, Ms Justice Isobel Kennedy and Mary Rose Gearty SC presenting the Irish perspective. The session was well attended by members of the Law Library and the Texan delegation, which made for a lively forum to debate and exchange views on the differences between the two systems.

The Denham Fellowship

The Bar of Ireland is delighted to announce that two very deserving individuals have been awarded The Denham Fellowship 2017. Both commenced the Barrister-at-Law Degree programme in The Honorable Society of King's Inns in October, launching into what will be a five-year programme of financial, educational and professional support, and ultimately a successful, rewarding and long-lasting career at the Bar. The Fellowship, run by The Bar of Ireland in association with the King's Inns, endeavours to encourage more diversity in the legal profession by assisting aspiring barristers who come from socioeconomically disadvantaged backgrounds to gain access to professional legal education at the King's Inns and professional practice at the Law Library. The Bar is also pleased to announce that the application process for 2018 is now open. The Bar of Ireland took stands at various law fairs in universities around the country in September and October to promote the Fellowship. We were delighted to meet with law students in NUI Galway, UCC, UCD, Trinity, and NUI Maynooth. The closing date for applications is Monday, November 20, 2017, and full details can be found on www.lawlibrary.ie.

Professional pension advice

October 31 marks this year's self-employed tax return deadline, with those using the Revenue Online Service (ROS) enjoying a slightly extended deadline of November 14, 2017. Self-employed barristers are able to claim tax relief against pension contributions that are paid by set Revenue deadlines and are within the age-related contribution maximum limits set out in **Table 1**. It is not possible to defer the contribution payment to a later date and still qualify for the relief available.

Table 1: Maximum tax relief available on a pension contribution.

Age	Maximum tax relievable pension contribution (as a % of earnings*)
Up to 29	15%
30 to 39	20%
40 to 49	25%
50 to 54	30%
55 to 59	35%
60 and over	40%

** Subject to an earnings cap of €115,000.*

JLT Financial Planning operates The Bar of Ireland Retirement Trust Scheme and, as in previous years, as we approach the tax deadline, your dedicated JLT Bar pension team will be present in barrister workplaces to process pension contribution payments and to give advice. There will be two rounds of meeting opportunities before the October and November deadlines. Meetings will be held on a first come, first served basis; for full details see **Tables 2** and **3** below.

There are a wide range of investment funds available under The Bar of Ireland Retirement Trust Scheme including: managed; passive; absolute return; multi asset; equity; bond; and, cash. The on-site JLT team will have detailed information on all the funds available.

If you plan on making a pension contribution, your cheque must be made payable to "The Bar of Ireland Retirement Trust Scheme" and a completed Contribution Submission Form must be included.

JLT points out that if members do not take this opportunity now, they will not get another chance to substantially reduce their 2016 income tax liability. The company firmly believes that pensions remain the most tax-efficient way to save for retirement. By contributing now you will not only benefit from a better retirement fund but also from the immediate tax relief available to you.

Anyone making a pension contribution no longer needs to submit pension documentation with their tax return; however, Revenue may request this at any stage in the future. JLT will issue the appropriate certification in respect of all contributions processed.

Over the next month or so all self-employed barristers must file their tax return for 2016, pay any outstanding income tax from 2016 and pay preliminary income tax for 2017. Contributing to your The Bar of Ireland Retirement Trust Scheme allows you to reduce your tax bill.

Donal Coyne, Director of Pensions, JLT Financial Services Limited.

Table 2: October 31 – tax deadline meetings.

Date	Location	Room
Friday, October 27 – 12.30pm-2.00pm	Criminal Courts of Justice, Parkgate St	Staff office (seventh floor)
Friday, October 27 – 2.00pm-5.00pm	Church St Building, 158/159 Church St	Room C
Tuesday, October 31 – 10.00am-1.00pm	Distillery Building, 145-151 Church St	Consultation Room 11 (second floor)
Tuesday, October 31 – 2.00pm-5.00pm	Law Library, Four Courts, Dublin 7	Director of L.I.S. Office (second floor)

Table 3: November 14 – tax deadline meetings.

Date	Location	Room
Friday, November 10 – 10.00am-1.00pm	Law Library, Four Courts, Dublin 7	Director of L.I.S. Office (second floor)
Friday, November 10 – 2.00pm-5.00pm	Church St Building, 158/159 Church St	Room C
Monday, November 13 – 10.00am-1.00pm	Church St Building, 158/159 Church St	Room C
	Law Library, Four Courts, Dublin 7	Director of L.I.S. Office (second floor)
Monday, November 13 – 12.30pm-2.00pm	Criminal Courts of Justice, Parkgate St	Staff office (seventh floor)
Monday, November 13 – 2.00pm-5.00pm	Distillery Building, 145-151 Church St	Consultation Room 11 (second floor)
Tuesday, November 14 – 10.00am-1.00pm	Distillery Building, 145-151 Church St	Consultation Room 11 (second floor)
	Law Library, Four Courts, Dublin 7	Director of L.I.S. Office (second floor)
Tuesday, November 14 – 2.00pm-5.00pm	Church St Building, 158/159 Church St	Room C
	Law Library, Four Courts, Dublin 7	Director of L.I.S. Office (second floor)

The lawyer at the centre

Attorney General Séamus Woulfe spoke to *The Bar Review* about his career and the challenges facing his office in the era of 'new politics' and Brexit.

Ann-Marie Hardiman
Managing Editor at Think Media Ltd

The offices of the Attorney General on Merrion Street sit snugly in the heart of Government Buildings, and the literal and symbolic significance of their position is not lost on the newest incumbent: "Government departments are often their own little kingdoms, but this office is a hub – almost everything of major importance comes through here".

Séamus Woulfe is settling in to his new role as the chief law officer of the State: "I'm enjoying it very much. We deal with a wide range of issues across the complete spectrum of public law, and a huge volume of material comes through my desk, but I'm very lucky that there's a great professional staff in the Attorney General's office, and the quality of the work is very high by the time it reaches me".

It's all quite different to being a barrister in private practice: "A big part of the learning curve is the interaction with bureaucracy. It's not necessarily the advice you give, but when you give it, or who you give it to".

There's no such thing as an average day: "It's a combination of trying to get through the paperwork, and all kinds of meetings – with officials in this office about advisory files or legislative matters, or with Government departments or ministers, and also with the judiciary or legal bodies like The Bar of Ireland or the Law Society".

New politics

Aside from its role as legal adviser to the Government on all issues, including litigation affecting the State, perhaps the principal task of the Attorney General's office is to assist in the legislative process. This would be significant under normal circumstances, but the era of 'new politics', where the coalition Government is supported by a 'confidence and supply' arrangement with Fianna Fáil and some independents, and an unprecedented number of independents and smaller political groupings are present in the Dáil, has had a particular impact in the form

Making history

Séamus Woulfe's early career at the Bar included high-profile cases that had a formative influence on him, and on Irish society as a whole.

In 1992, along with John Rogers SC and Mary O'Toole BL, he acted for Miss X in the Supreme Court in *Attorney General v X*. It's no exaggeration to say that the "X Case" gripped the nation, as the Supreme Court deliberated on whether a 14-year-old child who was pregnant as a result of rape could be allowed to obtain an abortion on the grounds that her life was at risk from suicide. For those in the eye of the storm, however, the focus was, of necessity, narrower: "It's part of your training as a barrister to focus on the objective legal issues as much as possible. You're aware that there's publicity and a lot of noise in the background, but you're focused on the legal issues from the starting perspective of the side you're on. We had to fight on those issues from that perspective, and our client won her appeal".

He acknowledges the strange serendipity in his now being the Attorney General who will likely advise on another referendum on abortion, but is glad to have had such extensive experience of the legal issues involved.

The other major case of Séamus' early career saw him represent then Labour TD Pat Rabbitte at the Beef Tribunal, which also produced fascinating legal issues: "One issue was the question of whether politicians could be compelled to disclose their sources. Under parliamentary privilege, they couldn't be compelled to do so for what they said in the Dáil chamber, but when they repeated it in Dublin Castle [during the Tribunal], and were not physically standing in the Dáil Chamber, could they be compelled? The Supreme Court overturned the High Court and said they could not be so compelled. It was a limited exception that if it was a Tribunal established by the Dáil, it was akin to saying it in the Dáil".

These were busy times for a "fairly junior" barrister, and Séamus acknowledges his good fortune at a relatively-early stage in his career: "The Bar is sometimes a very unpredictable profession, but you can get a lucky break. These cases got me a bit of a profile in a profession where you can't advertise yourself".

of a significant increase in the volume of Private Members' Bills. This is by no means a negative development, but it poses a challenge to the system, specifically in terms of how opposition TDs might be supported and resourced in preparing these Bills: "The Government has the AG's office to prepare and advise on its legislation, but Opposition members of the Dáil and Seanad will need greater resources to help them with preparing legislation if the system is to function more efficiently. Some Private Members' Bills have a good idea, or a good objective, but the technical skill or expertise often isn't there to develop it in the best legal language, and there may be technical problems, so it's causing a clog in the system".

One possible solution is the expansion of the Oireachtas' own small legal service to provide the necessary support. A former Secretary General in the Department of Communications, Energy and Natural Resources, Aidan Dunning, has prepared a report, which offers suggestions that acknowledge the wider context in which these Bills are presented: "Some Private Members' Bills are brought with the aim of voicing an issue in the Dáil, not really to change the law, so some change to the arrangements around Dáil speaking time might also help to resolve the issue".

The Office and the profession

An expansion of the legal services offered in Leinster House would be likely, of course, to lead to employment for legal professionals. Access to work emanating from the Attorney General's office, particularly for barristers at the start of their careers, is an ongoing issue, and one Séamus is keen to address: "I don't think the Office has had a specific policy in the past. Barristers can apply to be put on panels and can indicate their experience and expertise, but the difficulty for younger practitioners is a lack of experience. Part of my learning curve is trying to review the panels of counsel that are briefed by the State from the point of view of young barristers, and also of gender balance and diversity generally. When the Council of The Bar of Ireland was looking at ways to help young barristers get started, one of the suggestions was to assist them in obtaining discovery work, and the Bar now has a discovery database. I would hope to do something similar here, perhaps by establishing discovery panels. There was also in the past a system whereby the top three candidates from King's Inns in each year would be put on some panels for State work even though they are in their first year of practice. I'm looking at renewing that".

Séamus is in no doubt that the State gets value for money from the legal professionals it engages: "People are often willing to do work for the State at lower rates than commercial fees; the work is interesting and there's an element of public service".

> *"There will always be room in Ireland for a profession of advocates who specialise in the presentation of oral arguments in court. The only question may be whether or not the Bar reduces in size as a result".*

A place for advocates

The profession is facing into a period of enormous change with the enactment of the Legal Services Regulation Act (LSRA), but Séamus feels that the fundamentals will not alter: "There will always be room in Ireland for a profession of advocates who specialise in the presentation of oral arguments in court. The only question may be whether or not the Bar reduces in size as a result. Some may avail of new structures to form partnerships, and the core group of advocates might become smaller. I'm not recommending that it does, but the economic reality is that it is difficult to get started in a career at the Bar, and some may choose a different model in their early years.

"Barristers have to be good at written submissions too, and there may be more emphasis on those in future. The European Court of Justice favours a greater balance, and provides a fixed, and normally shorter, time for oral arguments. Things may go that way here, and some re-balancing may not be a bad thing".

Before taking up his current post, Séamus worked extensively in the area of regulatory law, advising the Medical Council and the Teaching Council, among others, so his perspective on the LSRA is contextualised by a climate of increasing professional regulation: "Personally, I always felt it was a bit unrealistic to think that the Bar could be purely self regulated. It was always

Good sport

The son of a civil servant, Séamus grew up with a keen interest in how government, and society, is organised, but rather than heading in the direction of politics, chose to pursue a legal career. He cites the film *The Winslow Boy*, which he saw as an adolescent, as a pivotal moment: "I was fascinated by the courtroom scenes and always wanted to be a barrister rather than a solicitor".

Séamus studied law in Trinity College Dublin. A J1 summer in the US left him with a strong desire to return as a postgraduate, but an opportunity to go to Canada instead led him to Dalhousie University in Nova Scotia, the oldest law school in Canada, on a Killam Scholarship: "It's a great thing for people to get a taste of that North American positivity. The mid 1980s in Ireland was a very negative time, but in North America people leaving college still felt the world was their oyster. The trip also gave me the opportunity to play squash, which I love".

Séamus is married to fellow barrister Sheena Hickey, who stepped aside from practice when their children were born but is currently considering returning to the law. His daughter Grace is in second year at secondary school, while son Alex is in sixth class. A sports lover, squash remains his first love: "When you're on the squash court, you can't think about anything else. The ball is going fast, so you clear the head".

He plays a little tennis and golf, and as a staunch GAA fan he is, of course, celebrating a wonderful year for the Dubs. He is a mentor in his local GAA club in Clontarf, where both of his children play.

going to be necessary to have some degree of external regulation, for example in dealing with very serious disciplinary cases".

The issue of judicial appointments has also, of course, been a source of considerable controversy in recent times, and at the time of writing, the Judicial Appointments Bill had passed Second Stage in the Dáil and was due before the Oireachtas Justice Committee. Séamus feels it's important to focus on the fundamental aims of the Bill: "There's a difficult balance between having external and lay involvement in the appointment of judges, and the involvement of judges themselves, who know the candidates and know what's involved in the job. Whatever system is finally enacted by the Oireachtas, the important thing is that it will be capable of attracting and selecting the best candidates. Whatever the mechanism for appointing people, the criterion expressly stated in the Act is that merit should be the decisive principle. By and large the system has served us very well, but it probably is an important substantive provision in the Bill to say that that's the decisive factor in making the appointment".

The big issues

Two issues in particular look set to dominate not just the Attorney General's office but the nation as a whole in the next 12 months: the proposed referendum on the Eighth Amendment of the Constitution and Brexit. Séamus is no stranger to the myriad issues around the Eighth Amendment, having acted in the 'X Case' in the early 1990s (see panel): "The challenge will be in dealing with the very complex legal issues that arise when it comes to any form of amendment, and the drafting work that would go with that, which may involve not only the text of an amendment to the Constitution, but possibly having to prepare draft legislation. I'm in no way pre-empting the decision of Government, but in recent years there has been a methodology of saying that alongside the amendment there will be legislation, and the people need to know the shape of the legislation at the time they're voting on the amendment. The Taoiseach has said that he's hoping to have the referendum in May or June of next year, which means that there will be a lot of intensive work over a relatively short period of time".

In the case of Brexit, the legal problems are potentially immense: "There are huge challenges for this Office and all of Government as we approach 2019. To take one example, I attended a conference recently on the European Arrest Warrant, and what happens to a system that's been well developed in recent years to deal with the extradition of alleged offenders. Would there have to be new arrangements between the UK and all 27 remaining member states, or will there be the potential for bilateral agreements just with the UK? Further issues arise if the UK is not willing to accept the European Court of Justice as the arbiter in disputes".

A transition period may allow for things to be done more gradually: "There will have to be rules about what happens to cases that have already started: what's the cut-off going to be and things like that. So much of industry and services are regulated and governed by European Union rules that trying to disengage the British elements of that is going to be extremely complicated".

At the table

The Attorney General has the rare privilege among unelected officials of sitting at the Cabinet table, so what is it like to be present when decisions crucial to the running of the State are made?

"It's a fascinating experience and a huge privilege for someone who's not elected by the People to be able to attend and observe and listen to the elected Government doing its business. In some ways Cabinet is like any board of a company; it has its own dynamics and personalities. For somebody with an interest in politics and government it's particularly interesting and exciting to be there and part of it."

The Bar

As a formerly active member of The Bar of Ireland, and Vice Chairman of the Council at the time of his appointment to the post of Attorney General, Séamus remains an *ex officio* member, and hopes to retain a close connection to his professional body: "I would hope to attend some Council meetings – absenting myself when the Government is under discussion, of course. It's something that a number of my predecessors have done and something I would be very eager to do".

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

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ADMINISTRATIVE LAW

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DPP v O'Shea

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Damages – European Union law – Error of law – Referred to *Ewaen Fred Ogieriakhi v Minister for Justice and Equality and ors* (No.2) [2014] IEHC 582, Referred to *Ogieriakhi v Minister for Justice and ors* [2013] IEHC 133 – (Denham C.J., O'Donnell Donal J., McKechnie J., Clarke J., O'Malley Iseult J. – 13/07/2017) – [2017] IESC 52

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Unlawful discrimination – Jurisdiction – Employment equality law – Appellant seeking to disapply a statutory instrument made by the respondent – Whether appellant had jurisdiction to set aside or disapply substantive law – Referred to *Minister for Justice and Commissioner of Garda Síochána v Director of the Equality Tribunal* [2010] 2 IR 455, Referred to *Revenue and Customs Commissioners v Droog* [2016] 10 JIC 0601, Referred to *Tormey v Ireland* [1985] IR 289 – (Clarke J., MacMenamin J., Laffoy J., Dunne J., O'Malley Iseult J. – 15/06/2017) ≠ [2017] IESC 43
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European Communities (intra-community transfers of defence related products) (amendment) regulations 2017 – SI 268/2017
European Communities (marine strategy framework) (amendment) regulations 2017 – SI 265/2017
European Communities (nuclear safety) regulations 2017 – SI 332/2017
European Communities (public authorities' contracts) (review procedures) (amendment) regulations 2017 – SI 327/2017
European Union (award of concession contracts) (review procedures) regulations 2017 – SI 326/2017
European Union (insurance and reinsurance) (amendment) regulations 2017 – SI 384/2017
European Union (markets in financial instruments) regulations 2017 – SI 375/2017
European Union (passenger ships) (amendment) regulations 2017 – SI 295/2017

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European arrest warrant – Surrender – Constitution – Appellant seeking an order setting aside an order of the Supreme Court – Whether the application was directly contrary to the provision of Article 34.4.6º of the Constitution – Referred to *Barlow v Minister for Agriculture, Food and the Marine* [2016] 10 JIC 2701, Referred to *Minister for Justice and Equality v O'Connor* [2017] IESC 21, Referred to *Minister for Justice Equality and Law Reform v Wharrie* [2016] 10 JIC 2705 – (O'Donnell Donal J., McKechnie J., MacMenamin J. – 03/07/2017) – [2017] IESC 48
Minister for Justice and Equality v O'Connor

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Polygamous marriage – Public policy – Conflict of laws – Appellant seeking a declaration that his marriage with his first wife was valid as of the date of its inception – Whether Irish law either requires or prohibits the recognition of either or both of the appellant's two marriages – Distinguished *Balmer v Minister for Justice and Equality* [2016] IESC 25, Distinguished *Nottinghamshire County Council v B* [2013] 4 IR 662 – (Denham C.J., O'Donnell Donal J., Clarke J., MacMenamin J., Laffoy J., Charleton J., O'Malley Iseult J. – 15/06/2017) – [2017] IESC 40
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[pmb]: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Rugby World Cup 2023 Bill 2017 – Bill 78/2014
Waste Reduction Bill 2017 – Bill 80/2017
Legal Metrology (Measuring Instruments) Bill 2017 – Bill 81/2017
Thirty-fifth Amendment of the Constitution (Protection of Pension Property Rights) Bill 2017 – Bill 82/2017 [pmb] – Deputy Willie O'Dea
Rent Transparency Bill 2017 – Bill 85/2017 [pmb] – Deputy Noel Rock
Equality (Miscellaneous Provisions) Bill 2017 – Bill 87/2015 [pmb] – Deputy Jim O'Callaghan and Deputy Fiona O'Loughlin
Education (Regulation of Voluntary Contributions in Schools) Bill 2017 – Bill 90/2017 [pmb] – Deputy Carol Nolan
Planning and Development (Amendment) (No. 2) Bill 2017 – Bill 91/2017
Planning and Development (Rapid Broadband) Bill 2017 – Bill 93/2017 [pmb] – Deputy James Lawless
Social Welfare, Pensions and Civil Registration Bill 2017 – Bill 94/2017
Roads (Amendment) Bill 2017 – Bill 95/2017 [pmb] – Deputy Aengus Ó Snodaigh
Genuine Progress Indicators and National Distributional Accounts Bill 2017 – Bill 96/2017 [pmb] – Deputy Brendan Howlin
Ministers and Secretaries (Amendment) Bill 2017 – Bill 97/2017
Education (Inspection of Individual Education Plans for Children with Special Needs) Bill 2017 – Bill 98/2017 [pmb] – Deputy Carol Nolan
Small Unmanned Aircraft (Drones) Bill 2017 – Bill 99/2017 [pmb] – Deputy James Lawless
Defamation (Amendment) Bill 2017 – Bill 102/2017 [pmb] – Deputy Róisín Shortall and Deputy Catherine Murphy
Thirty-fifth Amendment of the Constitution (Blasphemy) Bill 2017 – Bill 103/2017 [pmb] – Deputy Catherine Murphy and Deputy Róisín Shortall
Waste Reduction (Miscellaneous Provisions) Bill 2017 – Bill 104/2017 [pmb] – Deputy Brian Stanley
Island Fisheries (Heritage Licence) Bill 2017 – Bill 105/2017 [pmb] – Deputy Martin Kenny, Deputy Martin Ferris and Deputy Pearse Doherty
Court Funds Administration Bill 2017 – Bill 106/2017 [pmb] – Deputy John McGuinness
Road Traffic (Amendment) Bill 2017 – Bill 108/2017
National Archives (Amendment) Bill 2017 – Bill 110/2017

Bills initiated in Seanad Éireann during the period June 22, 2017, to September 27, 2017

National Housing Co-operative Bill 2017 – Bill 84/2017
Mortgage Arrears Resolution (Family Home) Bill 2017 – Bill 88/2017 [pmb] – Deputy Michael McGrath
Life Saving Equipment Bill 2017 – Bill 92/2016 [pmb] – Senator Keith Swanick, Senator Diarmuid Wilson, Senator Robbie Gallagher and Senator Paul Daly
Education (Welfare) (Amendment) Bill 2017 – Bill 109/2017 [pmb] – Senator Aodhan Ó Ríordáin, Senator Gerald Nash and Senator Kevin Humphreys

Progress of Bills and Bills amended during the period June 22, 2017, to September 27, 2017

Education (Admission to Schools) Bill 2016 – Bill 58/2016 – Committee Stage
Civil Liability (Amendment) Bill 2017 – Bill 1/2017 – Committee Stage
Criminal Justice (Victims of Crime) Bill 2016 – Bill 121/2016 – Report Stage – Passed by Dáil Éireann
Financial Services and Pensions Ombudsman Bill 2017 – Bill 59/2017 – Report Stage – Passed by Dáil Éireann
Health and Social Care Professionals (Amendment) Bill 2017 – Bill 76/2017 – Committee Stage
Mediation Bill 2017 – Bill 20/2017 – Committee Stage – Report Stage – Passed by Dáil Éireann
Mental Health (Amendment) (No. 2) Bill 2017 – Bill 23/2017 – Committee Stage – Report Stage – Passed by Dáil Éireann
Minerals Development Bill 2015 – Bill 69/2015 – Report Stage – Passed by Dáil Éireann
National Shared Services Office Bill 2016 – Bill 20/2016 – Committee Stage – Report Stage
Planning and Development (Amendment) (No. 2) Bill 2017 – Bill 91/2017 – Committee Stage – Passed by Dáil Éireann
Rugby World Cup 2023 Bill 2017 – Bill 78/2017 – Committee Stage – Passed by Dáil Éireann
Thirty-Fifth Amendment of the Constitution (Divorce) Bill 2016 – Bill 57/2016 – Committee Stage
Adoption (Amendment) Bill 2016 – Bill 23/2016 – Committee Stage
Autism Spectrum Disorder Bill 2017 – Bill 61/2017 – Committee Stage
Central Bank and Financial Services Authority of Ireland (amendment) Bill 2014 – Bill 88/2014 – Committee Stage
Intoxicating Liquor (Amendment) Bill 2017 – Bill 26/2017 – Committee Stage – Passed by Seanad Éireann
Mediation Bill 2017 – Bill 20/2017 – Committee Stage
Planning and Development (Amendment) (No. 2) Bill 2017 – Bill 91/2017 – Committee Stage (Initiated in Seanad)
Prohibition of the Exploration and Extraction of Onshore Petroleum Bill 2016 – Bill 37/2016 – Committee Stage
Recognition of Irish Sign Language for the Deaf Community Bill 2016 – Bill 78/2016 – Committee Stage

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

Bills and legislation – http://www.oireachtas.ie/parliament/
Government Legislation Programme updated September 19, 2017 – http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

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An Taisce – The National Trust for Ireland v McTigue Quarries Limited and ors – [2017] IESCDET 90 – Leave to appeal from the High Court granted on 28/07/2017 – (Clarke J, MacMenamin J., O'Malley J)

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

Protecting children's rights

This year's McGuinness Fellow, BEATRICE VANCE BL, has been working with the Children's Rights Alliance to improve the lot of children across Ireland, Europe and beyond.

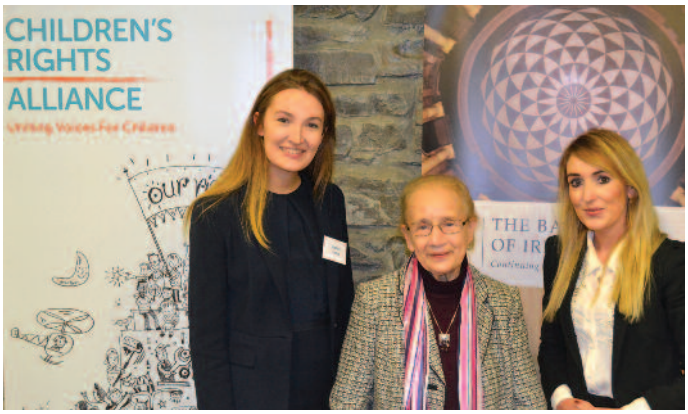
In July 2016, I was delighted to become the second Children's Rights Alliance and The Bar of Ireland Catherine McGuinness Fellow, succeeding Catríona Doherty BL. This prestigious Fellowship is named in honour of one of Ireland's greatest children's rights champions, Judge Catherine McGuinness, former member of the Supreme Court of Ireland and member of the Council of State. The Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. The Fellowship runs for one year and the fellow works as part of the Alliance's legal and policy team. The aim is that the fellow adds value to the work of the Alliance by providing legal expertise as a qualified barrister. In return, the fellow is provided with a unique developmental opportunity to enhance their reputation and future prospects.

Influencing legislation

My year began supporting the team with the drafting of a position paper on the Criminal Law (Sexual Offences) Bill 2015. This involved comparing the Bill with current legislation, conducting a gap analysis and assessing whether the United Nations Convention on the Rights of the Child (UNCRC) and European legal standards were met in the Bill. It was great to see the final policy paper referred to by members of the Oireachtas in Dáil debates, which I attended. The Alliance held a seminar on the Bill on October 3, 2016, at which I had the chance to meet the Tánaiste, who opened the event, as well as Prof. Geoffrey Shannon, Founding Patron of the Children's Rights Alliance and the Special Rapporteur on Child Protection. I, along with my colleagues in the Alliance, welcomed the enactment of a large part of the Bill in early 2017.[1]

Child Summit

In September 2016, the Alliance, with the Department of Children and Youth Affairs, co-hosted the first Child Summit in Croke Park. This was a national symposium to look at recommendations made by the UN Children's Committee in 2016, following its examination of Ireland's children's rights record. Two members of the Committee addressed attendees: Gehad Madi and Prof. Kirsten Sandberg. Young people from the Alliance and UNICEF Ireland's 'Picture Your Rights' project team also addressed attendees about the issues facing children



From left: Beatrice Vance BL; Judge Catherine McGuinness; and, Catríona Doherty BL at the access to justice event in the Distillery Building.

in Ireland. Minister for Children and Youth Affairs, Dr Catherine Zappone TD, addressed the event, alongside other prominent children's rights champions including Dr Niall Muldoon, Ombudsman for Children, and Prof. Geoffrey Shannon. This event highlighted both Ireland's achievements and shortcomings in implementing the UNCRC.

Education and training

Later in September I worked with Julie Ahern, the Alliance's Membership and Public Affairs Officer, in delivering know your rights training to a range of second-tier advice givers and practitioners in St Patrick's University Hospital. The Alliance and the Irish Council for Civil Liberties have produced a guide on children's rights and entitlements in plain language. The training encompassed legal sources and focused on the rights of child service users in healthcare settings.

In November 2016, the Alliance hosted an access to justice seminar in the Distillery Building, in association with The Bar of Ireland and supported by the Family Lawyers Association of Ireland. Paul McGarry SC, Chairman of the Council of The Bar of Ireland, officially opened the proceedings. This seminar, chaired by Judge McGuinness, reflected on the current experiences of children in the Irish courts. The inaugural Catherine McGuinness Fellow, Catríona Doherty BL, presented a paper on victims' legislation on a panel with Prof. Ursula Kilkelly of University College Cork and Carol Coulter of the Child Care Law Reporting Project. I was delighted to be formally introduced as the new Fellow by Tom Costello, Chair of the Alliance.

In January 2017, the Alliance was very supportive and encouraging when, through my work as a member of the legal panel in the International Protection Office (IPO), I was deployed to the island of Chios, Greece, to work in a refugee camp with the European Asylum Support Office.

Report Card

A mammoth task that the Alliance undertakes each year is its 'Report Card', a look at how the Government is progressing on children's rights. This year marks the ninth year of the Report Card series and it was launched in February. Each year, commitments in the Programme for Government relevant to children's rights are examined by the Alliance and are graded by an independent panel, based upon the Government's fulfilment of each commitment. The assessment panel was chaired by Judge McGuinness and included solicitors Catherine Ghent, Gareth Noble and Michael Farrell. I worked on the chapters 'Rights in the Family Environment and Alternative Care' and 'Equality', which encompassed child protection, guardians *ad litem* and rights of minorities. My involvement in the Report Card 2017 process allowed me to gain a valuable insight into the level of research and work that goes into such a project.

During the year, the Alliance has been working with the Irish Penal Reform Trust (IPRT) on a project led by Drs Fiona Donson and Aisling Parkes of UCC, which aims to develop an advocacy and research strategy on the rights of children affected by parental imprisonment.[2] This project is funded by the Irish Research Council and was launched in September 2017. In March, I got the incredible opportunity to travel to New Zealand along with Drs Donson and Parkes to deliver a paper on the rights of children of incarcerated parents at a conference hosted by the International Coalition for the Children of Incarcerated Parents.

Beatrice (left) at the International Coalition for Children with Incarcerated Parents Conference in Rotorua, New Zealand, with Dr Aisling Parkes (right) and Dr Fiona Donson.

Detention rules

As my final piece of work for the Alliance, I worked on a submission to the Council of Europe, which is seeking to codify a detailed set of immigration detention rules based on existing international and regional human rights standards. This will inform the preparation of a draft legal instrument on the conditions of administrative detention of migrants. I concentrated on the areas of access to legal advice and representation, and information on rights and obligations.

Throughout my year with the Alliance, I had the opportunity to meet many motivating, dedicated and pivotal women and men who work extremely hard to improve the lives of children in Ireland. Not only did I have the chance to work closely with Tanya Ward, Chief Executive, and the Alliance team, I met the Tánaiste, the Minister for Children and Youth Affairs and Judge McGuinness on several occasions. I managed to juggle the Fellowship with my criminal practice in the children's court, my civil and criminal practice generally, and my work with the International Protection Office (IPO), all with the support of the Alliance. I also gained skills and training in policy analysis, governance and strategic planning. My time with the Alliance gave me an insight into the input and influence a national non-government organisation can have on achieving important law reform and social change.

Finally, I would like to acknowledge the support of The Bar of Ireland, whose endorsement is key to the success of the Fellowship programme. The support of the Family Lawyers Association of Ireland is also greatly valued.

References

1. S.I. No. 112/2017 Criminal Law (Sexual Offences) Act 2017 (Commencement) Order 2017.
2. This is to build on the IPRT's 2012 Report 'Picking up the Pieces: The Rights and Needs of Children and Families Affected by Imprisonment', which identified the need for research in the area.

A benchmark for bullying claims

The Supreme Court decision in *Ruffley* sets a benchmark for workplace bullying claims.[1]

Marguerite Bolger SC

Introduction

The recent Supreme Court decision in the case of *Ruffley*[2] has examined the concept of bullying in the workplace in the context of an unfair disciplinary procedure. In his judgment, O'Donnell J. described it as a novel case, which "will set a benchmark for all bullying claims", involving treatment which he viewed as being at the margins of workplace bullying. While the plaintiff was ultimately unsuccessful in her substantive claim, a careful consideration of the judgments, particularly that of O'Donnell J., shows that the Supreme Court has validated and endorsed the cause of action of workplace bullying in Irish law, particularly in listing a number of examples of the type of conduct that may ground successful claims in the future.

Background

The facts of the case were relatively simple, but have given rise to complex legal analyses within the difficult area of interpersonal relationships. Ms Ruffley was (and still is) a special needs assistant in a school for children with physical and intellectual disabilities. On September 14, 2009, Ms Ruffley was caring for a child when he fell asleep in the sensory room of the school while she had the door locked, which was common practice for her and her colleagues. Both the class teacher and the principal confirmed that Ms Ruffley was to allow the pupil to continue sleeping. Neither discussed with Ms Ruffley at that time the locking of the door. The next day, the principal informed Ms Ruffley of her concern regarding the locking of the door and that she was treating the incident as a disciplinary matter. Ms Ruffley was put under a review process for three months in relation to the child. Four weeks into that review, Ms Ruffley, in a meeting with another teacher, sought to correct a form she had filled out about the child's progress, but the teacher refused to allow this and recorded it as "miscommunication". The principal accused Ms Ruffley of falsification and at that stage decided to bring the entire matter to the board. The Chairman of the board was very concerned about locking the sensory room door. The board considered the entire matter in Ms Ruffley's absence and she was never afforded an opportunity to make representations to them. The principal recommended a verbal or written warning. Some members of the board wanted Ms Ruffley to be dismissed. The board's reaction was described by O'Neill J. in the High Court judgment as "downright intemperate", which he found suggested as a matter of probability that the account given by the principal to the board of the history of the matter "was almost certainly untrue, highly biased, coloured and grossly and unfairly damnified the plaintiff". O'Neill J. said that he did not think the members of the board would have reached conclusions so adverse to the plaintiff "unless grossly misled as to the true circumstances prevailing". In December, a month after the board's meeting, Ms Dempsey informed Ms Ruffley that she was to get a final stage part 4 warning, which would stay on her file for six months. In January, Ms Ruffley was summonsed to another meeting with Ms Dempsey and the Chairman of the board, Mr Lynch, and was given a final stage part 4 warning, which was to stay on her record for 18 months. Ms Ruffley attended a further meeting with Ms Dempsey a few days later at which O'Neill J. found she was "belittled, humiliated and reduced to tears". Ms Ruffley appealed the final warning through her trade union and sought to rely on a questionnaire she had given to her fellow SNAs inquiring if they had ever locked the sensory room door or if they had been asked by the principal to lock the sensory room door. Four of them answered yes to the first question and no to the second. In June, the board considered the appeal and endorsed the original warning. In correspondence with Ms Ruffley's solicitors, the board acknowledged that other members of staff had locked the door of the sensory room but stated that this was not school policy. There was another incident some months later on September 27, 2010, when Ms Ruffley was reprimanded by Ms Dempsey for being late. This was described by O'Neill J. as the last straw. Ms Ruffley was certified as unfit for work. Ms Ruffley was awarded substantial damages by the High Court. The decision was overturned in the Court of Appeal, and while the Supreme Court upheld the decision,[3] the Court declined to make any order in relation to the payment out of €100,000 to Ms Ruffley and directed the school to pay half of Ms Ruffley's High Court costs.[4]

The Court of Appeal: a "largely fact driven analysis"[5]

The Court of Appeal decided by majority of 2:1 that Ms Ruffley had not established evidence of actionable bullying as she had not satisfied the Court that her treatment came within the definition of workplace bullying. The President emphasised the bona fide nature of the Chairman's concerns about locking the sensory room door. He found that the disciplinary process, while it may have arisen from a misunderstanding, was honestly pursued in the interests of the children and that there was nothing in the process constituting a sustained campaign maliciously pursued in order to intimidate or humiliate or denigrate the plaintiff. Irvine J. focused more on the concept of dignity in the definition of workplace bullying. She accepted that a right to dignity at work entitled a person to be treated with fairness but found that the evidence did not amount to bullying within the definition. Finlay Geoghegan M. delivered a powerful dissenting judgment. Like Irvine J., she emphasised the concept of dignity, which she found included: "a right to be treated with respect, fairly and not less favourably than other colleagues in a similar position".

The questions formulated by the Supreme Court

Ms Ruffley was granted leave to appeal to the Supreme Court on two questions:

1. Whether an unfairly carried out disciplinary process resulting in psychiatric injury is, in itself, capable of being actionable in damages on the basis that it amounts to workplace bullying without evidence of malicious intent on the part of the employer.
2. Whether behaviour not witnessed by other persons in the workplace is capable of undermining the dignity of an employee.

Although both questions were answered in favour of the appellant, the decision of the Court of Appeal was upheld. The Supreme Court went beyond the narrow focus of the two questions and attempted to address some of the broader issues thrown

up by the law on workplace bullying. While the more inclusive consideration of the issues by the Supreme Court is welcome, it was regrettable that the Court's consideration of this important issue was artificially constrained by the two specific questions. O'Donnell J. accepted that this meant:

"that the Court did not perhaps have the range of materials and depth of submissions as might have been provided if the broader issue had been addressed from the outset, and so my conclusions as to the law must be subject to some qualification and the possibility of refinement in future cases".

In answering the first question in the negative, both O'Donnell J. and Charleton J. conceptualised workplace bullying as a breach of the duty of care owed by an employer to its employees. Therefore, proof of intent (malicious or otherwise) is not required to establish liability for workplace bullying, even though evidence of such an intention would undoubtedly strengthen the claim. The second question arose from findings made in the majority judgments of the Court of Appeal that certain events did not require the consideration of the Court as they took place in Ms Ruffley's absence or without her knowledge. This question was dealt with firmly by O'Donnell J., who found that behaviour conducted in private can ground a claim for bullying, even though "any element of humiliation in public will certainly strengthen a claim".

The definition of workplace bullying

Workplace bullying has long been defined as the following:

"Repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work".

This definition was accepted by the Supreme Court in *Quigley v Complex Tooling and Moulding Limited*,[6] where Fennelly J. identified treatment that satisfied the definition: "[E]xcessive and selective supervision and scrutiny… unfair criticism, inconsistency, lack of response to complaint and insidious silence".

This dicta was quoted with approval by Charleton J. in *Ruffley*. O'Donnell J., in considering the definition, cautioned against viewing its components as "separate and self-standing issues" and pointed out that: "it is a single definition and a single test: was the defendant guilty of repeated inappropriate behaviour against the plaintiff which could reasonably be regarded as undermining the individual's right to dignity at work?" He emphasised the "distinctive" language of the definition, each point of which was "at a markedly elevated point on the register".

He concluded that:

"What must be repeated is inappropriate behaviour undermining the personal dignity of the individual… It is when a pattern of behaviour emerges that it can be said that the behaviour is repeated for the purposes of a definition. What must be repeated is the behaviour which is inappropriate and which undermines personal dignity. It is not enough that what is alleged to constitute unfair procedures is comprised of a number of different steps unless each of those steps can be said in themselves to be inappropriate and undermine human dignity".

Inappropriate behaviour

In focusing on the concept of "inappropriate behaviour", O'Donnell J. emphasised the need to assess "the question of propriety and human relations, rather than legality". In applying that to Ms Ruffley's treatment, he agreed that she was humiliated by Ms Dempsey and reduced to tears at the meeting of January 27, 2010. By contrast, he found that the board's decision to impose a disciplinary sanction on her in a manner that was unfair, flawed and liable to be quashed as invalid and unlawful could not be said "without more, to be inappropriate in the sense in which that word is used in the definition".

Dignity

There was an interesting discussion around the concept of dignity, which O'Donnell J. described as "perhaps the most important aspect of the definition" and "a central feature of the test". He said the requirement of conduct undermining dignity at work:

"is a separate distinct and important component of the definition of bullying which

identifies the interests sought to be protected by the law, and just as importantly limits the claims which may be made to those which can be described as outrageous, unacceptable, and exceeding all bounds tolerated by decent society".

While denial of fair procedures is never a trivial matter, he did not consider that it could be said to be undermining of human dignity, particularly when it is the same breach of procedures which is also contended to be inappropriate.

What will satisfy the definition?

O'Donnell J. described bullying as involving "a question as to how something was done rather than what was done". He stressed that the difficulties with Ms Ruffley's treatment were with what was done (being the procedures adopted or the lack of them) rather than the manner in which it was done (personal remarks or offensive behaviour). In analysing how and when the manner of an employee's treatment might constitute a breach of their employer's duties, O'Donnell J. gave a number of examples of workplace bullying such as ridicule, personal antagonism, exclusion from a group, shouting in public, the making of disparaging remarks in public or private about work, appearance, gender or sexuality, status or racial origin, intimidation, the circulation of damaging gossip or the use of aggressive and obscene language, or repeated requests to do tasks which were either menial or impossible to perform in the time required. Later in his judgment he gave what he called "familiar examples of bullying", such as:

"purposely undermining an individual, targeting them for special negative treatment, the manipulation of their reputation, social exclusion or isolation, intimidation, aggressive or obscene behaviour, jokes which are obviously offensive to one person, intrusion by pestering, spying and stalking – these examples all share the feature that they are unacceptable at the level of human interaction. That in turn is consistent with the concept of human dignity being protected".

This may be the most important aspect of the entire decision for the development of the jurisprudence on bullying claims. The examples set out what may satisfy the definition of workplace bullying (unlike the application of the flawed disciplinary procedure applied to Ms Ruffley). In any future case where a plaintiff can establish evidence of such conduct, then they may well be able to establish liability for any recognisable psychiatric injury they sustain as a direct consequence.

When a disciplinary procedure could involve actionable bullying

Both judgments of the Supreme Court found that Ms Ruffley's treatment within a flawed disciplinary procedure did not satisfy the definition of workplace bullying. Charleton J. gave a strong endorsement of the right of an employer to invoke a disciplinary procedure and endorsed what might be viewed as the default position in which a disciplinary procedure will not satisfy the objective definition of workplace bullying:

"Correction and instruction are necessary in the functioning of any workplace and those are required to avoid accidents and to ensure that productive work is engaged in. It may be necessary to point to faults. It may be necessary to bring home a point by requesting engagement in an unusual task or longer or unsocial hours. It is a kindness to attempt to instil a work ethic or to save a job or a career by an early intervention. Bullying is not about being tough on employees. Appropriate interventions may not be pleasant and must simply be taken in the right spirit. Sometimes a disciplinary intervention may be necessary".

However, the converse of that analysis of an acceptable disciplinary procedure must be that where such intervention is not necessary and/or not appropriate, it could come within the definition of workplace bullying and ground a claim for damages. O'Donnell J. did seem to countenance the possibility of a person being targeted or singled out for disciplinary sanction as potentially constituting actionable bullying:

"[I]n many cases in which it can be said a person has been 'targeted' or 'singled out' for disciplinary sanction and which constitutes part of a finding of bullying, the fact of a general practice will have been known to the superior prior to the initiation of any disciplinary process, and in such circumstances may give rise to the inference that the disciplinary proceedings are not being pursued bona fide because of a concern about the practice or behaviour, but rather as a form of punishing and perhaps humiliating the individual concerned".

So the misuse of a disciplinary procedure as a way of getting at the individual when the reason for invoking the procedure is not a bona fide one, and workplace bullying prior to the initiation of a disciplinary process, could give rise to an inference that the process itself was not instigated in good faith. The application of the test is objective rather than subjective, a point heavily emphasised by the Court of Appeal and by the Supreme Court throughout the case, including in determining the question for appeal.[7] A disciplinary process does not enjoy a blanket immunity from the application of the test for workplace bullying, a point Irvine J. had noted in her judgment in the Court of Appeal:

"Behaviour that can objectively be viewed as bullying enjoys no safe haven merely by reason of the fact that it may have taken place in the context of a disciplinary process".

Conclusions

Once again, as they did in *Quigley*, the Supreme Court has endorsed the cause of action of workplace bullying. While it is now difficult (although not impossible) to mount a claim of bullying based on the application of a disciplinary procedure, the Court has confirmed the behaviours that will satisfy the definition and thereby establish a breach of the duty owed by an employer to their employees. Bullying and harassment claims are, post *Ruffley*, as difficult as they ever were, but they are far from unstateable!

References

1. This is an edited version of a paper presented to the Employment Bar Association on July 19, 2017. I am grateful to Cathal O'Currain BL for his helpful comments on an earlier draft of my paper.
2. *Ruffley v The Board of Management of Saint Anne's School* [2017] IESC 33.
3. [2017] IEHC 33. Judgments of May 26, 2017.
4. *Ex tempore* decision of July 17, 2017.
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The hidden persuaders and the inner nature of the tort action

Hidden forces are at play in the presentation of information regarding awards of damages in personal injury cases.

Mr Justice Kevin Cross
Dmitriy Gelfand

2017 marks the 50th anniversary of the publication in *The Irish Jurist* of the 'Inner Nature of the Tort Action' by J.M. Kelly (*The Irish Jurist* 1967, Vol. II, p. 279). Prof. Kelly argued, perhaps whimsically, that the traditional theory for the awarding of damages in a tort action for non-pecuniary loss (endeavouring to put the plaintiff in the same position "so far as money can do so" as if the wrong had not been committed) was false, and rather, the inner nature of the tort action was to provide "satisfaction" as in a duel, so that the damages ought to reflect not what sum should compensate a plaintiff for his loss, but "what sum will satisfy my present feelings about my loss? How much would I take (not as an exchange for my pain or lost health, but) to let the defendant go". The plaintiff, if Prof. Kelly was correct, is to be regarded therefore as a duellist or a gladiator, and the damages are the duellist's satisfaction.

2017 also marks the 70th anniversary of the publication of *The Hidden Persuaders* by Vance Packard, which highlighted how large corporations manipulated consumers using advertising, frequently hidden advertising, techniques.

In relation to personal injury actions, the public has to suffer articles and programmes, usually inspired by the insurance industry, one of the gladiators in the arena, which advise that the reason for significant hikes in motor, public liability and employer's liability insurance premiums is because of the 'compensation culture' and allegedly recently inflated awards of damages. The purpose of this article is to demonstrate that these allegations, often by hidden persuaders, are not just an inaccurate suggestion as to why insurance premiums have risen, but also represent a sustained attempt to influence the level of damages. The evidence suggests that these hidden persuaders have had their desired effect. The gladiator has been 'netted' by the ringmaster.

Fraudulent claims

In conjunction with articles and programmes attacking the level of damages, the insurance industry has also funded advertisements attacking fraudulent claims. There is no doubt that a fraudulent claim should be harshly treated and dismissed. The courts now, of course, have power not alone to dismiss the entirety of a fraudulent claim but also to dismiss claims that include an inflated or exaggerated basis.

Plaintiffs are obliged to verify their claim by affidavit, and are routinely subjected to line-by-line cross-examination as to the contents of their pleadings with a view to exposing any inconsistencies or exaggerations. If exaggeration is found, then the penalties are severe. Defendants are also obliged to verify their claims. The court should, if requested, insist that the person swearing the defendant's affidavit is, like the plaintiff, someone who can be brought to account in the event of inaccuracies.

If an exaggerating plaintiff should be penalised, then the same fate should also await a defendant who is careless in relation to the oath.

Of course, no person who wanted to mount a fraudulent claim is going to be put off by billboard ads showing persons in a neck collar with a Pinocchio nose. Such advertisements only have the effect of dissuading the timid genuine plaintiff from asserting their rights by the general smearing of injured parties and their cases with the catch-all label of 'compensation culture'. Unfortunately, such advertisements, and the consistent campaign by the hidden persuaders has, it seems, subconsciously influenced the judges.

Damages

In relation to the quantum of damages, the position is that in recent years general damages have reduced rather than increased in actual terms, and when inflation

is taken into account, damages for personal injury have, during the course of my practice as a barrister since the mid 1970s, dramatically decreased.

In 1967, Prof. Kelly remarked that as a matter of practice, an Irish judge or jury would award something in the order of £500 for a fractured thigh necessitating some weeks convalescence but not involving any residual disablement, and asked the question why approximately £500 was regarded as an apposite award for the broken thigh: "why not £50? or £50,000?". The classic formulation of the purpose of damages for non-pecuniary loss such as personal injury is to put the injured party in the same position as he or she would have been had the tort not occurred. As Prof. Kelly rightly said, not one person in one hundred would submit to having his or her thigh cracked in exchange for an immediate cheque for £500 or even £550. Of course, £550 was £50 more than a strict interpretation of legal theories, suggesting that persons would be queuing up to have their thigh fracture. Be that as it may, the awarding of damages is not and never has been a legal exercise in the true sense. It must, of course, be done legally in that the award must be fair to both parties and neither motivated by sympathy towards the plaintiff's injuries nor by concern for the effect an award might have upon the defendant. The assessment of damages is an exercise in common sense. A judge is also now obliged to have regard to the Personal Injuries Assessment Board (PIAB) Book of Quantum, and to take some account of comparisons with other cases. Naturally, serious injuries require serious damages, moderate injuries moderate damages, and small injuries require small damages. However, a judge is not engaged in any Benthamite exercise of measuring comparators in any pseudoscientific manner. The judge's first obligation is to assess the sum that would put the plaintiff in the position that he or she would have been in had the injury not occurred. That is the legal principle and it is the judge's first obligation. If comparisons were to come before that legal principle, then you would have an inevitable downward drag upon awards in that comparisons always look back to the past. The award must be good in principle before any comparisons are made.

The assessment of the amount of damages involves the judge's subjective view of what is reasonable. In other words, since the abolition of juries in 1988, a judge has to transform himself or herself into that which he or she is not (i.e., a 'reasonable man') and decide upon a figure to compensate the injured party. When juries assessed damages, there was, at least, an approximation available to the legal system of the reasonable man in that 12 reasonable persons assessed what they believed to be fair. That safeguard has been removed and the law requires judges to do the job.

The fallacy of rising damages

Recent statements from the insurance industry suggested that in the last few years, the "average" High Court award has increased. That observation was repeated in the media without any scrutiny or comment. It is not clear how the

insurance industry would have been aware of the "average" High Court awards or settlements, since the vast majority of cases are settled and the amount of the award is not disclosed. The Courts Service has no record of the awards. The insurance companies do not, we are told, share data between themselves.

In any event, accepting, for the purposes of argument, that the "average" award in the High Court has increased in the last number of years, that of itself tells you absolutely nothing.

First of all, the jurisdiction of the Circuit Court in personal injury actions has increased to €60,000 and, accordingly, the large bulk of cases under €60,000 since February 3, 2014 or so has been removed from the High Court jurisdiction and the "average" will, therefore of necessity, have risen.

Secondly, the large catastrophic birth injury cases reported in the newspapers, which do involve very significant awards to compensate persons injured at birth or the like, have indeed increased in the last few years due to the high cost of care, etc., for these catastrophically injured persons and due to the need (as stipulated by the Court of Appeal in the *Gill Russell* case) to increase actuarial figures into the future. It is not damages for pain and suffering that are to compensate the plaintiff for the injury, but rather the special damages, which are the costs and expenses actually incurred, or that will be incurred, that have resulted in significant increases in awards for catastrophic injury. Also, these cases are, of course, funded not by the insurance industry but by the State Claims Agency and can have no effect on the cost of insurance.

Thirdly, in all cases, not just catastrophic injuries, what has increased is not general damages for pain and suffering but the special damages, the out-of-pocket expenses, the cost of repair of a motor vehicle, the loss of earnings in the past and into the future, and in some cases the cost of care in the past and into the future. All of these items of special damages have increased over the years in line with the cost of living. Indeed, medical expenses and damages have sometimes increased greatly in excess of the rate of inflation. These increases in special damages, of course, mean that a headline figure is published in a newspaper or in the media saying "€X for supermarket fall", etc., whereas a significant portion of the "X" will relate to these special damages, which are not compensation to the plaintiff for the injuries sustained but payment for actual costs incurred and financial loss. Members of the public are rarely informed what percentage of "X" relates to general damages. As judges used to advise juries, when all the special damages have been totalled up amounting even to a very substantial figure, no compensation had by that stage been provided to the plaintiff for the fact of the injury. Possibly judges might remind themselves of that legal principle when they are assessing damages.

The price of a house

When I commenced practice as a barrister in the second half of the 1970s, the upper jurisdiction of the Circuit Court was £2,000 and a fairly moderate High Court award from a jury of £10,000 general damages would purchase you a fine house in Cork, where I practised at the time. At the same time, a good award of £20,000 would purchase you, at least, two fine houses, one of which you could live in and one to rent, and in effect to provide for your needs for the rest of your life. If you obtained an award of say £50,000 in general damages, you would have been in a position to purchase a licensed premises. A plaintiff would require to be either catastrophically or very significantly injured today in order to purchase a single house.

None of those figures represented an award at this time for what might be described as a catastrophic or really significant injury. In 1984, the Supreme Court in *Sinnott v Quinnsworth* fixed what is called a "cap" on general damages in certain catastrophic cases (in which all the needs of a plaintiff for loss of earnings, future care, and the costs of aids and appliances had been catered for in the special damages) at the then rate of £150,000. In *Sinnott v Quinnsworth*, the jury had awarded a sum of £800,000 for general damages but the Supreme Court differentiated a catastrophically injured party, all of whose needs were catered for by extensive special damages, from other plaintiffs who would have more freedom to spend their general damages.

In 2009, in *Yun v MIBI and Tao* [2009] IEHC 318, Quirke J. considered all the authorities and fixed the "cap" at €500,000, which he then reduced to €450,000 due to the economic collapse the country was experiencing at the time. Thankfully, that economic collapse is now a thing of the past.

It is not suggested that the level of damages should be pegged to the cost of house inflation, but an award of €450,000 today would equate to £100,000[1] in 1980. In 1980, £100,000 was being awarded for general damages in serious, but by no means catastrophic, cases.

£10,000 in 1980 is equivalent to €45,690 in 2016. The level of general damages has fallen fairly constantly over the years of this century. An injury that would have resulted in an award of £10,000 in 1980 would be unlikely to achieve anything near €45,690 today. It is, however, the plaintiffs with serious and significant injuries, rather than those with minor injuries, whose damages have been the most dramatically reduced.

The last increase in general damages occurred when juries were abolished and the assessment of general damages fell to judges after the Courts Act 1988. However, the increase of general damages did not last long, and by the conversion of the punt to the euro in 1999, a case that had been worth £30,000 would typically have resulted in an award of €30,000. Accordingly, far from increasing, the level of damages has decreased in absolute terms and has, *a fortiori*, decreased taking into account inflation.

I do not accept that when judges have been effectively reducing the level of general damages, they have been acting in response to a change of habits or perspective of the so-called 'reasonable man'. Judges should be very wary of mistaking the views of the reasonable man for those articulated in the pavilion bar of the local golf club. The only way to establish the views of the reasonable man would be to reintroduce juries, and that is highly unlikely. I would suggest that in their attitude to the awarding of damages, the courts have been reacting not to the unbiased view of the reasonable man, but rather have been doing the work of the hidden persuaders, acting on behalf of one of the gladiators in the arena.

Fair and reasonable

As previously stated, the award for general damages is one that the judge considers to be fair and reasonable. Whether he or she does so, as the law requires, so as to put the plaintiff (insofar as money can do so) in the same position as he or she would have been had the injury not occurred, or as Prof. Kelly suggested, produces a figure to give "satisfaction" for the wrong done to the injured party, does not need to concern us. The judge assesses damages for the injuries that he or she believes to have occurred in the accident. The judge does so based upon the evidence.

It is sometimes suggested that there is or ought to be a difference between those injuries that can be seen on an x-ray and those which cannot. That is a false distinction. Compensation for 'whiplash' or soft tissue injuries to the neck or back is, in principle, no different from compensation for a broken leg, or indeed for a psychiatric injury. In each case, what is to be compensated is the trauma to the individual.

If a plaintiff is exaggerating or manufacturing a soft tissue or psychiatric injury, or indeed the consequences of any fracture, the defendant's medical team can and frequently does suggest that fact. Doctors can and do test plaintiffs for inconsistencies and assess whether a plaintiff is genuine or not by how they respond to various tests and examinations. In addition, plaintiffs are frequently put under observation by private investigators, who spend long hours watching to see whether there are any inconsistencies. It would be a very unusual person who would be prepared to go through the inconvenience of having to wait for four or five years before their case is heard, encased all the while in a cervical collar or utilising crutches without any medical need on all occasions. That would require a fairly sustained level of acting ability.

In any event, it is incumbent upon a trial judge to assess the witnesses and the evidence and to test it. This is what judges do. In this regard, there is absolutely no difference between the testing of the evidence of someone claiming a soft tissue injury to his neck or back, and someone claiming that they are depressed or have suffered post-traumatic stress disorder. It is just as possible to deliberately exaggerate the consequences and alleged long-term effects of a fractured leg, as it is the effects of a soft tissue injury to the neck. To attempt to limit compensation only to those whose injuries can be ascertained on an x-ray and to differentiate between those persons and other persons genuinely injured whose injuries are not amenable to x-rays is not alone unfair but constitutionally doubtful.

To suggest that awards in this jurisdiction should be reduced to equate to awards in some European countries with entirely different legal systems is as irrational as it would be to suggest that the awards in Ireland should be increased to the levels of, say, the United States of America.

Nothing but the truth

Plaintiffs do sometimes lie in order to obtain what is not rightfully theirs. Let us whisper it lest we offend: defendants sometimes lie too. A defendant who avers to a defence that states that there was not any negligence, or that the plaintiff was guilty of contributory negligence, when their professional reports indicate to the contrary, is no different from an exaggerating plaintiff. The lies of a plaintiff are generally the lies of an individual. The lies of a defendant are generally corporate. We do not see any billboards showing defendants with Pinocchio noses and Scrooge hats.

In relation to the costs of litigation, a change in taxation rules in recent years has resulted in a considerable reduction in professional fees to barristers and solicitors. The costs of litigation have therefore fallen, not risen. Accordingly, both general damages and professional costs have declined rather than increased.

Impact of the PIAB

When examining the alleged effect of court awards on insurance premiums, the next point to be made is that the number of cases commenced in the High Court has declined over recent years. The first reason for that is the introduction of the PIAB in 2004. The PIAB has had a greater effect in reducing the number of personal injury cases in the Circuit Court than in the High Court for the good reason that it is significantly more difficult for the PIAB to decide whether an injury, at the time of its assessment, will result in one year or ten years' loss of earnings, etc. But while the number of personal injury cases commenced in the High Court in 2004, immediately prior to the introduction of the PIAB, increased to 15,393, the average for the years 2000 up to 2003 was 11,117 cases. The latest year for which figures are available, 2016, indicated that 8,510 personal injury cases were commenced in the High Court.[2]

A spokesperson on behalf of the PIAB has already answered conclusively claims from the insurance industry to the effect that High Court awards are responsible for hikes in insurance premiums by furnishing their statistics as to the number of awards that they make and the significantly high number of claims that are disposed of by the PIAB.

It is my contention that it is not alone the existence of the PIAB that has reduced the number of High Court cases. Also, the number of accidents has decreased in recent years.

Road facts

In the case of road traffic accidents, the number of accidents resulting in injury or death as a percentage of road users, and therefore insurance premium payers, has decreased dramatically. The Road Safety Authority has made available statistics in relation to fatal, serious and minor injury collisions. The statistics relate to the number of collisions causing fatalities or injuries rather than the number of fatalities or injuries themselves. Accordingly, more than one injury or death may result from the same accident, but by utilising the same statistics for each year, comparisons can be made.

In the years between 1968 and 1983, there was an average of 518 fatal collisions. In the years between 1984 and 2014, the average was 339. In the years between 2000 and 2014, the average was 269, whereas between 2010 and 2014, the average was 173.[3]

The figures in relation to all injury collisions are not as dramatic. In the years between 1968 and 1983, the average for all injury collisions involving serious or minor injury was 5,354. Taking the years 1984 to 2014, the average yearly figure was 6,099. Taking the years between 2000 and 2014, the average was 5,853, and between 2010 and 2014, the average number of cases per annum involving injury was 5,306. From the above, it can be concluded that whereas the number of collisions involving fatalities has steadily fallen, the number of collisions involving injury increased to a peak in the 1990s and has been reducing since that date.

The total number of collisions involving fatalities or injuries is, of course, not the only relevant statistic when analysing road traffic premiums. To get the full picture, one has to remember the statistics in relation to the number of mechanically propelled vehicles over the years. In 1985, there were 709,546 private cars and a total of 914,758 mechanically propelled vehicles. The number of mechanically propelled vehicles on the road, as well as the number of private cars, has increased significantly over the years. In 2015, the number of private vehicles was 1,985,130 and the total number of mechanically propelled vehicles was 2,570,294.[4] In other words, allowing for the fact that there will always be a certain quota of uninsured drivers, the number of vehicles whose owners would

have been paying policies of insurance into the insurance companies has increased from somewhat over 900,000 in 1985 to over 2.5 million in 2015. In 1985, there were 377 fatal collisions and 5,141 collisions involving injury, a total of 5,518. In 2014, the last year for which I have full statistics, there were 179 collisions involving a fatality and 5,623 collisions involving injury, i.e., a total of 5,802. The number of collisions involving fatalities or injury in 1985 was nearly three times higher as a percentage of all mechanically propelled vehicles than the number of similar collisions compared to the number of all mechanically propelled vehicles in the year 2014.

It follows from the above that not alone is the PIAB taking a significant number of cases out of the jurisdiction of the courts, but that the insurance companies have the benefits of a far greater proportion of their customers' premiums, who have no accidents at all.

A similar position arises in the case of industrial accidents. Since the introduction of the Safety in Industry Act in the 1980s, it is clear to the most casual observer that at present, factories and building sites are far more safety conscious than used to be the case. Partly due to statutory requirements and also partly due to a wish to avoid accidents and litigation, employers have, since the Safety in Industry Acts, been steadily increasing the safety of their premises.

Whereas the number of persons in work has increased and decreased with the fluctuation of the economy, if you take the period 2003 to 2015, which is before, during and after the recession, the figures supplied by the Health and Safety Authority are that the rate of fatal accidents per 100,000 workers in 2003 was 3.27 and in 2015 was 2.53. Similarly, the figures for non-fatal accidents, causing four or more days' absence from work, was 1,200 per 100,000 workers in 2003 and 900 per 100,000 workers in 2015.[5]

To summarise, the number of accidents that result in High Court claims has been reduced, the number of accidents as a percentage of the insured has dramatically decreased and the cost of litigation on a case-by-case basis has also reduced. The damages for personal injury have not alone failed to keep pace with inflation but, in more recent times, have been lowered in actual terms. The inescapable conclusion from all of the above is that to blame the increase of premiums on the level of general damages in the courts is entirely untrue.

Judging

To further suggest, as has been done, that the reason for the alleged increase in general damages, which, of course, has not occurred, is that in recent years judges with many years of experience in personal injuries have been replaced by new judges who are inexperienced and under-qualified is untrue, insulting and defamatory.

Premiums have risen either due to mismanagement or lack of competition in the insurance industry, or because insurance companies can no longer invest the premiums of their customers in relatively high interest-bearing stocks.

However, the hidden persuaders have been very effective. There have even been judicial comments, without any evidential basis, suggesting that "one man's award is another man's premium increase". That sort of thinking is entirely unsupported by any evidence and indeed is counter to the evidence available. The hidden persuader does not require evidence to succeed; he hopes that the evidence that exists will never be tested, and merely requires the appearance of sounding reasonable. The hidden persuader is confident that whatever he says will be faithfully taken down and publicised without thought by certain sections of the media.

Shortly before his retirement in 1994, the then Chief Justice, Tom Finlay, addressed the practitioners of the Munster Circuit in Cork. His theme was how difficult it was to be a plaintiff in a personal injury action. This difficulty, he argued, was little understood in either the general public or the legal establishment. Since he gave his talk, the difficulties facing a plaintiff have multiplied. The statute of limitations for personal injuries has reduced from three years to two years.

The introduction of the PIAB in 2003 (which of itself cannot be regarded as an attack on the plaintiff) does create potential minefields as to which actions must be notified to the PIAB and when, and in what circumstances, the statute of limitations will be a factor. These minefields require a plaintiff to be professionally advised and, therefore, litigation oriented much earlier than hitherto. Previous simplicity has been replaced by complexity. Furthermore, the obligations of deponents of affidavits of verification created by the Civil Liability and Courts Act 2004, which have been discussed above, impact disproportionately upon plaintiffs, as do the obligations of disclosure of documents and reports, and the obligations to furnish the other side with what figure the plaintiff would take by way of settlement. In addition, as also referred to above, the practical deterrents against an exaggerating plaintiff are far more severe than any corresponding deterrents against the defence.

All of these factors have combined to make what Chief Justice Finlay thought to be a very difficult position into something that is far worse. In addition to these difficulties, a plaintiff will be advised by his solicitor and counsel that should he succeed the damages he will recover for his pain and suffering have, in practice, been reduced.

Prof. Kelly's duellist or gladiator sought satisfaction. The gladiator lies on the floor of the arena. He looks up to the judge for a decision. He believes that the judge will act in accordance with the law and custom. The emperor looks down at the gladiator. He knows he must make a decision. He knows he must decide in accordance with the law and custom. He knows he must decide without fear or favour. He knows he must ignore the roar of the crowd. But is the emperor aware of the provenance of the seemingly so sensible, so reasonable and so consistent voice of the hidden persuader from the shadows? The emperor's thumb twitches towards a determination.

References

1. All figures for inflation supplied by the CSO.
2. Figures supplied by the Courts Service.
3. Figures obtained from the Road Safety Authority.
4. Figures in relation to number of vehicles on the road furnished by the Automobile Association.
5. Figures supplied by the Health and Safety Authority.

Implementing the Victims' Directive: a prosecutor's perspective

The Victims' Directive has placed the victim in a central position within the Irish criminal justice system.

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In order to get a perspective on the position of victims' rights within the criminal justice process, from the point of view of the prosecutor, one must first look at the manner in which decisions are made by the Office of the Director of Public Prosecutions (ODPP).

The Guidelines for Prosecutors

The decision to prosecute or not to prosecute is based on the 'Guidelines for Prosecutors' (the Guidelines). The most recent edition of the Guidelines is the fourth edition, published in October 2016 following a substantial revision and updating exercise in advance of the transposition of the EU Victims' Directive 29/2012 on November 15, 2015.[1] Since that date the DPP's office has been complying with the terms of the Directive in its dealings with victims. This is set out in more detail in this article. The Guidelines recognise[2] that the decision to prosecute, or its corollary, not to prosecute, has far-reaching effects for victims, suspects, their families, and others in the community. The Guidelines govern the decisions made by the Director, her professional officers, and those delegated to make certain decisions on her behalf.[3]

The test for prosecution

Chapter 4 of the Guidelines is quite detailed, but boils down to two essential questions that make up the test[4] as to whether or not to prosecute:

(i) Is there sufficient evidence to establish a prima facie case? And if so,
(ii) Is a prosecution in the public interest?

The prima facie case or strength of the evidence

A prima facie case is defined in the Guidelines at paragraph 4.10, which states that there must be "... admissible, relevant, credible and reliable evidence which is sufficient to establish that a criminal offence known to the law has been committed by the suspect. The evidence must be such that a jury, properly instructed on the relevant law, could conclude beyond a reasonable doubt that the accused was guilty of the offence charged".

To prosecute or not to prosecute?

The Guidelines set out a number of principles that help those deciding on prosecutions to make those decisions. Primarily, these decisions are made by the Directing Division in the ODPP.[5] Once they have decided about the strength of the evidence, the Guidelines oblige the decision maker to go further.[6] They must make an assessment of the likelihood that a conviction would be recorded.

The public interest[7]

As in other common law systems, a fundamental consideration when deciding whether to prosecute is whether to do so would be in the public interest. A prosecution should be initiated or continued, subject to the available evidence disclosing a prima facie case, if it is in the public interest, and not otherwise. There are many factors which may have to be considered in deciding whether a prosecution is in the public interest. Often the public interest will be clear, but in some cases there will be public interest factors both for and against prosecution. There is a clear public interest in ensuring that crime is prosecuted and that the wrongdoer is convicted and punished. It follows from this that it will generally be in the public interest to prosecute a crime where there is sufficient evidence to justify doing so, unless there is some countervailing public interest reason not

to prosecute. In practice, the prosecutor approaches each case first by asking whether the evidence is sufficiently strong to justify prosecuting. If the answer to that question is 'no', then a prosecution will not be pursued. If the answer is 'yes', then before deciding to prosecute the prosecutor will ask whether the public interest favours a prosecution or if there is any public interest reason not to prosecute.

Victims in the decision-making process – pre Directive

Until recent times, the victim in Irish law only had a role as a witness. The dynamic of the criminal justice system has been based on prosecutor versus offender, as befits the common law, adversarial system we are all familiar with. Victims did not have a formal status or role, although the Prosecution of Offences Act 1974, as amended, permitted the victim or their family to communicate views on their case to the DPP at various stages in the process. The changes brought about by the Directive put the victim in a much more central position and oblige the State agencies to re-orient their approach to inform, consult and accommodate not just the needs, but also the views of victims.

Victims' Directive[8]

The purpose of the Directive is to set out minimum standards for victims throughout the EU. From the point of the view of the victim, many of the changes brought by the Directive build upon existing practices, for example, the expanded use of victim impact statements,[9] the use of videolink,[10] and the provision of reasons for decisions made not to prosecute.[11] The Directive was drafted in the knowledge that a victim's role in criminal proceedings varies between member states. In some member states, a victim will be party to criminal proceedings and in others they will not.

The position in relation to the role of victims across the EU is therefore complex. The Directive, from the point of view of the ODPP, is a coin with two sides.[12]

One side relates to rights that accrue to a victim when a decision is made to prosecute,[13] and the other relates to the rights that accrue when a decision is made not to prosecute.[14]

Rights in relation to decisions made to prosecute

The central theme of the Directive is in relation to the provision of clear, adequate and timely information,[15] in a format that the victim can understand,[16] to ensure that victims are kept fully abreast of the developments in a prosecution.

Rights when a decision is made not to prosecute

Similarly, when a decision is made not to prosecute, the Directive puts the victim in a more central role, particularly in relation to the giving of the reason for the decision made not to prosecute[17] and offering the reviews of those decisions. This builds upon the existing ODPP policy of giving reasons and offering reviews for decisions made not to prosecute.[18] The right of the DPP to review a decision made not to prosecute was recognised by Irish domestic courts as long ago as *Eviston*[19] in 2002.

Reasons

Article 6(1)(a) confirms the right of victims to request information on "…any decision … not to prosecute the offender".[20] The Directive is drafted with a two-stage process in mind. First, the victim should be given "…a brief summary of reasons for the decision concerned",[21] in order to allow them to decide whether to seek a review of that decision. The question of what "…a brief summary" means is addressed in Article 11(3), which states that victims should "…receive sufficient information to decide whether to request a review of any decision not to prosecute".

The question as to whether to prosecute or not is informed by the Guidelines. It is a legal assessment based upon the individual facts in each case, and the answer to the question is, by necessity, a legal one as well. The reasons that we provide are based upon our test for prosecution in the Guidelines, and so will relate to either the sufficiency of the available evidence, or the public interest.

By far, the vast majority of decisions not to prosecute are based upon the insufficiency of evidence. This reflects the very high standard of proof required by our criminal courts. In practice, this means that the responses we give to requests for reasons are graduated. For example, in relation to matters involving fatalities, we try to provide as much relevant information for the bereaved as we can, subject to the applicable laws in relation to data protection,[22] confidentiality, and the guarantees in the Irish Constitution.

Reviews

The right to review is carefully set out in Article 11(1).[23] As noted in Article 11(2),[24] across the EU, victims play very different roles within their respective legal systems. This is a right exercised on request, and not an automatic right. It is worth noting the terms of Recital 20,[25] which provides a means by which a member state can determine the role of the victim within the individual legal system. For example, in the Circuit or Central Criminal Court, when a *nolle prosequi* has been entered, or in the District Court, if a prosecution is withdrawn, which results in an order of dismiss, it may not be possible to offer a review of that decision without breaching our obligations to accused persons, given our particular constitutional arrangements.

Statistics

Of the approximately 14,300 cases that the ODPP directs upon each year, approximately 4,100 result in decisions not to prosecute. As of June 30, 2017,[26] we have received:

- 967 requests for reasons; and,
- 342 requests for reviews.

In terms of the breakdown of the reasons that we have given following requests from victims, the largest single cohort is in relation to sexual offences (37%), and the second largest category is in relation to offences of violence (25%), with the final largest group being made up of offences involving property (15%). Fatalities make up just under 8%. Of those requests for reasons, one-third become requests for review. Again, the breakdown of the offences is roughly commensurate with the requests for reasons.

Of those decisions, eight have been reversed on review (three decisions related to complainants in one case), five were in relation to sexual offences, one fatal case, one assault, and one property matter. It must also be noted that the Gardaí deal with roughly 280,000 prosecutions per annum under our delegated authority. For decisions made by An Garda Síochána without reference to our Office, victims will seek the reason for the decision made, and/or a review of

that decision, from An Garda Síochána, who will provide the reason or conduct a review themselves.

Victims' Directive – practical changes

The Victims' Directive has had a number of effects, both in terms of the practical effects of its content, and also the wider implications for the work of the ODPP. In the absence of domestic legislation, the ODPP has relied upon the Directive having direct effect. Since November 16, 2015, this Office has:

- set up a dedicated Communications and Victims Liaison Unit;
- updated our publications and website, and published new material setting out the way that victims can access the services provided by this Office;[27]
- provided training for both practitioners[28] and a number of non-governmental organisations; and,[29]
- liaised with the Department of Justice and Equality, An Garda Síochána and other agencies.

Once the Criminal Justice (Victims of Crime) Bill 2016 becomes law, it is envisaged that all of the above measures will be revisited, and updated where necessary.

Criminal Justice (Victims of Crime) Bill 2016

The Criminal Justice (Victims of Crime) Bill 2016[30] ("the Bill")[31] has passed the Dáil[32] and moved to the Seanad. It is envisaged that it will become law very soon. It will place the provisions of the EU Directive on a domestic statutory footing. The Bill proposes that discreet, particularised pieces of information[33] will be provided by the Gardaí on first contact. The "extent and detail"[34] of that information shall be determined "…by reference to the type or nature of the alleged offence and any specific needs and personal circumstances of the victim which are identified".[35]

The victim will receive a written acknowledgement of the making of the complaint.[36] The victim can indicate how they wish to receive this information, which will be supplied to them "…as soon as practicable, and in so far as is practicable".[37] This information must be provided in clear and concise language. It must be supplied in a language that the victim can understand. Interpretation and translation must be provided where it is necessary, to enable victims to participate in the criminal justice process.[38]

The theme of the provision of information is continued in section 7 of the Bill. It introduces the concept of "…significant developments"[39] that a victim should be informed of, and includes information (including but not limited to):

- the arrest, charge, release on bail/remand in custody[40] of a suspect;
- the use of a victim impact statement[41] made by the victim (extended[42] to all victims), and the provision of a copy of any such statement made by the victim;
- "…a decision not to proceed with, or to discontinue, the investigation and a summary of the reasons for the decision";[43]
- the nature of the charge and the date of the trial;[44]
- the date of sentencing, and any appeal;[45]
- information on any escape from Garda or other custody;[46]
- the date of release of a convicted person from custody;[47]
- the death of such a person in custody;[48] and,
- restorative justice programmes.

Victims should therefore receive comprehensive information on the criminal justice system and their role within it, and the range of services and entitlements victims may access from their first contact with An Garda Síochána.

Further, each victim will be individually assessed[49] so that any special measures necessary to protect them from secondary and repeat victimisation, intimidation, or retaliation can be put in place during the investigation[50] and during the court process.[51]

Special measures during investigations may include advice on personal safety – including safety orders and barring orders, applications to remand the accused in custody or seek conditions on bail, and interviews being carried out in appropriate premises by specially trained persons[52] and, in the case of sexual or gender-based violence, by a person of the same sex as the victim.

In court proceedings, the possibility of giving evidence through live television link[53] or from behind a screen[54] will be extended to all victims[55] who would benefit from such measures.[56] The right to provide a victim impact statement will also be extended to all victims.

Other measures in the Bill will ensure that the particular vulnerability of child victims is recognised and that where a specific need to protect a victim is identified, a court may exclude the public from proceedings[57] and restrict questioning regarding the victim's private life.[58]

These measures complement those in the Criminal Law (Sexual Offences) Act 2017, and the Domestic Violence Bill 2017.[59]

One important change will be in relation to the use of intermediaries.[60] This is a provision that was included in the 1992 Criminal Evidence Act. Although a number of attempts have been made to use the provisions of section 14, this provision has been utilised rarely in this jurisdiction to date.[61] In our neighbouring jurisdictions, the use of intermediaries[62] involves an assessment of the individual concerned, followed by a pre-trial "ground rules" hearing in which the parties agree to certain rules by which the questioning of the witness in question will be undertaken at trial.[63]

Many of the practices set out in the 2016 Bill were already in place in one form or another. This Bill will allow for a move towards uniformity and consistency of practice.

Challenges

The Directive, and latterly the Bill, will represent a change in emphasis, rather than tack. While this article focuses on the issues in relation to the investigation and criminal justice process, the other amendments hardwire the requirement to anticipate and plan for the needs of victims in future. The Courts Service,[64] for example, is under an obligation, in respect of the construction of new courthouses, to plan for the needs of victims and to ensure that they do not come into contact with suspects.

That physical obligation is worth considering in the context of court procedures. If the court buildings of the future must take account of the requirements of the Victims' Directive, there is a case that the court procedures should be subject to the same scrutiny. Building on existing practice:

- scrutiny of court practices – could the evidence of children be taken to suit the needs of the child, for example by having their evidence heard only in the morning?;
- greater use of special measures;
- training;

- early assessment of victims, feeding into an early decision in relation to the needs of victims in court; and,
- early consideration in relation to the practical aspects of dealing with victims, for example discussions on how to deal with intermediaries, or the use of videolink.

Many practitioners already meet with victims and vulnerable witnesses within the existing arrangements. Capturing that best practice (and training) in relation to these meetings, and all aspects of the victim/practitioner relationship, would lead to consistency and uniformity of approach.

Conclusions

Francis Bacon said: "If we do not maintain justice, justice will not maintain us". The same is true for victims' rights. This is a project that rightfully will never be finished. But that is not a pessimistic view. On the contrary, it is an optimistic view. The role of the victim will change in response to societal changes. There will always be a more vulnerable person whose needs will be required to be met, and it is only right and proper that the State agencies involved in the provision of services to such people adapt, grow and innovate to ensure that the needs of those persons are met, so that the best possible service can be provided to people who need it most. We look forward with our colleagues and partner agencies across the criminal justice system to that challenge.

References

1. Chapter 12 focuses exclusively on the rights of, and obligations to, victims of crime.
2. See chapter 4.1.
3. Senior Gardaí, under Delegated Authority No. 3, and certain senior Revenue officials, are entitled to make decisions in certain less serious types of cases on behalf of the Director. All prosecutions in Ireland are prosecuted in the name of the Director of Public Prosecutions (DPP). The DPP prosecutes all offences on indictment under the terms of section 4 of the Prosecution of Offences Act 1974.
4. Chapter 4.4, page 12.
5. Subject to the authority delegated by the Director to An Garda Síochána under Delegated Authority No. 3, and to her other officers in the performance of their duties.
6. See paragraph 4.11.
7. See Chapter 4, Guidelines for Prosecutors.
8. Directive 2012/29/EU of the European Parliament and of the Council of October 25, 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029.
9. Available since section 5 of the Criminal Justice Act 1993 primarily for offences of violence.
10. Since section 16 of the Criminal Evidence Act 1992.
11. Since the DPP's policy of November 22, 2008, in relation to fatalities where a decision was made not to prosecute.
12. See chapter 12 of the Guidelines for Prosecutors.
13. Article 3: Right to understand and to be understood, Article 4: Right to receive information from the first contact with a competent authority, Article 5: Right of victims when making a complaint, Article 6: Right to receive information about their case, Article 7: Right to interpretation and translation, Article 8: Right to access victim support services, Article 9: Support from victim support services, Article 10: Right to be heard, Article 12: Right to safeguards in the context of restorative justice services, Article 13: Right to legal aid, Article 14: Right to reimbursement of expenses, Article 15: Right to the return of property, Article 16: Right to decision on compensation from the offender in the course of criminal proceedings, Article 17: Rights of victims resident in another Member State, Article 18: Right to protection, Article 19: Right to avoid contact between victim and offender, Article 20: Right to protection of victims during criminal investigations, Article 21: Right to protection of privacy, Article 22: Individual assessment of victims to identify specific protection needs, Article 23: Right to protection of victims with specific protection needs during criminal proceedings, Article 24: Right to protection of child victims during criminal proceedings.
14. Article 3: Right to understand and to be understood, Article 4: Right to receive information from the first contact with a competent authority, Article 5: Right of victims when making a complaint, Article 6: Right to receive information about their case, Article 7: Right to interpretation and translation, Article 8: Right to access victim support services, Article 9: Support from victim support services, Article 11: Rights in the event of a decision not to prosecute, Article 20: Right to protection of victims during criminal investigations.
15. Article 6(2) (a) and (b).
16. Per Article 3.
17. Proposed section 7(2)(c), (d), (e).
18. The Director has given reasons and reviews in relation to decisions made not to prosecute in relation to fatalities since October 22, 2008.
19. [2002] 3 I.R. 260.
20. Subject to limited exceptions as provided for: prejudice to ongoing criminal proceedings, prejudice to ongoing criminal investigations, threats to life and limb, and threats to the security of the State as set out in recital 28.
21. Article 6(3).
22. Data Protection Act 1998.
23. Article 11(1): "Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law".
24. Which allows for a restriction of this right of review to "serious crimes" in the event of a "decision not to prosecute. The procedural rules for such a review shall be determined by national law".
25. "Recital 20 recognises that the role of victims in the criminal justice system varies across Member States and that this has an impact on the scope of rights set out in the Directive where there are references to the role of the victim in the relevant criminal justice system."

References

26. Since November 16, 2015.
27. 'How we make Prosecution decisions', and 'How to request reasons and reviews'. Those booklets have been sent out to Garda stations countrywide, and to many victims' advocacy organisations. Conscious of the increasingly diverse nature of Ireland's population, and of the importance of making information easily accessible to those whose first language may be other than English or Irish, the booklets are available also in a range of other languages – Arabic, Chinese (Mandarin), French, Latvian, Lithuanian, Polish, Portuguese (Brazil), Romanian, Russian and Spanish. The booklets can also be accessed through our website – www.dppireland.ie. We also updated our Guidelines for Prosecutors to its 4th edition (published in October 2016), to include a new chapter, chapter 12, which deals with the rights of victims under the Victims' Directive.
28. This has been provided to all State solicitors, the staff of the office of the DPP (both administrative and legal staff), An Garda Síochána, the Health and Safety Authority and prosecutors nationwide.
29. Training has been given to those involved in assisting victims of crime, e.g., the Victims of Crime Helpline, the Rape Crisis Centre, AdVic, Victim Support Europe.
30. Available at: https://www.oireachtas.ie/documents/bills28/bills/2016/12116/B121a16d.pdf.
31. Available at: http://www.justice.ie/en/JELR/Pages/Criminal_Justice_Victims_of_Crime_Bill_2016.
32. Passed Dáil Éireann on July 6, 2017.
33. At proposed section 6(1)(a)-(o) and deal with the role of the victim, relevant information about the criminal justice system and the investigation of the complaint.
34. Proposed section 6(2) of the Bill.
35. Ibid. at 28 above.
36. Proposed section 6.
37. Proposed section 6(3), as amended on July 6, 2017.
38. Per Article 3 of the Directive.
39. Proposed section 7(2)(a).
40. Proposed section 7(2)(a)(i)-(iii).
41. Proposed section 7(2)(b).
42. Proposed section 27 amends the definition of victim in line with the Directive, as it applies to section 5 of the 1993 Criminal Justice Act, thereby entitling all persons (and relevant family members where appropriate) who have "suffered harm, including physical, mental or emotional harm, or economic loss, which was directly caused", by a criminal offence to avail of the right to make a victim impact statement.
43. Proposed section 7(2)(c).
44. Proposed section 7(2)(g).
45. Proposed section 7(2)(h).
46. Proposed section 7(2)(k) and (l).
47. Proposed section 7(2)(m).
48. Proposed section 7(2)(m)(v) and 7(2)(o).
49. Proposed section 14.
50. Proposed section 16.
51. Proposed section 18.
52. Proposed section 15.
53. Proposed section 18(2)(c) and 26 (amending the 1992 Criminal Evidence Act in relation to the extension of those entitled to give evidence via videolink, extension of the use of intermediaries, and use of screens).
54. Insertion of new s.14A into the Criminal Evidence Act 1992 by proposed section 26.
55. Based upon the experience of our colleagues in England, Wales and Northern Ireland, it is thought that the biggest single change in court practice will be the expanded use of videolink evidence, especially in relation to domestic, and sexual, violence offences.
56. Other measures include an obligation to consider the individual characteristics of the victim when deciding whether or not to utilise special measures per new section 14B of the Criminal Evidence Act 1992 proposed by draft section 26 of the Bill, and the added option of the removal of wigs and gowns (proposed new Section 14C Criminal Evidence Act 1992).
57. Proposed section 18(2)(a) and 19.
58. Proposed section 18(2)(b) and 20 – this largely respects and preserves the discretion of the trial judge to protect a witness from oppressive questioning where: "…(a) the nature or circumstances of the case are such that there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and (b) it would not be contrary to the interests of justice in the case, the court may give such directions as it considers just and proper regarding any evidence adduced or sought to be adduced and any question asked in cross-examination at the trial, which relates to the private life of a victim and is unrelated to the offence".
59. At committee stage in the Seanad as at July 4, 2017, per: http://www.oireachtas.ie/viewdoc.asp?DocID=34491&&CatID=59.
60. A very useful account of the what, how and why in relation to intermediaries can be found at https://www.theadvocatesgateway.org/.
61. Again, anecdotal evidence from England and Wales, but especially Northern Ireland, indicates that this is becoming an increasingly valuable tool in assisting persons who suffer from a range of infirmities to enable them to give evidence.
62. Given the wide and diverse range of needs of the persons in question, intermediaries come from a wide range of disciplines, for example speech and language therapists, social workers and psychologists, and are accredited to master's degree standard within the context of a professional register.
63. Agreed measures have included: the use of shorter, simpler language; better scheduling (e.g., school age children gave evidence from 10.00am until 12.00pm, and are then returned to school); breaks every 20 minutes; and, the use of graphic boards (detailing colours, shapes, letters, etc.) to assist the victim in understanding the concepts being explored in a graphic form.
64. Proposed section 28 of the Bill, amending the Court Service Act 1998, with the insertion of s.5A.

To get more barristers involved with the Wellness Committee, it is changing its name and CPD points will be on offer for attending events.

From wellness to resilience

Mary Rose Gearty SC

The newest committee of The Bar of Ireland is one aimed at encouraging members to look after their mental and physical health. For its first year, the committee was entitled the Wellness Committee. Its events attracted significant but contradictory responses: it is the most popular initiative of the last decade, judging by the reaction from members, and the most strongly resisted, judging by attendance at events organised to promote wellness. In this, it is perhaps the committee equivalent of Queen's 'Bohemian Rhapsody', which remains one of the only songs to appear regularly in lists of the best and the worst pop songs of all time.

The Committee recently reflected on each member's unexamined but immediate reaction to the use of the word wellness. Unanimously, we found that its association with tea and sympathy did not resonate with us as professionals in a difficult and stressful environment. We were not as interested, professionally, in promoting wellness as we were in improving performance and resilience to stress. Conscious of the fact that the exact same measures should be promoted in either case, we nonetheless concluded that labels matter. Our resolution was that the Committee must be renamed: it is now the Resilience and Performance Committee.

Just as the management of our practice is a necessary business skill, so too is the management of our health. To encourage better attendance at future events, the Committee will offer a resilience programme which will attract CPD points. It will provide assistance with stress and time management, just as practice management lectures focus on skills such as bookkeeping and the retention of data. The advice of expert speakers will be offered on the causes of stress and how to take performance-enhancing measures. We will promote activities that increase resilience.

Wellness by stealth

The Committee has already embarked on a certain amount of wellness by stealth. In other words, when you attend a conference on tort law or an advocacy workshop, you may find yourself listening to a short presentation on boosting health and changing your approach to work through mindfulness/prayer/positive thinking (delete as appropriate). These presentations are slotted in between the lectures on the main topic as being of importance and of interest to all members. Experience teaches us that our members are slow to attend such presentations unless combined in this way with traditional updates and lectures. This approach to the improvement of our resilience and performance will continue.

In other words, the Committee will continue to promote and encourage many of the same important activities and concepts: most of us need more sleep and more exercise. Our outlook on our work profoundly affects our physical and mental health. In forming a healthy approach to work and stress, one of the most influential factors is the extent of our social support. This is where the various clubs and societies at the Bar come into play. More than this, however, the very library system we operate is an effective support structure, even without further cementing those links by joining a club or society. One of the best ways to improve psychological health is to improve social support. As a survey of over 2,400 barristers in the Bar of England and Wales concluded: "The deepest level of support within the self-employed Bar is reported as coming from others within Chambers. This is further endorsed by the qualitative results which show a collegiate peer level bonding in relation to a shared experience of the role. Often individuals form close bonds when they share adverse or challenging situations or events – the challenge and emotions associated becoming the relationship glue".[1]

Collegiality remains one of the most important and performance-enhancing features of life and work at the Bar and must be fostered and actively promoted at every level of the Bar and on every circuit.

None of this is news to any barrister who has given these matters some thought. The very process of complaining or bragging about our morning in court, while sharing a coffee with colleagues, enhances our well-being. Oops. Resilience.

Consult a Colleague Helpline

01-817 4790/4791

Two barristers available at all times.

References

1. 'Wellbeing at the Bar: A Resilience Framework Assessment'. April, 2015. Available on the website of the General Council of the Bar of England and Wales: www.barcouncil.org.uk.


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Director of Pensions, Donal Coyne, wrote to all members in October listing the pension clinics being held in various Law Library locations from October 27 to November 14 to give advice and facilitate payment.

*Where both the tax return and the payment of tax due is done through the Revenue On-Line Service (ROS), the deadline will be extended from October 31 to November 14 for a barrister to pay a pension contribution and claim income tax relief for 2016.

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