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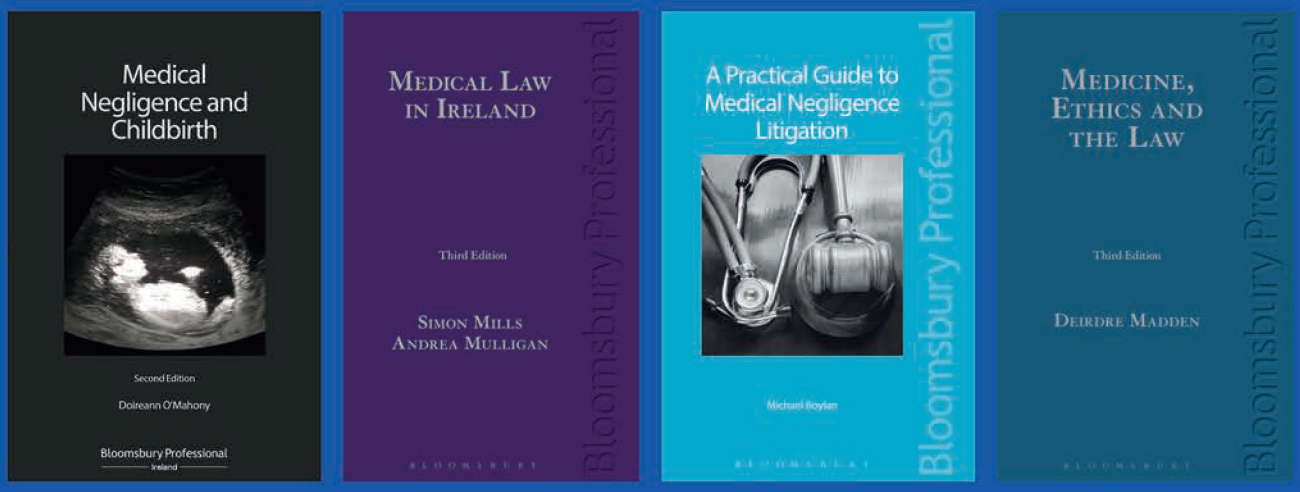

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Embracing change at the Bar

At a time of great change for the Bar, it is vital that we ensure that we continue to advocate for our clients and assist with the rule of law.

Abraham Maslow, the twentieth-century American psychologist and philosopher, is credited with developing the theory of self-actualisation, by which he espoused the idea that each individual has a hierarchy of needs that must be satisfied. He believed that one must fulfil one's innate human needs in orderly priority. He once said: "In any given moment we have two options: to step forward into growth or step back into safety".

Our profession has been characterised by some commentators as one that is resistant to change. However, I would assert that that is a misrepresentation (or misinterpretation); we are not resistant to change, rather we are simply protecting order and the rule of law.

Our innate needs see us yearning for life in the pre-Covid era; however, it is now becoming obvious that many aspects of how we used to work have fundamentally changed and it is incumbent on us to embrace those changes for the betterment of the administration of justice, while at the same time ensuring that we can fulfil our role as advocates for our clients.

Hybrid v in-person hearings

Over the course of the last few months, there have been murmurings about when we might be able to return to in-person hearings. There are disparate views across our profession as to the suitability of remote hearings for certain types of cases. Some colleagues have welcomed the benefits that remote hearings have presented. Others have raised concerns about the adequacy of remote hearings in advocating for their clients.

The 'Closing Argument' in this edition references the limited research available on the effectiveness of remote hearings and highlights the impact their continuance will have on the training of newly qualified barristers, and by extension, the future skillset of our profession. Access to justice must allow clients to have access to properly trained and experienced counsel. Appropriate service to clients by barristers allows for a smooth operation of the judicial system, which leads to greater efficiencies, and ultimate saving in court time and costs.

The Council is actively engaged in dialogue with the President of the High Court and the Courts Service on these matters.

AGM 2021

Members will by now have received notice of the forthcoming Annual General Meeting of The Bar of Ireland, which will take place on Monday, July 26, 2021. Included in that notice is a link to the Annual Report, which provides a summary overview of the work undertaken by the Council, with the unstinting support of Council staff, on behalf of all members, with the singular aim of furthering the interests of our profession. Please do take the time to read the Annual Report.

In addition, there are also a number of important resolutions to be considered at the forthcoming AGM, including the consideration by the Bar of a new disciplinary framework, which has been recommended for adoption by the Council.

Young Bar

This edition provides an important opportunity to showcase and promote the talent prevalent across the young Bar through the inaugural Essay Competition. This great initiative has been overseen by the Young Bar Committee. It is a means by which our more junior colleagues can promote their legal knowledge and insight through publication.

New Council

I would like to thank my colleagues on Council who have elected me to serve a further year as Chair. The new Council takes office on September 13, 2021. I also wish to take the opportunity to thank outgoing Council members for all their hard work and support over the last year. The participation and debate by Council members in the decision-making process has undoubtedly ensured that the choices made on behalf of the Law Library were properly challenged and tested in order to arrive at the best outcome.

Minding ourselves

Since the arrival of Covid-19 and the restrictions which followed, isolation and stress have become serious concerns for our profession. The Bar is noted for its collegiality, and I urge every member to make an effort in maintaining contact with each other. The recent loss of a much loved and respected colleague has reverberated across the Bar. Details of our Consult a Colleague Service are set out on page 107, and members are urged to utilise the service. In addition, all members of the Council are available to any member at any stage. Please feel you can reach out.

Please stay safe.

Maura McNally S.C.

Maura McNally SC
Senior Counsel, Barrister
– Member of the Inner Bar
Chair of the Council of The Bar of Ireland

Showcasing talent at the Bar

This edition showcases the work of newer entrants to the Law Library.

As we close the legal year, we are delighted to present this special edition, which showcases the expertise and legal knowledge that is available throughout the ranks of the Law Library. This month marks the inauguration of an essay competition open to members of the Outer Bar in the early years of practice. We are privileged to carry the winning entries, which cover such wide-ranging topics as the use of Norwich Pharmacal orders to identify anonymous online users, termination of lease agreements, and Covid-19 restrictions on the right to practise religion. We congratulate the winning entrants and hope this competition will become an annual event.

In our Law in Practice section, we examine the use of data access requests to gain access to documentation in the course of litigation. We contrast this with the process of discovery and detail how the data access request can often be used to achieve the same result.

Elsewhere, the courts have recently been forced to grapple with some of the issues that arise in relation to plaintiffs with terminal illness who bring personal injury claims. It is clear that such litigants, already suffering great personal tragedy, face some difficult choices in relation to the relief sought. Our authors examine the anomalies that arise and the different courses of action available. Finally, our closing argument looks at the practice of remote hearings and examines how they may feature in a post-Covid world.

Happy vacation!

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

Specialist Bar Association news

Planning, Environmental and Local Government Bar Association

The Planning, Environmental and Local Government Bar Association (PELGBA) held its Annual Conference on May 27, 2021. This was the first time that the PELGBA held its Annual Conference online and attendance was higher than at last year's conference, which was held in person in the Distillery Building in early 2020. It was a lively and engaging conference, expertly chaired by Ms Justice Nuala Butler. Presentations were given by Dermot Flanagan SC, Eamon Galligan SC, Stephen Dodd SC, Tom Flynn BL, and Suzanne Murray BL. The speakers presented on a range of topics varying from planning law enforcement to climate change and environmental law.

The PELGBA also held a housing conference on July 9, 2021, with a high calibre of speakers, including: Darragh O'Brien TD, Minister for Housing, Local Government and Heritage; David Rouse, Multi-Unit Development Advisor with the Housing Agency; and, Mema Byrne BL. The speakers presented on a wide range of topics including the new Housing for All plan, recent developments and practices in the multi-unit developments and owners' management company sector, and updates on housing laws.

Professional, Regulatory and Disciplinary Bar Association

David Sweetman BL reflected on the UK experience of the Proposals for an Individual Accountability Framework in Irish Financial Services at the monthly Professional, Regulatory and Disciplinary Bar Association (PRDBA) briefing on June 2, 2021. On July 1, Mason Hayes & Curran (MH&C) also held a joint webinar with the PRDBA on the topics of disciplinary complaints arising out of Covid-19 and the Regulated Professions (Health and Social Care) (Amendment) Act 2020. The speakers examined the recent developments in these fields and their impact on future proceedings. The speaker line-up included Louise Beirne BL, Maurice Osborne BL, and Kate Hogan, Senior Associate, MH&C.

Employment Bar Association

The third and final webinar of the Employment Bar Association (EBA) series on 'The Future of Work' took place on June 9, 2021.

Speakers included Kevin Callinan, General Secretary of the Fórsa trade union, Melanie Crowley of MH&C, Alex White SC, and Katherine McVeigh BL. On June 23, the EBA held its Breakfast Briefing, where Rosemary Mallon BL gave an update on the Workplace Relations Commission post *Zalewski*.

The EU Bar Association

The EU Bar Association (EUBA) held two webinars during the month of July. One was a joint webinar with the Irish Society for European Law (ISEL) held on July 1 on the topic of 'The Building Blocks of a Career in EU Law'. Speakers included: Emily Egan McGrath BL; Aileen Murtagh, legal counsel at Biomarin Pharmaceutical Inc.; and, Calum Warren, Senior Associate, Matheson. The second webinar was hosted on July 5 and chaired by Ms Justice Nuala Butler. The speakers, Michael M. Collins SC and Prof. Eoin Carolan SC, spoke on the *Zalewski* judgment, with a particular focus on the implications for regulatory sanctions and its impact on ECN+ and ComReg.

Cumann Barra na Gaeilge

June 22 saw the launch of a new and exciting Irish language Bar Association – Cumann Barra na Gaeilge. This new Bar Association is dedicated to encouraging the development of the Irish language in the Law Library and to facilitate the use of Irish in all areas of legal practice. The launch welcomed speakers including: Bróna Ní Anluain, Breitheamh den Ard-Chúirt; Maura McNally SC, Cathaoirleach Chomhairle an Bharra; Rónán Ó Domhnaill, An Coimisinéir Teanga; Darach Scolaí, Leabhar Breac Foilsitheoir; Dáithí Mac Cárthaigh BL; Brian Fee QC, Leabharlann an Bharra, Béal Feiriste; Vivian Uíbh Eachach, An Príomh-Aistritheoir, Tithe an Oireachtais; An Dr Niall Comer, Uachtarán, Conradh na Gaeilge; and, An Breitheamh Colm Mac Eochaidh, Cúirt Bhreithiúnais an Aontais Eorpaigh.

Immigration, Asylum and Citizenship Bar Association

Tim O'Connor chaired the Immigration, Asylum and Citizenship Bar Association (IACBA) webinar held on June 23, 2021. Michael Conlon SC presented on the topic of medical aspects of immigration law, and Patricia Brazil BL presented on the topic of revised inadmissibility grounds and the new return order procedure.

The Probate Bar Association

The Probate Bar Association (PBA) invited Patricia Hickey to present on the subject of 'Wards of Court' at its Breakfast Briefing on June 29, 2021.

Construction Bar Association

Derek Dunne BL presented recent developments in alternative dispute resolution in the courts at the Construction Bar Association (CBA) Tech Talk on June 30, 2021.

The right to life: the death penalty and Malawi

Less than a year after winning the prestigious Chatham House Award in recognition of "courage and independence in the defence of democracy" for the historic decision to overturn Malawi's controversial 2019 tripartite elections, the Malawi judiciary made international headlines once again by declaring the death penalty unconstitutional. In the landmark case of *Charles Khoviwa versus the Republic* (MSCA Miscellaneous Criminal Appeal Number 12 of 2017), the Supreme Court of Appeal held that the right to life was "the mother of all rights".

Although the *Khoviwa* case is the first to declare the death penalty unconstitutional, the case is the latest, and most crucial, in a line of landmark cases that establish legal precedent on the death penalty in Malawi. In the 2007 case of *Francis Kafantayeni and others versus the Attorney General* (Constitutional Case No. 12 of 2005), the constitutionality of the mandatory death penalty for capital offences was brought into question. In declaring the mandatory death penalty unconstitutional, the Court ordered the rehearing of cases involving those who had been given the death penalty.

The *Kafantayeni* case ushered in the introduction of a de facto moratorium on the death penalty. However, in fact, the death penalty had not been carried out in the 15 years preceding the ruling, nor during the 14 years after. Malawian death sentences could have been more accurately described as sentences to indefinite detention.

However, in or around 2014, there was intense media attention surrounding the murder of people with albinism in Malawi, in addition to political and international pressure to prosecute and sentence harshly those convicted of these crimes. This culminated in the renewed use of the death penalty.

International Human Rights Day Malawi 2020.

The *Khoviwa* judgment was a great shock to the many stakeholders involved in prosecuting the case as, not only did it occur in the context of a judicial environment experiencing the renewed use of the death penalty, but also because the question of constitutionality was not actually put directly to the justices of the Supreme Court. It was therefore a truly remarkable win for human rights in the country and yet another demonstration of the judiciary of Malawi's firm commitment to democratic values.

Practice support and fee recovery – a year in service

In July 2020 the Council introduced the Practice Support & Fee Recovery service.

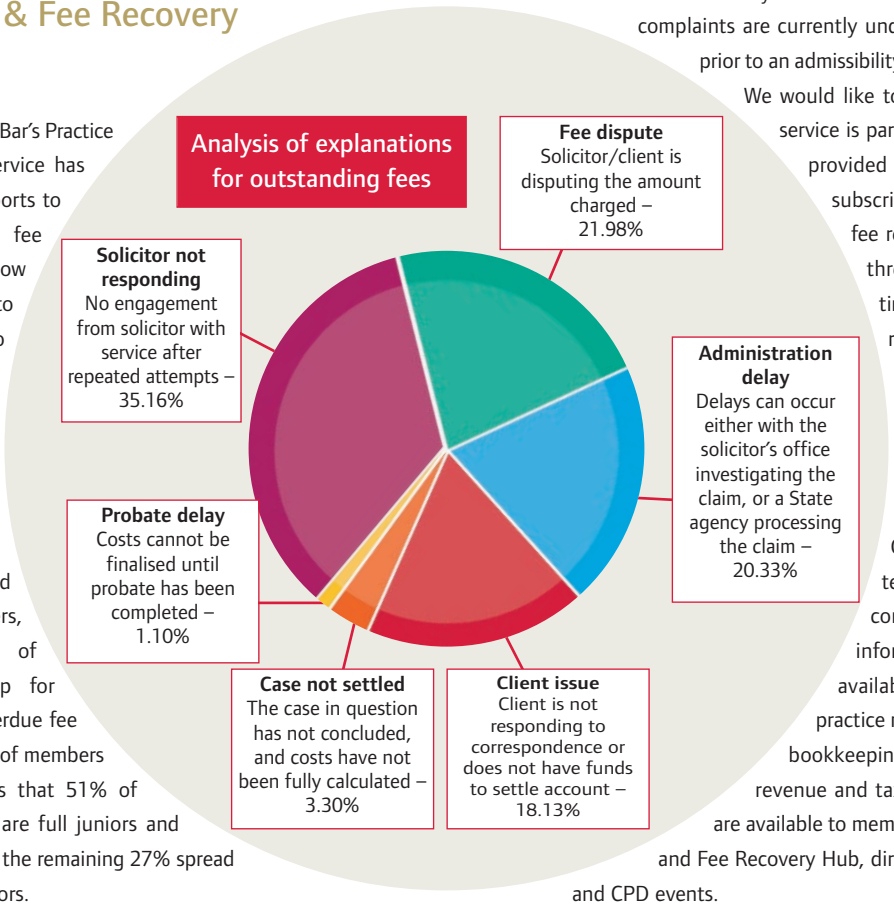
Over the past 12 months, the Bar's Practice Support & Fee Recovery Service has provided much-needed supports to members in relation to fee recovery and cashflow management. In addition to this, the Service has also provided essential support and guidance regarding the various Government financial supports available.

Fee recovery

Since the Service was launched last year, 123 members, representing over 6% of members, have signed up for assistance in recovery of overdue fee notes. A review of the status of members who have signed up shows that 51% of members using the Service are full juniors and 22% are senior counsel, with the remaining 27% spread across 4th- to 11th-year juniors.

To date, we have successfully secured payments in excess of €270,000 for 77 overdue fee notes. The team is currently pursuing over 180 overdue fee notes for members, with a combined value of over €1.3m.

An analysis of the cases referred to the services in which professional fees remain outstanding, can be seen in the chart.



As part of the structured fee recovery process a member has the option to lodge a complaint with the Legal Services Regulatory Authority (LSRA) regarding non-payment of fees. The team has actively engaged with the LSRA in relation to the complaints process and has agreed a more streamlined method for submission of a complaint regarding non-payment of fees by a member via the Fee Recovery service. The team is currently actively managing 19 such complaints on behalf of members. Two complaints have been paid by the solicitors in question during the LSRA's preliminary investigation prior to the admissibility determination. One complaint was deemed inadmissible following the LSRA preliminary review and has been withdrawn. One complaint has been deemed admissible and has now gone before the Complaints Committee and is currently under further investigation. All remaining complaints are currently under preliminary investigation prior to an admissibility determination by the LSRA.

We would like to remind members that this service is part of the full array of services provided as part of your Law Library subscription. You may avail of the fee recovery service in respect of three overdue fee notes at a time, provided you have made reasonable attempts to secure payment, and the fee notes are overdue for a period of six months or greater.

Practice support

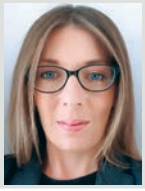
Over the past 12 months the team has worked on the continued development of the information and supports available for members in key practice management areas, including bookkeeping, cashflow management, revenue and tax. Information and supports are available to members via the Practice Support and Fee Recovery Hub, direct member communications and CPD events.

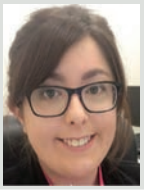
During the year there were six dedicated practice support member communications issued, along with weekly updates in *In Brief*. These communications have seen a 63% engagement level from the membership. The main topics covered included guidance notes on the annual budget, reminders on key tax changes and deadlines, and information on various Government Covid-19 financial supports, such as the Restart Grant, which provided in excess of 500 members with a minimum grant of €4,000 each, equating to a combined minimum financial support of over €2m.

We look forward to continuing to expand the information and supports we have on offer to assist members in optimising the 'business end' of their practice.

Get in touch

We would encourage members to visit the 'Practice Support & Fee Recovery' hub on the website and familiarise themselves with the range of best practice information and tips on offer. For those who wish to avail of the fee recovery service, please contact the team, as detailed in the panel. A starter pack will be sent to you together with the terms and conditions of the service.





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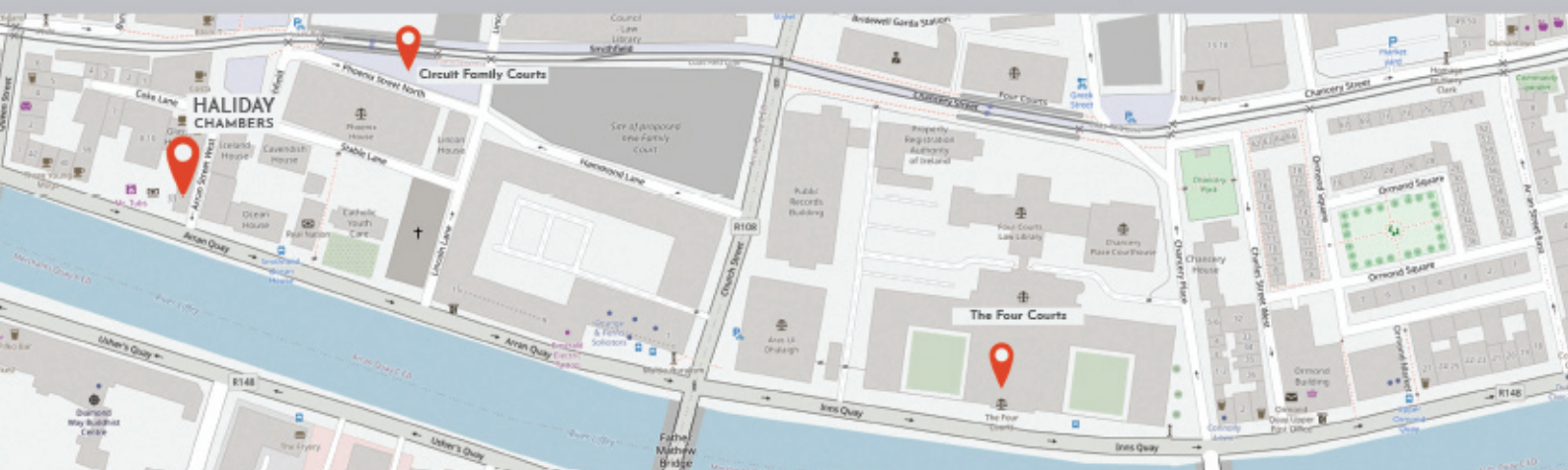

Human Rights: Universal Rights?

The Bar of Ireland Chair's Conference took place online this year from June 16-18, and addressed a myriad of issues around human rights and the rule of law at home and abroad.

Maura McNally SC, Chair of the Council of The Bar of Ireland

Micheál P. O'Higgins SC

In her opening remarks, Maura McNally SC, Chair of the Council of The Bar of Ireland, said the Bar had chosen this topic for its Conference because human rights affect us in every aspect of our lives, and in the developed world we take certain rights for granted, but is every person given equal access to those rights – here, elsewhere in the EU or in the world? She welcomed the expert speakers who would be participating over the three days, and thanked them for agreeing to take part. She also thanked those delegates who had donated to the Bar's chosen charities, the Capuchin Day Centre and Irish Rule of Law International, saying that almost €5,500 would be divided between them as a result of member donations. She also thanked Conference sponsors Aon and Irish Life, without whom, she said, the event would not be possible.

Promoting Human Rights and the Rule of Law in Ireland

The first session of the Conference focused on the home front, with opening speaker Micheál P. O'Higgins SC presenting a paper jointly prepared with April Duff BL on 'Distorting democracy or protecting rights: some thoughts on the power of the courts to strike down legislation'.

This presentation used an analysis of case law and legal scholarship to look at how the power to strike down acts of the Oireachtas has been used in Ireland, and to make some remarks on more recent Supreme Court judgments, which introduce the notion of derived rather than unenumerated rights.

The Irish courts have traditionally been conservative in striking out legislation. The presentation used the example of the Supreme Court judgment in *TD v Minister for Education*, where Justice Kelly's granting of a mandatory injunction directing the Department of Education to implement policy was struck down on appeal on the basis that it represented a clear breach of the doctrine of separation of powers.

Micheál discussed the move from a doctrine of 'unenumerated rights' to one of derived rights, reflecting the principle that the right should relate to, and emerge from, the Constitution itself, rather than from other sources. While the impact of this change is yet to be fully seen, it seems unlikely that it will result in a significant recognition of new rights.

The presentation also discussed whether plenary actions are preferable to judicial review in challenging the constitutionality of a statute. Recent case law seems to have moved towards establishing plenary action as the required approach. Micheál argued that this has the potential to restrict access to the courts by virtue of the time and expense involved. Judicial review may be a cheaper, speedier and more finely tuned approach. He argued that rather than setting down a rigid rule, perhaps the test should be more case specific.

Prof. Claire Hamilton, Professor of Criminology at Maynooth University, spoke on '*People (DPP) v JC:* a bad day for democracy?'

The Supreme Court decision in *JC* overhauled the protectionist exclusionary rule, and Prof. Hamilton sought to analyse the impact of the judgment, and whether it had, as many commentators suggest, negatively impacted the rule of law. She placed the discussion in the context of international threats to liberal democracy, in the US, Poland and Hungary for example, as well as discussion of sweeping powers introduced by governments, including in Ireland, to deal with the impact of Covid-19.

She said that the exclusionary rule acts as a check on Government behaviour, and shows that the law applies to everyone. The case can be made that flouting of the law by State bodies is more damaging than one person found not guilty because of the exclusion of evidence. She outlined the results of a survey of practitioners on the impact of the judgment, which pointed to concerns about its impact on the presumption of innocence, and on police and prosecutorial culture, a possible "free pass for ignoring procedure".

As to whether the decision is indeed "a bad day for democracy", she said that with very few relevant Supreme Court judgments in the five years since *JC*, it is hard to know. There are safeguards intended to correct imbalances, but the research suggests that these are not working as well as they should be, although there is scope for further guidance. She said that we are "at a crossroads in relation to Irish role of evidence". "There is no decisive moment when democracy is lost to us", she said. The sky didn't fall with *JC*, but concerns about a successive thinning down of democracy remain.

Mr Justice Donal O'Donnell addressed the concept of a written constitution as a standard for society to rally round. He referred to Linda Colley's history of written constitutions and the assertion that a constitution tells us a story about ourselves, adding that it also tells a story

Prof. Claire Hamilton, Professor of Criminology, Maynooth University

Mr Justice Donal O'Donnell

Paul Gallagher SC, Attorney General

Mr Justice Frank Clarke Chief Justice of Ireland

of how we wish to be perceived. He said that a constitution is "the business of everyone". When it works, it is because politics, law (not just judges but the whole legal community) and the public are interested in it. He talked about the role of a constitution in the protection of human rights. However, he cautioned against complacency here in Ireland, as it would be a mistaken perception that Ireland is not vulnerable to the forces that are attacking democracy around the globe.

…that the rule of law depends on respect for lawyers, he argued that it also depends on respect for politicians.

Justice O'Donnell asked what we can do in the face of these challenges. He argued for enhanced engagement in and support for the law among the population as the protection of liberty depends on men and women believing in it. He felt this could be assisted by appropriate reform of the judicial appointments system, and by reforms to reduce the cost of justice. He finished by saying that the standard to which the rule of law is held should be the highest: "It's all of our business to hold it there, so it will continue to tell us a story about ourselves that we can be proud of".

The final speaker of the day was Paul Gallagher SC, Attorney General, who offered his thoughts on future challenges to the rule of law.

He felt that these challenges would be different to those that had gone before, not just in Ireland but globally. The rule of law depends on lawyers, a judicial system and a state that respect the principles of law. He argued that the application, interpretation, and scope of law in modern society are very important, as are the approaches judges take to interpretation. He felt that the quality of judicial reasoning is vital in this instance, especially in common law countries. Agreeing with Justice O'Donnell that the rule of law depends on respect for lawyers, he argued that it also depends on respect for politicians.

He also raised two other matters he felt represented challenges for the future. The first was the issue of judicial discretion. He discussed the arguments for sentencing guidelines, citing research on how 'good' judicial discretion might be versus, for example, an algorithm, as evidence of the need to examine these issues.

He also argued strongly that the growth of artificial intelligence (AI) and the merger of infotech and biotech pose huge challenges to human rights. He said that special and clearly thought-out legislation will be needed, and questioned whether laws will be able to catch up with the speed of technological development, or be sophisticated enough to protect us.

The implications of all of this for the future of legal jobs is also something that must be considered, he said, and the legal profession must face up to these challenges to protect the role of the independent referral Bar.

International Tides: Rule of Law Overseas

The second day of the Conference looked to events beyond Ireland's borders. Another prestigious line-up of speakers addressed a range of issues, with a general, and worrying, consensus that there is much to be concerned about on the international stage.

Chief Justice of Ireland Mr Justice Frank Clarke addressed the thorny issue of judicial involvement in public controversy, specifically involvement in protests at attacks on the judiciary and the rule of law in Poland. He argued that the changes to the judicial system in Poland individually and cumulatively went beyond policy and were an attack on the judiciary, and that EU court judgments since have vindicated this perspective.

He went on to outline the argument as to why this is "the business of Irish judges". A philosophical argument can be made, he said, for solidarity between judiciaries: "injure one, and you injure all". Increasingly, Irish judges and higher courts are involved in organisations in the EU and beyond, representing different strands of civil, public, and common law. All of these bodies have spoken with one voice in support of colleagues in Poland.

There are also practical reasons why such attacks on other judicial structures are an issue for Ireland. Chief Justice Clarke said that Irish judges are called on, regularly and increasingly, to respect and enforce the judgments of other EU courts. He argued that the underlying principle in this "necessary harmonsiation" is the assumption that the judge in the other country is independent and respects the rule of law. If there is a legitimate concern in that regard, then if Irish judges must enforce these

Sir Declan Morgan, Lord Chief Justice of Northern Ireland

Baroness Helena Kennedy QC

Michael McDowell SC

judgments, "we are tainted too". For the Chief Justice, not only are these not merely policy matters, they are the legitimate business of the Irish judiciary.

Sir Declan Morgan, Lord Chief Justice of Northern Ireland, addressed the question of whether Brexit is a challenge to the rule of law on the island of Ireland. The constitutional impact of Brexit in Northern Ireland is currently the subject of a High Court action under a number of points: that the Northern Ireland Protocol puts Northern Ireland on a different footing to the rest of Great Britain; that the changes contained within the Protocol are incompatible with the Northern Ireland Act 1998; and, that the Protocol is a breach of the Belfast Agreement because it was done without the majority agreement of the population. While the outcome of this action is as yet unknown, Sir Declan expressed deep concern at the violence that has taken place, mainly in Loyalist areas, since March. These concerns are shared by many in Northern Ireland, as a recent poll showed that 59% of people there fear a summer of violence.

> *"When people feel fear and insecurity they can be led to populist and nationalist ideology".*

From a legal perspective, he spoke of the fact that Northern Ireland's position is unique: with a land border with the EU but no 'hard' border, the law is now a "legal hybridity". Some EU laws, and rights, are binding, but others are not. For example, it is unclear as to whether the Charter of Fundamental Rights of the EU is still law in Northern Ireland. He spoke too of the possible impact of post-Brexit decisions by the UK Government, which is now proposing radical reform of the judicial review process, and a review of the Human Rights Act. Attacks by the Government on judicial decisions are also a concern. Sir Declan said that in order to provide some clarity to the people of Northern Ireland, it is necessary to be clear about what the rule of law requires: independent judgement, consensus on underlying arrangements, and community investment are all essential.

He ended by saying that there is much to be clarified for Northern Ireland and Ireland, including the role of Article 16 of the Protocol, which he called an "escape clause". Only when these challenges are resolved will the true impact of Brexit on whole island of Ireland be clear.

Baroness Helena Kennedy QC brought a more global perspective, speaking of the rise of populism, which she linked to the 2008 economic collapse. "When people feel fear and insecurity they can be led to populist and nationalist ideology", she said, including hostility to immigrants or LGBT people, and attacks on the media and other institutions.

While we focus rightly on countries like Hungary, or Russia, traditionally liberal democracies are far from exempt, and she gave the example of Brexit, which she said was premised on reclaiming sovereignty and reducing the influence of international courts, and the Trump administration in the United States, with its disrespect for international institutions. While she welcomed the return of multilateralism under President Biden, she said there was no doubt that "populism is having its day in the sun".

Returning to post-Brexit Britain, she too voiced her concerns at the proposed reviews of the judicial review process and the Human Rights Act, and their roots in the Government's resentment of the Supreme Court's decision on the prorogation of Parliament in 2019. When the UK disrespects law and rules-based order, she said, this sends a bad signal, and referencing Chief Justice Clarke's presentation, she said: "I hope you'll join us when we take to the streets to resist attacks on our independence".

She ended by emphasising her view that lawyers, judges and bar associations have a very important role to play in maintaining standards and speaking out for human rights, both domestically and internationally.

The final speaker of the session, Michael McDowell SC, sounded a somewhat pessimistic note in his presentation on realism and the international rule of law.

He spoke of the undoubted attraction of a legal order that regulates and protects citizens and governments, based on shared values of human rights. Types of international law, such as environmental (climate justice), criminal (the International Criminal Court), and trade (the World Trade Organisation), contribute to an "international orthodoxy of belief" that there is an accepted corpus of law and rights, including such elements as a free media and democratically elected governments. However, "the moral ecosystem is very fragile", he said, and we are in danger of "moral

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Orla O'Donnell, RTÉ Legal Affairs Correspondent

The Rt Hon. The Baroness Hale of Richmond OBE

Ms Justice Mary Finlay Geoghegan

The Honourable Rosalie Abella

altitude sickness" if we continue to focus on these issues without bringing a "granular realism" to bear.

> *Lawyers, judges and bar associations have a very important role to play in maintaining standards and speaking out for human rights, both domestically and internationally.*

He pointed out that true liberal democracy is the exception rather than the rule globally, and so-called 'Western' liberal democracy is rare outside the common law and EU world. He argued that there is an economic bias to many concepts of the rule of law, with agendas such as the elimination of tax burdens playing a vital role, and the response to nations who are violating human rights will depend on how they relate to these economic elements. As a stark example, he spoke of China, an economic and military superpower whose "unspeakable" treatment of the Uighur people, and suppression of democracy in Hong Kong, has been met with little in the way of action from the international community. When states are important to us, he said, they are not challenged. "We have to be honest and truthful about the limitations of the international rule of law", he said, "not abandon our ambitions for human rights and economic justice, but be realistic".

Celebrating women at the Bar

The final session of the Conference was a celebration of the centenary of the first female members of The Bar of Ireland. A panel discussion moderated by RTÉ Legal Affairs Correspondent Orla O'Donnell brought together three trailblazers of the legal world: The Rt Hon. The Baroness Hale of Richmond OBE, Former President of the UK Supreme Court; Ms Justice Mary Finlay Geoghegan, former Judge of the Irish Supreme Court; and, The Honourable Rosalie Abella, Justice of the Supreme Court of Canada. Maura McNally SC, Chair of the Council of The Bar of Ireland, and only the second female Chair in the Council's history, joined a fascinating discussion that covered the participants' careers, their views on the challenges facing women in the legal world, and what can be done to make things better.

Each of the three guests had very different entry points to the profession. Justice Abella's family arrived in Canada as refugees after World War II. Her father was a lawyer, but was unable to practise law in Canada because he was not a citizen, and this spurred her to pursue a career in law, despite being told by many that "girls aren't lawyers". Lady Hale was the first girl from her school to do law, and chose the profession after her head teacher told her she wasn't clever enough to study history. While her early career was mainly in academia, she qualified and practised as a barrister, which was of course essential to her eventual appointment as a judge. Justice Finlay-Geoghegan completed a degree in mathematics, but was drawn to the law. Having been advised by her father (himself a barrister), that the Irish Bar was no place for a woman, she qualified as a solicitor and specialised in commercial law (then, as now, a male-dominated area). She retained what she called a "hankering to give the Bar a go", however, and qualified as a barrister, bringing her commercial expertise with her.

None of the guests felt that they had experienced a great deal of gender discrimination in their careers. In fact, all made the point that they felt fortunate to have qualified at a time when "they were looking for women", and when their very rarity in the profession made them stand out. However, there were particular challenges in that position too, as Justice Abella eloquently expressed: "As a woman I was very aware that I had to work twice as hard. We were pioneering metaphors. We had to make sure people didn't think this 'experiment' wasn't working".

They all spoke about the choices they had to make when it came to career opportunities while raising a family. None spoke of regrets, although there were undoubtedly roads not taken, but rather preferred to look positively on the opportunities they had chosen to pursue. Perhaps because, as Lady Hale pointed out, "no woman says 'someday I'll be a judge' in our generation", there was less emphasis on specific ambitions, and more on taking opportunities when they presented themselves. Justice Abella was the first pregnant member of the judiciary in Canada, and spoke of "no choices, but a lot of good luck", saying: "We just did it – looking back on it now I don't know how".

In a discussion of what can be done to make things better for women, and other minorities, at the Bar, Maura McNally spoke of the huge issues presented by maternity leave and childcare, especially in the Irish system, where barristers are self-employed and do not have the relative protection of law firms or chambers. She also spoke of the need to challenge conscious and unconscious bias in the profession. She outlined some actions The Bar of Ireland is taking in this regard: waiving fees for members on maternity leave; the equitable briefing policy; the work of the Bar's Diversity Committee; and, the Denham Scholarship.

Lady Hale made the interesting point that perhaps how we measure success needs to change too. Rather than look to the Supreme Court bench, many women pursue extremely successful careers in government, or the regulatory legal world, or become in-house counsel. She pointed out that in England, 60% of Government lawyers are women, and that many of these, for example, would be brilliant candidates for judicial appointments. This raised the interesting point that perhaps inequalities could be addressed by looking elsewhere in the profession for such candidates. Justice Abella pointed out that this is already the case in Canada, where many excellent judges are appointed from the public service.

They guests were less keen on concepts such as 'positive discrimination' (Justice Abella said that she wasn't sure such a thing was possible). All felt that appointments should be based on finding the best candidate, although all agreed that the judiciary needs to be representative of society. Lady Hale was in favour of concepts such as affirmative action, taking steps to make it easier for people from non-traditional backgrounds to enter the profession, and said that we have to think creatively about these issues. Justice Abella agreed, saying that the profession needs to "identify the barriers, examine them, and see what we can do". She did however point out that "the old boys network was not based on merit!"

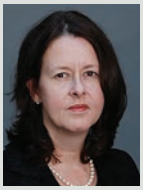
Final questions addressed the standout moments in their careers, and whether there was anything they would do differently.

Lady Hale referenced the UK Supreme Court ruling on prorogation of parliament as an obvious standout, but was also very proud of her work in family law reform. Her only 'regret' was perhaps "upsetting people without meaning to". Justice Finlay-Geoghegan was proudest of being part of establishing the Court of Appeal, and said she regretted making *ex tempore* judgments quickly, wishing she had taken more time.

Justice Abella referenced cases she had been involved in on gay rights, pay equity and the right to strike. She said she had no regrets, and perhaps summed up the views of all the participants when she said: "I am not a package of obstacles I overcame. I am a product of opportunities".

Access to justice – the terminally ill plaintiff

A recent Supreme Court judgment in the case of an individual affected by the CervicalCheck scandal highlights key issues in actions where a plaintiff is terminally ill.



Jeremy Maher SC
Ciara McGoldrick BL

On March 19, 2020, the Supreme Court delivered judgment in *Ruth Morrissey and Paul Morrissey v Health Service Executive, Quest Diagnostics Incorporated and MedLab Pathology Ltd.*[1] The case concerned the negligent failure to correctly read the first-named plaintiff's cervical smear samples, taken as part of Ireland's National Cervical Screening Programme, CervicalCheck, in August 2009 and August 2012.

In 2014, Ruth Morrissey was diagnosed with invasive cervical cancer. After initial treatment, the cancer returned in 2018 and she was now terminally ill with an extremely limited life expectancy. She died on July 19, 2020, aged 39, some four months after the Supreme Court judgment. She is survived by her husband and young daughter. Multiple legal issues arose in this case. These included the practical duty of those who look at smears (cytotechnologists), the standard of approach issue, and the legal 'standard of care' applicable in such circumstances.[2] The Supreme Court also confirmed the primary liability of the Health Service Executive for negligence in the provision of services as part of the CervicalCheck programme. The case has also highlighted other significant issues, which confront the victim of a tort who has been given a terminal diagnosis. These include:

(i) the importance of access to justice;
(ii) general damages in a case of a life foreshortened; and,
(iii) special damages in the case of a life foreshortened.

Access to justice

It is a popular misconception that the purpose of personal injuries litigation is simply the recovery of damages. This is to wholly underestimate the importance of tort law in the vindication of the personal rights of the citizen. Such importance was confirmed by the Supreme Court in *Grant v Roche Products (Ireland) Limited and Others* [2008] 4 IR 679. As Mr Justice Hardiman said at paragraph 79:

"There is thus authority, both judicial and academic, for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever".

In *Grant*, the plaintiff's son had died in tragic circumstances. He had taken his own life having been prescribed medication manufactured and distributed by the first to fifth named defendants (described as "the Roche Defendants"). Mr Grant brought a fatal claim pursuant to Part IV of the Civil Liability Act 1961. The Roche Defendants put in a full defence. They offered the plaintiff the sum of €30,990.22, which included €25,394.76 for mental distress, which was the full amount of damages that could have been awarded in the event that the claim was successful.

Mr Grant's solicitors rejected this offer, describing it as "a cynical attempt to avoid a public trial in relation to wrongful conduct" concerning the drug in question.

The Roche Defendants sought to stop the claim proceeding and issued a motion seeking an order pursuant to the "inherent jurisdiction of the Court" staying the proceedings or alternatively restraining the continued prosecution of the proceedings on the grounds that, as the plaintiff had been offered the relief sought, the continued prosecution of the proceedings would be an abuse of process.

In essence, the contention of the Roche Defendants was that all you can achieve in litigation of this nature is damages. However, they also couched the application in terms of the likely length of the trial and the expense associated with it, thus seeking to strengthen their argument that a trial that served no purpose was an abuse of process of the court. If the defendants' contention was correct and personal injury litigation was only concerned with the recovery of damages, the litigation had to be at an end.

The plaintiff's case is set out at paragraphs 39 to 49 of the judgment. Counsel for the plaintiff sought the vindication of personal rights in accordance with Article 40.3.3 of the Constitution and argued that:

"One way in which the State met its constitutional obligation to vindicate those rights was by the provision of suitable forms of civil action. There was no authority for the proposition that this role is in some way limited to criminal law. The role of a civil action is more than the allocation of damages; it is one of the ways in which rights are vindicated. The terms of s. 48(1) of the Civil Liability Act 1961 meant that an action under Part IV was, amongst other things, an inquiry into accountability for the death because damages could only be awarded 'where the death of a person is caused by the wrongful act of another'".[3]

Counsel for the plaintiff also referred to the State's obligation "in the case of injustice done to vindicate, *inter alia*, the right to life of all citizens, including the late Liam Grant Junior". Mr Justice Hardiman noted counsel for the plaintiff's argument:

"How is this to be done if the State provides no mechanism for enquiring into liability except as a precondition to an award of damages? If such a procedure could be brought off by simply paying the very restricted amount permitted by way of damages in those circumstances, that would be, it was submitted, "a rich man's charter" to subvert the vindication to the right to life".[4]

Counsel for the Roche Defendants submitted that the answer to the question raised in this case was to be found by reference to what was provided in the Act itself, which, he submitted, was "damages" for the relatives of the deceased and for nothing else. Mr Justice Hardiman rejected the defendants' argument, stating as follows at paragraph 69 of the judgment under the heading Article 40.3.2:

"I consider that counsel for the plaintiff is self-evidently correct in his submission that the construction of Part IV of the Act of 1961, like any statute, must be approached in the context of the Constitution. The plangent words of Article 40.3 in relation to the right to life are almost too well known to require quotation:

(i) The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
(ii) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen".

Mr Justice Hardiman proceeded to consider the meaning of the word "vindicate". In this he relied extensively upon his analysis of the Irish language version and stated as follows at paragraph 75:

"In light of the foregoing and bearing in mind the primacy of the Irish text in the event of deviation, it seems to me that the term "a shuíomh" or "vindicate" is best rendered, and in a manner which is harmonious as between the Irish and English versions, by a combination of two of the *Oxford English Dictionary* definitions, those of 'defend against encroachment or interference' and 'clear of blame, justify by evidence or argument'".

The judge continued:

"If this meaning is applied to a process which is intended to be a remedy or vindication for an injustice, then it seems to me to require the three characteristics of vindication, which were asserted by counsel for the plaintiff in this case, i.e.:

(i) a judicial process which
(ii) featured a determination of liability; and,
(iii) a pronouncement of liability'".

Hardiman J. rejected the central proposition of the defendants' argument that the vindication of personal rights only arose in the criminal or regulatory context and not civil law.[5] He found support for his view as to the scope of the protections afforded by the Constitution in the decisions of *Meskell v Córas Iompair Éireann* [1973] IR 21 and of Henchy J. in *Hanrahan v Merck Sharp & Dohme Ireland Ltd* [1988] ILRM.

Thus, the Supreme Court decision in *Grant* is powerful and persuasive authority for the proposition that the law of torts is an important tool in the vindication of constitutional rights. At paragraph 82, Hardiman J. concluded:

"I also wish to reiterate that I do not accept that the finding that a death was caused by the wrongful act of another person is a finding which confers no tangible benefit on the relatives of the deceased, in circumstances such as the present, for the reasons set out above".

The decision in *Grant* is an important and timely reminder that the purpose of tort law is not simply the recovery of damages, although that is an important element of the claim. It is also important for the victim of a wrong to be able to assert in public the occurrence of the wrong in question and to have such assertion tested and, if appropriate, to be vindicated in such assertion.

General damages in the case of a life foreshortened

In *Morrissey*, the Supreme Court had to consider whether the general damages of €500,000 awarded to Ruth Morrissey by Mr Justice Cross in the High Court were excessive. The third named defendant had appealed against that aspect of the decision.

The uncontroverted evidence at trial was that Mrs Morrissey's life expectancy was extremely limited. At the time of the hearing in the High Court she was 37 years of age. She died in July 2020 at the age of 39, some 40 years below the average life expectancy of a woman in Ireland. As noted in the judgment of the Court (Clarke C.J. at paragraph 14.2), the appeal as regards general damages concerned two issues.

Firstly, it was argued that the award of general damages exceeded the established maximum award or "cap" permissible in respect of general damages, which was said to rest at €450,000.

Secondly, it was argued that even if the cap was at €500,000, then the award was disproportionate when assessed against the level of damages awarded in other cases.

The Supreme Court rejected both arguments. Firstly, it upheld the trial judge's award of €500,000, finding that the maximum award or cap was now represented by that figure. As regards the second argument, namely that the award of damages was disproportionate, it was argued by Medlab that Mrs Morrissey's injuries did not reach the maximum level of gravity on the spectrum of personal injuries. Clarke C.J. said as follows at paragraph 14.27:

"In my view, there are different ways in which it is possible properly to characterise injuries suffered as a result of negligent action as being at or near the top of the compensation range so far as pain and suffering are concerned. I have no doubt that this is one such case".

A number of observations can be made:

(a) The decision in *Morrissey* represents a departure from a previously held view that general damages where life was foreshortened could never be at the same level as a person who could expect to live for many years in a state of pain and suffering.

(b) The Supreme Court did not address the situation of a plaintiff who has less cognitive insight into the extent of his or her injuries and whether he or she should receive lesser damages than a plaintiff who has "normal cognitive insight".

(c) *Morrissey* should now be considered in the light of the Personal Injuries Guidelines adopted by the Judicial Council on March 6, 2021. At page 8 – under the heading "Injuries resulting in foreshortened life expectancy" the Court set out six factors which could affect the level of the award:
   (i) age;
   (ii) reduction in normal life expectancy;
   (iii) nature, extent and duration of treatment, e.g., surgery, chemotherapy, radiation or other medication;
   (iv) impact on work;
   (v) interference of quality of life including social, familial and other relationships; and,
   (vi) psychological sequelae, including depression.

The guidelines increase the cap or top range of general damages in the case of foreshortened life expectancies to €550,000.

Special damages in the case of a life foreshortened

While the third-named defendant failed in its appeal on general damages, the Supreme Court did allow its appeal in respect of the claim made by the plaintiffs for childcare or loss of free services after the first named plaintiff's death. As noted at paragraph 15.2 of the judgment:

"The essential difficulty stems from the longstanding case law which suggests that a third party cannot sue in damages for loss arising out of a death caused by the wrongdoing of a defendant. There have been some exceptions identified and there have been alterations in the law brought about by the legislature. However, on MedLab's case, the fundamental position remains as indicated in that historic case law, subject only to those exceptions which have been recognised or where legislative change has been brought about".

The common law position that no damages could be recovered for financial loss arising out of a death dates back to the decision in *Baker v Bolton* (1808) 1 Camp 493, where Lord Ellenborough stated: "In a civil court, the death of a human being could not be complained of as an injury, and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence".

The Supreme Court noted that certain exceptions had been developed to this rule both at common law and at statute. One of these exceptions is the doctrine of "the lost years", whereby a dying plaintiff can recover the

loss of earnings that she or he might reasonably have been expected to earn during their normal lifetime, less the living costs associated therewith. The Supreme Court was not however prepared to extend the concept of the lost years to permit the recovery of the cost of care for a child after the death of a parent who might otherwise have been expected to provide free services.

The statutory exception to the above rule is that provided for in section 48(1) of the Civil Liability Act 1961. This provides:

"48.-(1) Where the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action in damages for the benefit of the dependants of the deceased".

As noted by the Supreme Court, section 48 has been the subject of limited consideration in this jurisdiction. It has been interpreted as requiring the deceased person to have had a cause of action vested in him or her at the date of death and that the claim not be statute barred at the time of death.[6] So, where a claim has been settled or proceeded to judgment prior to a plaintiff's death, it would appear that his or her dependants are precluded from taking a claim pursuant to section 48 after the plaintiff's death. The Supreme Court left open the question whether this is the correct interpretation of section 48. The Supreme Court stated at paragraph 15.25:

"…any further significant evolution in this area is one that can only be achieved by comprehensive legislation rather by an evolution in the case law. I appreciate that the current situation does contain some anomalies. But the risk of creating further anomalies by a piecemeal approach on the part of the courts involving a radical alteration in the underlying common law assumption in the area is one which, in my view should be avoided". A year later no such intervention has been forthcoming.

Conclusion

There are many scenarios that can demonstrate the injustice inflicted on dying plaintiffs and their families as a result of the current state of the law. Consider the case of a young woman who is terminally ill as a result of negligence in the interpretation of her cervical smears and who had chosen not to work outside the home so that she could care for her children. Depending on the ages and number of her children, a dependency claim could be significantly greater than her personal claim. She therefore faces the following dilemma:

(a) She can take a claim against the Health Service Executive while she is alive and thereby receive vindication, recover general damages and recover the costs incurred as a result of her illness until the date of her death. She must accept that her statutory dependants may not be able to take proceedings to recover the significant cost of replacing the unremunerated care she provided to her children. Unlike a woman who works outside the home and can recover for her remunerated work, she cannot recover damages for her unremunerated work under the doctrine of lost years and have the comfort that such sum would be available to her children following her death.

(b) Alternatively, she can elect not to take proceedings during her lifetime and hope that a successful claim will be brought on behalf of her statutory dependants. She must gamble that she will die within the statutory limitation period. She will forego damages for her pain and suffering. She will forego vindication of her constitutional rights. She will not recover the costs she has incurred as a result of her illness or the sums required to finance the assistance and supports necessary to allow her to manage her terminal illness as she would wish.[7] Her evidence will not be available, for example to resist a plea of contributory negligence.

Those provided with a terminal diagnosis as a result of negligent care surely deserve better than this?

References

1. [2020] IESC 6.
2. The Supreme Court confirmed that the test was that set out in *Dunne v National Maternity Hospital and another* [1989] IR 91.
3. Paragraph 39.
4. Paragraph 41.
5. Paragraph 77.
6. *Mahon v Burke* [1991] 2 IR 495; *Hewitt v HSE* [2016] 2 IR 649.
7. Such costs as she is in a position to incur are recoverable should a successful claim be brought on behalf of her estate under Section 7 of the Civil Liability Act 1961.

Non-material damage and representative actions in data protection law

Developments in the Court of Justice of the European Union may provide clarity on the issue of non-material damages in data protection cases, while other developments may precipitate long-awaited reform in Ireland regarding class actions.

Patrick Crowe BL

The issue of damages in respect of the General Data Protection Regulation (GDPR)[1] and/or the Data Protection Act 2018 (the 2018 Act) has been the subject of considerable discussion across European Union (EU) member states since its enactment. In particular, the specific issue of non-material damage has become problematic among national courts. To this end, the Federal Constitutional Court of Germany has recently required a lower court to make a preliminary reference to the Court of Justice of the European Union (CJEU) regarding non-material damages

and the GDPR. There has also been a move towards the broadening of representative actions at EU level, which may see the long-awaited reform in Ireland in providing for class actions.

The relevant statutory provisions

Article 82 of the GDPR provides for the right to compensation and liability in respect of an infringement:

"Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered".

Recital 146 of the GDPR also provides:

"[…] The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation. This is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law […]". [emphasis added]

Recital 85 gives examples of material and non-material damage:

"[…] A personal data breach may, if not addressed in an appropriate and timely manner, result in physical, material or non-material damage to natural persons such as loss of control over their personal data or limitation of their rights, discrimination, identity theft or fraud, financial loss, unauthorised reversal of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned".

Article 82 of the GDPR was implemented in Ireland by s. 117 of the 2018 Act, which provides as follows:

"(1) […] a data subject may, where he or she considers that his or her rights under a relevant enactment have been infringed as a result of the processing of his or her personal data in a manner that fails to comply with a relevant enactment, bring an action (in this section referred to as a "data protection action") against the controller or processor concerned. […] (10) "damage" includes material and non-material damage;".

The position of the Irish courts

The leading case in Ireland concerning damages for an infringement of the GDPR was *Collins v FBD Insurance Plc*.[2] The plaintiff issued proceedings in the Circuit Court and was awarded damages of €15,000 for an infringement under s. 7 of the Data Protection Act 1988 (as amended).[3] The infringement concerned the manner in which the defendant had hired a private investigator to investigate his insurance claim. The defendant appealed to the High Court, arguing that the plaintiff was not entitled to compensation in the absence of evidence of actual loss or damage.[4] Feeney J., in dismissing the plaintiff's claim, held that the plaintiff failed to show "actual damage", stating:[5]

"A person seeking compensation arising from a breach of statutory duty under an Act must establish that the loss or damage that such person has suffered flowed from the breach, unless the statutory duty involved is one of strict liability. Here, the statute does not provide for strict liability and for me to interpret s. 7 of the Data Protection Acts as enabling a claimant to benefit from an award of damages for non-pecuniary loss, would be for me to expand the scope of s. 7 beyond that provided for in the Act or required by the Directive".

In a subsequent Supreme Court case of *Murphy v Callinan and ors*,[6] Baker J. adopted the decision of *Collins*. In *Murphy* the plaintiff's claim concerned the alleged inaccuracy of his data processed by the defendant in respect of an insurance policy. Though the judgment of the Supreme Court post-dated the enactment of the 2018 Act, the old Data Protection Act 1988 still applied due to the date of the issuing of the proceedings. Baker J. held that s. 7 of the 1988 Act, while it did expressly create a duty of care on a data controller in regard to personal data, did not make the infringement of the GDPR actionable without proof of negligence or a causative connection to an alleged material damage or other loss.[7] The Supreme Court did, however, note that the new regime under the 2018 Act permits an individual to seek compensation from the court for infringements even in the absence of any material damage or financial loss.[8]

In the recent Court of Appeal decision in *Shawl Property Investments Limited v A. and B.*,[9] one of the issues raised by the appellant was whether there was an infringement of the GDPR and the 2018 Act by the respondent in the use of her private data in the course of obtaining a previous court order. The appellant was seeking that the said court order be set aside. In particular, the appellant contended that the data contained details of prior family proceedings, which had been conducted in camera. She placed reliance upon Recitals 1, 4 and 7 together with Article 4(11) of the GDPR in positing that the conduct of the trial judge constituted "an outright breach of all of the fundamental rights the GDPR seeks to protect and the manner in which those rights ought to be protected".[10]

The Court of Appeal held that any claim regarding an infringement of the GDPR and 2018 Act would be a matter for a separate trial judge by way of plenary proceedings and would not be appropriate for the Court of Appeal to decide upon. The Court stated that the trial judge would have to decide whether the processing of the personal data within the court proceedings was for legitimate purposes under Article 5 of the GDPR and ss. 60(3)(a), 158, 159 and 160 of the 2018 Act (which govern processing of data within court proceedings). The Court of Appeal, however, reaffirmed *obiter* that:

"[the 2018 Act] permits an individual to seek compensation from the court for breaches of data subject rights even in the absence of any material damage or financial loss.[11]

[…] Nothing stated in s. 117 or indeed the Act itself suggests that a data protection action is a tort of strict liability".[12]

German court and preliminary reference

There is an ongoing issue concerning uniformity across member states[13]

in respect of non-material damage resulting from an infringement of the GDPR. As discussed, Ireland has introduced s. 117 into our national legislation, which adopts Article 82 of the GDPR. To date, there has yet to be a reported judgment on the matter in Ireland.[14]

The initial case in the District Court concerned a lawyer who received a promotional email from the defendant to his professional email address without prior consent.

Hence, it is worth looking towards other member states to seek some guidance. In Germany, there is no corresponding provision in the Bundesdatenschutzgesetz (the German legislation incorporating the GDPR) that incorporates Article 82 and the concept of non-material damages like s. 117 of the 2018 Act. Accordingly, there was a prevailing view in Germany that a successful plaintiff would have to demonstrate a clear, specific and objective harm that has resulted from a violation of data protection law to be awarded a claim for damages.[15] In January 2021, the German Federal Constitutional Court[16] took steps to bring the matter to a head by ordering the Local Court of Goslar (the District Court) to make a preliminary reference to the CJEU. The initial case in the District Court concerned a lawyer who received a promotional email from the defendant to his professional email address without prior consent. The plaintiff was refused a non-material damages claim as the District Court held that no damage was apparent because it was a single advertising email, which had not been sent at an inopportune time.

The plaintiff referred the decision of the District Court to the Federal Constitutional Court, which accepted the plaintiff's submission and held that the District Court must refer a preliminary question to the CJEU on:[17]

"[…] The answer to the legal question of how Article 82 (1) of the GDPR is to be interpreted, against the background of Recital 146, relevant to the decision on the payment claim asserted by the complainant".

In referring to Recital 146 of the GDPR, the Court stated that the claim for monetary compensation had not been exhaustively clarified in the case law of the CJEU, nor could it be determined directly from the GDPR.[18] At the time of writing of this article, the District Court has yet to issue the preliminary reference to the CJEU.[19]

The preliminary reference from the German court is welcome in circumstances where the CJEU has yet to provide a determination on non-material damages. As matters stand, member states do not yet have any practical guidance as to how to apply Recital 146 of the GDPR and, in particular, "the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation".

The CJEU

Though the preliminary reference by the German court will address the issue specifically to non-material damages for infringements of the GDPR, it is still helpful to refer to earlier CJEU judgments on the matter of non-material damages generally. Ordinarily, the precise content of the compensation and non-material damages is under the realm of national procedural autonomy; however, the CJEU has concluded that the national law must guarantee that "full and proper compensation" is available.[20] This is also expressly provided for in Recital 146, which states "[D]ata subjects should receive full and effective compensation for the damage they have suffered".

In the case of *Staelen v the European Ombudsman*,[21] the European Ombudsman (the Ombudsman) appealed a judgment of the General Court of the European Union (the General Court) to the Grand Chamber concerning Ms Staelen's claim for compensation for the damage she claimed to have suffered as a result of the Ombudsman's handling of her complaint concerning mismanagement by the European Parliament of the list of suitable candidates in an open competition for a position,[22] on which she appeared as a successful candidate. One of the matters appealed by the Ombudsman was whether non-material damage had actually been established. The Grand Chamber cited the "settled case-law" of the CJEU regarding non-material damage at paragraph 91:[23]

"[…] it must be borne in mind that, according to the settled case-law of the Court, the damage for which compensation is sought must be actual and certain"[24]

And again at paragraph 127:[25]

"[…] it is necessary to go on to consider whether those breaches have caused Ms Staelen actual and certain non-material damage, within the meaning of the case-law referred to in paragraph 91 of the present judgment, although the Court must also be satisfied that that damage is the direct consequence of those breaches".[26]

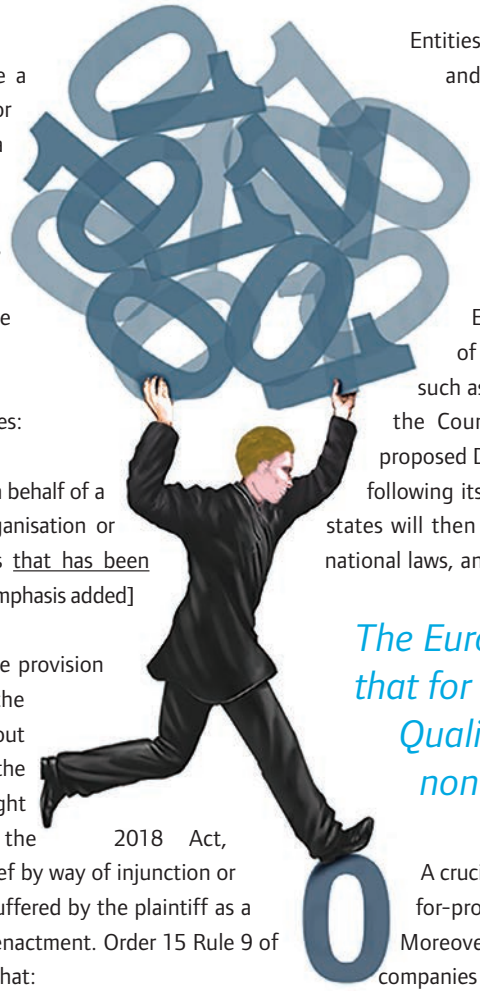
Ultimately, the Grand Chamber held that the General Court erred in law by characterising the loss of confidence in the institution of the Ombudsman alleged by Ms Staelen as non-material damage that may be compensated.[27] However, the Grand Chamber held that she would be entitled to compensation of €7,000 for the non-material damage she suffered in relation to the "psychological harm" she experienced, which was caused by the Ombudsman.[28] The Grand Chamber was of the view that such psychological harm was "actual and certain", and thus complied with the jurisprudence of the CJEU in respect of non-material damage.

Representative actions and class actions

Mass infringements of the GDPR are increasing in frequency, and the area of representative actions will become central to claims of non-material damage for such infringements. This was apparent in the recent mass data breach by Fastway Couriers (Fastway). Fastway confirmed[29] that one of its IT systems had been subject to a cyber-attack, the consequence of which being that the addresses and contact details of 446,143 parcel receivers had been compromised. Article 80 of the GDPR concerns representative

actions, stating that a member state:

- shall allow a data subject to mandate a non-profit body to lodge a complaint or seek a judicial remedy against a controller or processor on its behalf;
- may provide that a non-profit can do so independently of a data subject's mandate; and,
- may provide that a non-profit can receive damages on behalf of a data subject.[30]



S. 117(7) Data Protection Act 2018 provides:

"A data protection action may be brought on behalf of a data subject by a not-for-profit body, organisation or association to which Article 80(1) applies that has been mandated by the data subject to do so".[31] [emphasis added]

Therefore, the Oireachtas opted out of the provision under Article 80, which could allow the non-profit body to issue proceedings without the mandate of the data subject to bring the action. In addition, where an action is brought by a non-profit body under s. 117(8) of the 2018 Act, the court shall have the power to grant relief by way of injunction or declaration or compensation for damage suffered by the plaintiff as a result of the infringement of the relevant enactment. Order 15 Rule 9 of the Rules of the Superior Courts provides that:

"[…] where numerous persons have the same interest in a cause or matter, one or more persons may sue or be sued or may be authorised by the court to defend a matter on behalf of or for the benefit of all interested persons".

As a result, despite the introduction of representative actions under s. 117(7), there is no provision for the bringing of class actions in Ireland – notwithstanding calls for reform for a number of years.[32] Currently, where many claimants have similar claims, the litigation is typically progressed by lead cases (often called pathfinders), which proceed as a 'test case'. However, like every litigant, the claimant in a test case faces the risk of costs potentially being awarded against them if they lose, potentially leaving them solely liable for the litigation costs. Furthermore, the Supreme Court in the recent decisions of *Persona Digital Telephony*[33] and *SPV Osus v HSBC Institutional Trust Services (Ireland) Ltd*[34] found that arrangements proposed by plaintiffs to pursue litigation (third-party funding in *Persona* and an assignment of a claim in *SPV Osus*) were contrary to public policy[35] and gave rise to champtery.[36] This means that there is no provision for a third-party and/or assignment of a claim where it is a for-profit body taking the case.[37]

The proposed EU Representative Action Directive (the Directive) introduces a harmonised model for representative actions for member states for "mass harm" situations.[38] Under this Directive, "Qualified Entities" (organisations or a public bodies) will be empowered and financially supported to bring both domestic and cross-border actions for injunction and redress. The European Parliament has stated that for any cross-border actions, the Qualified Entity must be, *inter alia*, a non-profit entity. For domestic actions, member states will have the option on whether to also require the Qualified Entities to be non-profit entities. The European Parliament further confirmed that "the scope of collective action would include trader violations in areas such as data protection".[39] Once the European Parliament and the Council approve the political agreement underlying the proposed Directive, the Directive itself will enter into force 20 days following its publication in the *Official Journal of the EU*. Member states will then have 24 months to transpose the Directive into their national laws, and an additional six months to apply it.[40]

The European Parliament has stated that for any cross-border actions, the Qualified Entity must be, inter alia, *a non-profit entity.*

A crucial point for practitioners will be whether Ireland will allow for-profit bodies to be Qualified Entities in domestic actions. Moreover, because many of the world's leading technology companies are based in Ireland, it could be at the vanguard of major representative actions for non-material damage.[41] As a result, one could argue that Ireland's position concerning Qualified Entities for any domestic actions has an added significance over other member states. Furthermore, it is submitted that Ireland should use the transposition of the Directive as an opportunity to provide for a proper procedure for representative actions and allow our national courts the proper tools to effect class actions.

Conclusion

Because infringements of the GDPR and the 2018 Act are largely dealt with by the Circuit Court in this jurisdiction, the dearth of written judgments on the issue means that there is currently little guidance for practitioners.[42] Accordingly, there has been considerable commentary on the position taken by the courts of England and Wales, and the national courts of the other European member states concerning non-material damage under the GDPR.[43] However, the Irish courts are ultimately bound by CJEU jurisprudence, and the German preliminary reference to the CJEU should go some way in allowing member states to interpret non-material damages in a way "which fully reflects the objectives of [the GDPR]".[44] The incoming Directive on representative actions may also pave the way for class actions for infringements of the GDPR and the 2018 Act domestically, but this will very much depend on the transposition of the Directive and whether it is restricted to non-profit bodies.

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7. *Ibid* at [41].
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9. [2021] IECA 53.
10. *Ibid* at [59].
11. *Ibid* at [112].
12. *Ibid* at [114].
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Brassil v DPP
Costs – Stay – Representation – Appellant seeking no order as to costs – Whether costs should follow the event – [2021] IECA 136 – 07/05/2021
Castletown Foundation Ltd v Magan
Costs – Dismissal – Bound to fail – Third defendant seeking an order dismissing the claims brought against it by the plaintiff – Whether the claims brought against the third defendant by the plaintiff were bound to fail – [2021] IEHC 351 – 19/05/2021
Fannon v Tom O'Brien and Promontoria (Oyster) DAC and by Order Ulster Bank Ireland DAC
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R. v R.

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DPP v Benko
Consultative case stated – Criminal procedure – Service of book of evidence – Consultative case stated by the Dublin Circuit Criminal Court judge – Where an accused is being sent forward for trial from the District Court is service of the book of evidence on the accused's solicitor adequate in order to comply with ss. 4A and 4B of the Criminal Procedure Act 1967? – [2021] IECA 164 – 03/06/2021
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Board of Management of Salesian Secondary College (Limerick) v Facebook Ireland Ltd
Disclosure – Inherent jurisdiction – Prejudice – Plaintiff seeking an order pursuant to the inherent jurisdiction of the High Court directing that the second defendant disclose the full names and addresses of the persons who were members of the Congregation of Christian Brothers in Ireland during the period from August 1, 1979, to December 31, 1984, and who are currently members of the Congregation of Christian Brothers – Whether the plaintiff was likely to be prejudiced absent the information – [2021] IEHC 320 – 10/05/2021
Grace v Hendrick and Garvey
Privilege – Discovery – Personal injury – Plaintiff seeking an order compelling production of documents over which privilege had been claimed – Whether the defendant was entitled to claim privilege over the documents – [2021] IEHC 180 – 12/03/2021
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Statutory instruments

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Statutory instruments

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HEALTH

Statutory instruments

Health Act 1947 (exempted traveller) (Covid-19) (amendment) (no. 4) regulations 2021 – SI 211/2021

Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (amendment) (no. 3) regulations 2021 – SI 212/2021

Health (acute in-patient charges) regulations 2021 – SI 213/2021

Health Act 1947 (exempted traveller) (Covid-19) (amendment) (no. 5) regulations 2021 – SI 216/2021

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Public Health (Alcohol) Act 2018 (commencement) order 2021 – SI 230/2021

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Interlocutory injunction – Defamation – Defence – Plaintiff seeking an interlocutory injunction prohibiting the publication or further publication of two identified advertisements published by the defendants – Whether the advertisements were clearly and unquestionably defamatory – [2021] IEHC 381 – 04/06/2021

Lidl Ireland GmbH v Irish Farmers Association, Cullinan and Rushe

Interlocutory injunction – Common law rights – Freedom of speech – Appellant seeking to appeal against an interlocutory injunction – Whether the trial judge was entitled to grant the reliefs sought by the respondent – [2021] IECA 147 – 18/05/2021

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Medical devices regulations 2021 – SI 261/2021

Genetically modified organisms (deliberate release) (amendment) regulations 2021 – SI 278/2021

PERSONAL INJURIES

Personal injuries – Trial of a preliminary issue – Modular trial – Defendant seeking either a trial of a preliminary issue or a modular trial – Whether a modular trial was needed in the interests of justice – [2021] IEHC 298 – 22/04/2021

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Leave to appeal – Substitute consent – Consent for future planning – Applicant seeking a certificate for leave to appeal the principal judgment – Whether it was necessary for the second respondent to make the European Union (Environmental Impact Assessment and Habitats) Regulations 2015 in order to transpose the Environmental Impact Assessment Directive – [2021] IEHC 349 – 18/05/2021

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Cave Projects Ltd v Gilhooley

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Roscrea Credit Union Ltd v O'Sullivan

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Saqlain v The Governor of Cloverhill Prison and Ireland and The Attorney General

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Transfer of assets – Estate – Administration – Defendant seeking an order preventing the transfer of the assets of the ancillary administration of the deceased's estate to the principal administration of his estate – Whether the High Court should follow the decision of the English Court of Appeal in *Re Lorillard* [1922] 2 Ch. 638 – [2021] IEHC 383 – 03/06/2021

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Probate – Estate – Property – Appellant appealing from the finding that she held 58% of the property in trust for the deceased's estate – Whether, if there was a joint tenancy, it was severed by events in 2008 – [2021] IECA 148 – 18/05/2021

O'Malley v Breen

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Road traffic (driving instructor licensing) (extension of period of validity of licence) regulations 2021 – SI 215/2021

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SOCIAL WELFARE

Statutory instruments

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TAXATION

Statutory instruments

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TELECOMMUNICATIONS

Statutory instruments

Wireless telegraphy (liberalised use and related licences in the 700 MHz duplex, 2.1 GHz, 2.3 GHz and 2.6 GHz bands) regulations 2021 – SI 264/2021

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Bills initiated in Dáil Éireann during the period May 7, 2021, to June 17, 2021

[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.

Acquisition of development land (assessment of compensation) bill 2021 – Bill 84/2021 [pmb] – Deputy Alan Kelly

Companies (protection of employees' rights in liquidations) bill 2021 – Bill 53/2021 [pmb] – Deputy Mick Barry

Dog breeding establishments (amendment) bill 2021 – Bill 64/2021 [pmb] – Deputy Peadar Tóibín, Deputy Seán Canney and Deputy Noel Grealish

Health (regulation of termination of pregnancy) (foetal pain relief) bill 2021 – Bill 73/2021 [pmb] – Deputy Carol Nolan, Deputy Peadar Tóibín, Deputy Peter Fitzpatrick, Deputy Noel Grealish, Deputy Éamon Ó Cuív, Deputy Seán Canney, Deputy Michael Collins, Deputy Richard O'Donoghue, Deputy Danny Healy-Rae, Deputy Michael Healy-Rae and Deputy Mattie McGrath

Judicial Council (amendment) bill 2021 – Bill 51/2021[pmb] – Deputy Pearse Doherty

Loan guarantee schemes agreements (Strategic Banking Corporation of Ireland) bill 2021 – Bill 62/2021

Nursing homes support scheme (amendment) bill 2021 – Bill 76/2021

Pensions (amendment) (transparency in charges) bill 2021 – Bill 72/2021 [pmb] – Deputy Ged Nash

Personal insolvency (amendment) bill 2020 – Bill 76/2020

Planning and development (amendment) (first-time buyers) bill 2021 – Bill 83/2021 [pmb] – Deputy Paul McAuliffe

Planning and development (amendment) (repeal of part V leasing) bill 2021 – Bill 60/2021

Planning and development (climate emergency measures) (amendment) bill 2021 – Bill 86/2021 [pmb] – Deputy Bríd Smith, Deputy Paul Murphy, Deputy Richard Boyd Barrett and Deputy Gino Kenny

Principles of social welfare bill 2021 – Bill 19/2021

Redundancy payments (lay off, short time and calculation of reckonable service) bill 2021 – Bill 77/2021 [pmb] – Deputy Louise O'Reilly

Regulation of tenderers bill 2021 – Bill 81/2021 [pmb] – Deputy Mairéad Farrell and Deputy Patricia Ryan

Social welfare (payment order) (amendment) bill 2021 – Bill 66/2021 [pmb] – Deputy Claire Kerrane

Thirty-ninth amendment of the constitution (right to vote at 16) bill 2021 – Bill 67/2021 [pmb] – Deputy Thomas Pringle

Trade union recognition bill 2021 – Bill 65/2021 [pmb] – Deputy Richard Boyd Barrett

Wildlife (amendment) bill 2021 – Bill 74/2021 [pmb] – Deputy Jennifer Whitmore

Bills initiated in Seanad Éireann during the period May 7, 2021, to June 17, 2021

Affordable housing bill 2021 – Bill 71/2021

Civil legal aid (exclusion of value of free or partly free board) (amendment) bill 2021 – Bill 69/ 2021 [pmb] – Senator Lynn Boylan, Senator Fintan Warfield, Senator Paul Gavan and Senator Niall Ó Donnghaile

Employment equality (amendment) (non-disclosure agreements) bill 2021 – Bill 82/2021 [pmb] – Senator Lynn Ruane, Senator Eileen Flynn, Senator Frances Black and Senator Alice-Mary Higgins

Health and criminal justice (Covid-19) (amendment) bill 2021 – Bill 78/2021

Maritime jurisdiction bill 2021 – Bill 63/2021

Planning and development (amendment) (no. 3) bill 2021 – Bill 85/2021

Protection of employment (platform workers and bogus self-employment) bill 2021 – Bill 68/2021 [pmb] – Senator Marie Sherlock, Senator Mark Wall, Senator Rebecca Moynihan, Senator Annie Hoey and Senator Ivana Bacik

Residential tenancies (amendment) bill 2021 – Bill 70/2021 [pmb] – Senator Barry Ward

Progress of Bill and Bills amended in Dáil Éireann during the period May 7, 2021, to June 17, 2021

Climate action and low carbon development (amendment) bill 2021 – Bill 39/2021 – Committee Stage

Counterfeiting bill 2020 – Bill 77/2020 – Report Stage

Criminal justice (perjury and related offences) bill 2018 – Bill 112/2018 – Committee Stage – Report Stage

Gender pay gap information bill 2019 – Bill 30/2019 – Report Stage – Passed by Dáil Éireann

Health and criminal justice (Covid-19) (amendment) bill 2021 – Bill 78/2021 – Committee Stage

Land Development Agency bill 2021 – Bill 11/2021 – Committee Stage

Loan guarantee schemes agreements (Strategic Banking Corporation of Ireland) bill 2021 – Bill 62/2021 – Committee Stage

Personal insolvency (amendment) bill 2020 – Bill 76/2020 – Committee Stage

Planning and development, heritage and broadcasting (amendment) bill 2021 – Bill 47/2021 – Committee Stage

Private security services (amendment) bill 2021 – Bill 49/2021 – Committee Stage

Public service pay bill 2020 – Bill 78/2020 – Committee Stage – Report Stage

Sale of tickets (cultural, entertainment, recreational and sporting events) bill 2021 – Bill 55/2021 – Committee Stage

Progress of Bill and Bills amended in Seanad Éireann during the period May 7, 2021, to June 17, 2021

Affordable housing bill 2021 – Bill 71/2021 – Committee Stage

Education (leaving certificate 2021) (accredited grades) bill 2021 – Bill 54/2021 – Committee Stage – Passed by Seanad Éireann

Health and criminal justice (Covid-19) (amendment) bill 2021 – Bill 78/2021 – Committee Stage – Passed by Dáil Éireann

Loan guarantee schemes agreements (Strategic Banking Corporation of Ireland) bill 2021 – Bill 62/2021 – Committee Stage

Maritime jurisdiction bill 2021 – Bill 63/2021 – Committee Stage

Planning and development, heritage and broadcasting (amendment) bill 2021 – Bill 47/2021 – Committee Stage

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

Bills and legislation

http://www.oireachtas.ie/parliament/

http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Supreme Court Determinations – leave to appeal granted

Published on Courts.ie – May 7, 2021, to June 17, 2021

DPP v A. C. [2021] IESCDET 45 – Leave to appeal from the Court of Appeal granted on the 26/04/2021 – (MacMenamin J., Dunne J., Woulfe J.)

Gladney v Tobin [2021] IESCDET 67 – Leave to appeal from the Court of Appeal granted on the 14/06/2021 – (O'Donnell J., MacMenamin J., Charleton J.)

Murphy vDPP [2021] IESCDET 51 – Leave to appeal from the Court of Appeal granted on the 10/05/2021 – (MacMenamin J., Dunne J., Woulfe J.)

For up-to-date information please check the courts website:

www.courts.ie/determinations

Discovery and DSARs – trends, reform and motivations

In recent years, a trend has emerged that data subject access requests are being used for purposes other than those originally envisioned by the GDPR. Recent case law has sought to clarify this, and the often complex interaction between discovery and DSARs.

The Data Protection Act 1988 provided, for the first time in Irish legal history, the ability of data subjects to obtain a copy of their personal data. Further amendments to the 1988 Act and the introduction of the momentous General Data Protection Regulation (GDPR) have burgeoned the full contours of the data subject access request (DSAR).

DSARs and discovery – analogous procedures?

While a DSAR and the discovery procedure are two separate and distinct documentary vehicles, they share many traits. The aim of discovery is to aid a party in the progress of litigation, to prevent unfair evidential advantage being taken at trial, and to encourage the parties to litigation to have "all the cards face up on the table".[1] Conversely, a DSAR enables a data subject to, *inter alia*, seek copies of their data from a data controller. Article 15 of the GDPR empowers a data subject with the "right" to obtain personal data and information relating to the manner in which it is being processed.[2] In *Ittihadieh v Cheyne Gardens RTM Company Ltd and ors*,[3] the UK court stated that "[t]he underlying purpose of the right of access to personal data is for the data subject to check the accuracy of the data and to see that they are being processed lawfully".[4]

Documents sought by way of discovery have a number of hurdles to overcome and satisfy for such a request to be deemed appropriate. One of the seminal distinguishing features between a DSAR and discovery is the point in which a party can seek access to the documents. With a DSAR, it can be sent at any time to a data controller.[5] Once the data controller has received the DSAR, they have one month in which they must furnish copies of the data subject's personal data.[6] There is a stark difference with the discovery procedure. The discovery of documents in litigation can only be sought after all of the pleadings have been delivered and a notice of trial has been served. Any request for discovery must take place under the Rules of Court 28 days after the matter has been listed for trial.[7] Only in very exceptional circumstances can a request for discovery be made prior to the delivery of the Statement of Claim.[8] Conversely, no such requirements exist for a data subject seeking access to documents and thus a DSAR can be sought at any time.

Discovery – a perennial judicial exercise

The courts in recent years have expressed deep disdain at the proliferation of discovery disputes in litigation. Along with the prohibitive costs associated with discovery, the courts have expressed concern that the discovery process can present as a barrier to justice for parties involved in litigation. The Supreme Court in *Tobin*[9] recently stated that "if it could be established that there was a 'better way' than discovery which would be cheaper, then it can properly be said that discovery is not necessary, even if a contested category of documentation could be shown to be relevant".[10]

Conor Duff BL

Further, in the recent Supreme Court decision in *Tweedswood*,[11] the Chief Justice noted the risk that "discovery may become so time consuming and expensive that it can present a barrier to access to justice"[12] for both plaintiffs and defendants. Similar criticisms were voiced in the report from the committee to review the administration of civil justice chaired by Mr Justice Peter Kelly,[13] the report of which states:

"[t]he discovery process, as it currently operates, has been the subject of criticism by judges, practitioners and litigants. These concerns centre on the potential for discovery to affect access to justice adversely by increasing the cost of litigation and by frustrating and delaying the progress of cases before the courts".[14]

DSARs and ulterior motives

DSARs are routinely used for *arrière-pensée* prior to instituting proceedings. Indeed, the concept of a DSAR is anathema to the teleological understanding of the discovery process. The discovery process is a procedure reserved for parties involved in litigation. Save for arbitration and tribunals of inquiry, the discovery process is not available to litigants engaged in statutory dispute resolution bodies such as the Personal Injuries Assessment Board (PIAB), the Workplace Relations Commission (WRC) and the Private Residential Tenancies Board (PRTB). The inability of a party engaged with such a statutory dispute resolution process to obtain documents through discovery can often lead to evidential deficits at the hearing of the matter or, indeed, being taken by surprise at the hearing of an action.

The spate of DSARs in the context of actions before statutory tribunals is reflected in the Data Protection Commission's (DPC) recent annual report. The DPC has stated that the proliferation of complaints to the DPC arising from an employer's failure to comply with an employee's DSAR is "undoubtedly driven by the fact that neither the WRC nor the Labour Court can order discovery in employment claims. In 2012 alone, complaints relating to DSARs constituted 33% of the total number of complaints received by the DPC".[15]

In the UK case of *DB v The General Medical Council*,[16] the court adjudicated on an application by the claimant doctor seeking an order preventing the Medical Council from providing an independent expert report to one of his former patients for the purposes of bringing a professional negligence action. The report was commissioned by and furnished to the Council for the purposes of their investigation into a complaint made by the former patient of the claimant and was critical of the care provided to the patient in a number of respects.

The result of the investigation was that the Council concluded that they would dismiss the complaint and decided on "no further action".[17] Following this, the former patient requested access to the independent medical report. The claimant's solicitor also wrote to the Council stating that the report constituted "personal data of DB alone; and that the DPA request was being used as a vehicle for disclosure with a view to litigation of further complaint".[18] Upon receipt of the claimant's solicitor letter, the Council undertook a "balance of interests" assessment and concluded that the report contained joint personal data and should be disclosed to the patient.

However, the court concluded that the decision to provide the report to the previous patient "took no adequate account of the fact that the purpose of the request was to use the report and its information in the intended litigation against [the claimant]". The court went on to state that the "sole or dominant purpose" of the access request was for the purposes of litigation. The court also held that in the absence of consent, a balancing exercise had to be undertaken as to whether to disclose such documentation. The court ultimately held that the balance in this case was in favour of not disclosing the report to the patient.

A further ulterior motive for the use of DSARs is for the purposes of obtaining data from a third party. In traditional civil litigation, motions seeking to compel third-party discovery are notoriously difficult to obtain.[19] The DSAR process has created an efficient, cost-effective and expeditious method to obtain data from a third party for the purposes of litigation. Traditionally, with non-party discovery, the requesting party to the proceedings is met with an order for costs in favour of the non-party to the proceedings.[20] Such costs are not incurred by submitting a DSAR to a third party.

The relevance of motivation

There is an apparent divergence in the approach of the Irish and UK courts to whether a DSAR can be used for the purposes of obtaining data solely for use in prospective or contemplated litigation. The position between the two jurisdictions has recently become re-aligned, with the current state of play being that a DSAR cannot be refused if the data controller is of the view that the DSAR is being used as a vehicle for obtaining documents for contemplated litigation.

The motivation for seeking a DSAR was considered by the High Court in the case of *Bus Átha Cliath v The Data Protection Commissioner*.[21] The matter came before the High Court as a Circuit Court Appeal from an order made by Judge Linnane. The case concerned personal injury proceedings brought by Ms McGarr in the High Court, which occurred on Bus Átha Cliath's (the applicant's) bus. Ms McGarr sought, by way of DSAR, copies of information inclusive of CCTV relating to the personal injury.

The DSAR was refused by the applicant on the basis that the information was prepared in anticipation of potential litigation and as such was privileged. Ms McGarr made a complaint to the DPC, which issued an enforcement notice requiring the applicant to provide her with a copy of the CCTV.

The applicant appealed the decision of the DPC to the Circuit Court, which upheld the enforcement notice. This decision was then appealed on a point of law to the High Court. The applicant submitted that the appropriate procedure to obtain the CCTV footage was in virtue of a discovery request pursuant to the Rules of Court in lieu of a DSAR. The DPC responded that if the legislature intended on imposing limitations on the right of access to personal data in circumstances where litigation has been instituted or contemplated, that such an exception would have been expressly provided for.[22]

The Court, in distinguishing the present case from the UK cases relied upon by the applicant, stated that the DSAR is a separate and distinct process empowering a data subject to seek copies of data being processed.

The Court further stated that Ms McGarr had a statutory right to copies of her personal data.[23] Hedigan J. upheld the Circuit Court order and concluded that the existence of proceedings between a data requester and the data controller does not preclude such a data access request. Commenting on the decision in *Bus Átha Cliath,*[24] the DPC in their annual report in 2012 welcomed the judgment as it provided "important legal clarity" on the right of access for individuals where litigation is contemplated.[25]

By contrast, in the UK case of *Lees v Lloyds Bank PLC,* the claimant was of the view that his loans with the respondent bank were included in a portfolio of loans that were sold to a vulture fund. As a result, the claimant alleged that the respondent bank was disentitled to pursue possession proceedings against him. The claimant made a series of DSARs between the periods of November 2017 and April 2019. As part of his request, the claimant sought data relating to the sale of his loans to include information as to who the loan was sold to, copies of the service agreements, the rights to the title and copies of the memorandum of satisfaction.[26] The respondent bank replied stating that they could not locate any loan applications and that his loans had not been sold.

Shortly thereafter, the respondent bank issued possession proceedings against the claimant. The claimant again in March 2019 sent circa. 70 access requests to various parties. Four of those requests were sent to the respondent bank seeking, *inter alia*, information surrounding what capacity the respondent bank was acting in, in the context of the possession proceedings, who the respondent bank was sharing the claimant's data with and for what purpose. In response to these requests, a company called TLT replied to these requests. The claimant subsequently objected to TLT replying on behalf of the respondent bank; specifically, the claimant sent an additional access request to the respondent bank seeking information relating to its relationship with TLT.

As part of the relief sought, the claimant sought "assistance" from the Court in respect of the purported breach of the provisions of the UK Data Protection Act and the GDPR.[27] This matter was listed before the Chief Master of the UK High Court. The claimant also raised a jurisdictional argument that the Master did not have jurisdiction to hear his dispute as it concerned matters relating to his personal data and would be more appropriately dealt with by a High Court judge.

In dealing with the data protection issues, Chief Master Marsh observed that the GDPR was not in force when the claimant made his access requests. The Master also had regard to the provisions of the UK Data Protection Act 1998 and referred to the provisions relating to compensation "for damage and distress caused by a contravention of the requirements of the Act".[28] In his written judgment, the Master dealt primarily with the assertions advanced by the claimant that his loans had been transferred to another body. The Master held that the respondent provided "adequate response[s]" to the claimant in his "quest to uncover evidence that the benefit of the loans made to him had been the subject of securitisation". He ultimately determined that he had discretion whether or not to make an order in respect of the data protection claims. The Master found, *inter alia*, that the issuance of "numerous and repetitive DSARs" was "abusive", that "the real purpose of the DSARs" was to "obtain documents rather than personal data", that there was a "collateral purpose that lay behind the requests", and that "the data sought will not be of benefit" to the claimant.[29] Ultimately, the Master concluded that the claimant's claim was completely without merit and dismissed his action.

Ability to compel a DSAR through the discovery process

In certain instances, a respondent to a discovery motion may argue that discovery of documents in question is not necessary owing to the position of the applicant, who may have alternative sources of information or evidence available to him or her, which are adequate to prove the issue to which the documents sought are said to relate.[30] The Rules of the Superior Courts specify that a party can seek discovery of documents in the "power, possession or procurement" of the opposing party.

In *Susquehanna International Group Limited v Needham,*[31] the High Court considered whether a litigant can compel the opposing party to issue a DSAR to a third party. In this case, the plaintiff was seeking damages and injunctive relief relating to an alleged breach of the employment contract by the defendant employee, who it was alleged had attempted to provide information to competitor companies. The plaintiff brought a motion against the defendant seeking to compel him to make discovery of documents relating to his interactions with the competitor.

The issue that arose in the context of the discovery motion was the extent to which a party is required to obtain documents in their "power" or "power of procurement". Specifically, the plaintiff sought documents relating to interactions by the defendant with the competitor company to include "documents held by [such competitors] that the defendant can obtain on foot of data protection requests". The Court had to determine whether the plaintiff can compel the defendant to use a data access request to obtain documents that would be relevant for the purposes of discovery.

The case raised complex legal issues such as the extent to which a party can be compelled to obtain documentation within their "power of procurement". The other key legal issue was whether a DSAR can be used for the purpose of proceedings currently in being for reasons other than a genuine desire to obtain personal data. Baker J. in the High Court stated that the seminal issue for determination was whether the defendant has a "presently enforceable legal right" to obtain copies of the documentation.[32] The Court rejected the argument made by the defendant that the plaintiff's request for discovery was an attempt to use data protection for a collateral purpose. The Court distinguished the case from the UK judgment in *Durant v Financial Services Authority* on the basis that *Durant* concerned the applicant himself making an application for access to information.[33]

In *Durant*[34] the UK courts appeared to have carved out a new exception to the obligation on a data controller to comply with a DSAR. *Durant*[35] concerned a DSAR made by the claimant seeking access to his personal data from the respondent financial services authority pursuant to the provisions of the UK Data Protection Act, 1998. The Court held that "[h]is claim is a misguided attempt to use the machinery of the Act as a proxy for third-party discovery with a view to litigation or further investigation".[36] However, the reasoning of the courts in *Durant*[37] has been

discredited in subsequent judgments from the UK. In *Ittihadieh*,[38] the court held that the purpose of a DSAR is not to access documents; rather, information relating to the data subject.[39] The court also clarified that "the mere fact that a person has collateral purposes will not invalidate a [DSAR], or relieve the data controller from [their] obligations".[40]

The Court in *Susquehanna*[41] ultimately concluded that there is no principled reason why "information which is capable of being obtained by a data request cannot be the subject matter of a request for discovery".[42] In reaching this conclusion, Baker J. referred to the "primary purpose" of the Directive being the right of privacy and accuracy and the effect of the legislation is to "make available as of right certain information held by others relevant to that person".[43]

In respect of the obligation to obtain documents in the "power" or "power of procurement" of the party from whom discovery is requested, Baker J. ultimately held that "[t]he defendant is to be directed to make discovery of all documents that are reasonably available to him by means of a DSAR and that will require him to take reasonable steps to procure the documents by such means".[44]

Susquehanna is an important decision not only because it decided that a party should be required to pursue at his or her own expense a DSAR in order to comply with a discovery request that had been made of him or her, but also because the Court decided in that action, and without hearing from the company in whose possession the documents were stated to be held, that the defendant had a legally enforceable right to obtain those documents by way of a DSAR.[45]

Conclusion

A trend that has emerged in recent years is that the DSAR is being used for purposes other than those originally envisioned by the GDPR. The jurisdictional limitations of dispute resolution statutory bodies such as the WRC and PIAB to grant discovery have been exploited by the use of the DSAR. The Irish judgments in *Bus Átha Cliath*[46] and *Susquehanna*[47] have demarcated the statutory independence of the DSAR and have provided judicial clarity on the interaction between discovery and DSARs.

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Young Bar Article Competition

The Young Bar Committee ran its inaugural article competition in February of this year, inviting entrants to evaluate civil or criminal procedure, whether such procedure is fit for purpose, and to discuss reform in their chosen area. Interest in the competition was exceptional, and this will hopefully continue as the competition is rolled out over the coming years.

Entries were judged by a panel comprising Ms Justice Gearty, Ms Justice Hyland, Seamus Clarke SC, and Brendan Kirwan SC. First place went to Michael O'Doherty BL for his article on the topic of Norwich Pharmacal relief and the identification of anonymous online users. In second place was Seamus Collins BL for his article on commercial leases. Finally, in third place was the topical subject discussed by Grace Sullivan BL: Covid-19 restrictions and the free practise of religion in Ireland.

We're delighted to present all three articles in this special edition of *The Bar Review*. Congratulations to the winners and to all entrants for the high standard of writing submitted.


Ms Justice Gearty


Ms Justice Hyland


Seamus Clarke SC


Brendan Kirwan SC

Norwich Pharmacal relief and the identification of anonymous online users

The proliferation of anonymity on the internet means that a party that has been the victim of unlawful behaviour online is often unsure as to the identity of the defendant against whom legal proceedings should be instituted. The manner in which their identity may be obtained – a Norwich Pharmacal application, its strengths, weaknesses, and developments that may improve it – are addressed in this article.

Michael O'Doherty BL
First place in the inaugural
Young Bar Article Competition

Application for 'sole discovery' is not provided for either by legislation or the Court Rules. Instead, an action whose aim is purely to obtain information in respect of a proposed defendant is provided for by the inherent jurisdiction of the High Court. The relief was established in *Norwich Pharmacal v Customs and Excise Commissioners*,[1] in which Lord Reid gave the definitive statement of the principle:

"… if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers".[2]

The granting of a Norwich Pharmacal order is an entirely discretionary relief,[3] and the UK courts have adopted a four-stage test.[4] Recent decisions in this jurisdiction, however, have tended to focus on the issue of whether the applicant has established that a legal wrong has been committed against them, which is discussed below.

The Norwich Pharmacal procedure is commonly used as a prelude to various forms of proceedings,[5] and in general terms is a very useful relief, which is handled by the courts in an efficient manner. The focus of this article, however, is on an application that is brought to discover the identity of an anonymous user of an online platform – such as Facebook, Twitter or Google – who has infringed someone's personal rights.

Concerns with this area of law, and suggested reforms

a) The requirement to prove a legal wrong

This is usually the primary issue upon which a Norwich Pharmacal application is decided, and is formulated so that such an application is not used as a 'fishing expedition' in the hope of discovering evidence that may ground proceedings.[6] It does not appear necessary that the applicant identify the exact nature of the proceedings they intend to instigate.[7] It does appear necessary, however, that they intend to use the information only for the purposes of instituting proceedings against the defendant.[8] This reflects a concern that the identity may be sought for a collateral purpose, such as harassing someone who posted content that may be objectionable to the applicant, but is not unlawful.

An issue in respect of Norwich Pharmacal applications that is not entirely clear is the threshold of proof that an applicant must reach in respect of whether a wrong has been committed. In the UK, the current test appears to be that the applicant must make out an "arguable case".[9] There is less clarity, however, in this jurisdiction.

A prospective plaintiff is required to bring a plenary action to the High Court, with the higher cost that entails, simply to obtain the identity of the party against whom they wish to institute proceedings in the lower court.

In the case that first approved the granting of Norwich Pharmacal relief in this jurisdiction, *Megaleasing and ors v Barrett and ors*,[10] Finlay C.J. held that "the existing authorities … do in fact confine the remedy to cases where a very clear proof of a wrongdoing exists".[11] The recent High Court decision in *Blythe v The Commissioner of An Garda Síochána*,[12] however, rejected the suggestion that evidence of wrongdoing was required to be established "to a high degree of certainty".[13] Instead, the Court approved the finding in *EMI Records v Eircom*[14] that the test required a "prima facie demonstration of wrongful activity".[15]

The adoption of this test from *EMI* raises certain questions. The case concerned an application by record companies to discover the identities of Eircom's customers who were infringing the former's copyright by illegally downloading material. Firstly, *EMI* can be distinguished from the more traditional Norwich Pharmacal applications in that the applicants were seeking not to institute legal proceedings against the defendants, but rather to warn them to desist or face having their internet connection terminated. Secondly, Kelly J.'s finding appeared to be focussed on the obligation of confidentiality that the respondent had towards its customers, emphasising that prima facie evidence of wrongdoing will override any duty of confidentiality owed by an internet service provider to a customer.[16] It is unclear, therefore, whether he intended to establish a general threshold of proof required to ground a Norwich Pharmacal application in the first place.

b) The lack of jurisdiction for the Circuit Court

Norwich Pharmacal orders are provided courtesy of the inherent jurisdiction of the High Court. The Harassment, Harmful Communications and Related Offences Bill, as introduced in 2017, proposed to not only codify the procedure, but also to extend its availability to the Circuit Court. The proposed Section 14, however, did not survive the enactment of the Bill in December 2020.[17] Many of the proceedings that arise from online harm involve defamation and breach of data protection rights, both of which are regularly instituted at Circuit Court level. It is regrettable, therefore, that a prospective plaintiff is required to bring a plenary action to the High Court, with the higher cost that entails, simply to obtain the identity of the party against whom they wish to institute proceedings in the lower court.

c) The potential costs to be borne by the applicant

A further issue of uncertainty is how the traditional rule that costs follow the event should be applied in Norwich Pharmacal proceedings that do not follow the traditional, adversarial format.[18] Following the original decision in *Norwich Pharmacal*,[19] the general rule in the UK is that the applicant will pay for the cost of the application,[20] on the basis that such costs can ultimately be recovered by the applicant from the wrongdoer.[21] This principle, unfortunately, ignores the practical reality that a defendant who anonymously posts content online is very often impecunious, and not in a position to satisfy an award for damages, let alone the significant cost of High Court proceedings.

The position appears to be different in this jurisdiction. In the recent decision in *Blythe v The Commissioner of An Garda Síochána*,[22] the High Court held that the traditional rule that costs follow the event should be applied in Norwich Pharmacal proceedings.[23] Other than this decision, however, a practice appears to have developed that no order for costs be made in such proceedings.[24] In June 2020, Norwich Pharmacal relief was granted to a social media influencer against Facebook. A report of the judgment describes Facebook's legal representatives as remarking that it would not be seeking its costs against Ms McGowan, a comment that suggests a belief, at least on their part, that they may ordinarily be entitled to apply for such costs.[25]

While an agreement between the parties as to costs is not something that a court should ordinarily interfere with, clarity in respect of this issue would be welcome. While it is true to say that Norwich Pharmacal applications are not 'adversarial' in the traditional sense, the suggestion that the respondent is an entirely innocent party who should be awarded their costs merits closer attention in the particular circumstances of applications against online platforms. Furthermore, while they may adopt a 'neutral position' to such an application in court,[26] the online platform has already declined to provide the information voluntarily at first instance, and consequently obliged an applicant to incur significant High Court costs. In those circumstances, it is arguable that the applicant's obtaining of an order is a 'victory', and that the traditional rule of costs following the event should be applied. This is expanded on below.

d) The necessity to apply for relief in the first place

The fundamental reason why the type of Norwich Pharmacal application being considered here requires to be instituted is that the user of a

particular online network is operating anonymously. The benefits of anonymity, in terms of fostering positive discussion, enabling whistleblowing and facilitating freedom of expression, are self-evident. The downside of facilitating anonymous posting of content is that it encourages unlawful content. In respect of direct legal liability for such material, online platforms are provided robust protection for the material they host by Article 14 of the E-Commerce Directive.[27] Furthermore, the general position of such platforms when requested to identify users who post such content is that they are "not in a position" to arbitrate as to whether the material a user has uploaded is unlawful.[28]

There is an inconsistency in this position. Online platforms make decisions as to lawfulness in respect of millions of items of content, every time they deal with a notice and take-down request or suspend a person's account. Why they should consider themselves unable to adjudicate whether a complainant may have grounds to litigate against another user – an adjudication that does no more than allow proceedings to be instituted, and does not involve any punitive action against the anonymous user – is unclear.

There would appear to be no procedural inability on a platform's part to make legal judgments about the material they host, and there is also little in the way of legal impediment to them doing so.[29] The fundamental reason why users can operate anonymously is because the online platform allows them to. While platforms are traditionally very protective about the right of their users to operate anonymously,[30] there is no such thing as an absolute legal right to anonymity.[31] It is at the discretion of a platform hosting user-generated content as to whether they require the user to identify themselves when posting material.[32]

Furthermore, privacy and data protection rights are not unqualified. The Constitutional right to privacy is subject to the Constitutional rights of others and the preservation of public order, morality and the common good.[33] Likewise, in respect of data protection, the rights of data subjects are qualified by the requirement to protect the rights and freedoms of other persons.[34] The Constitutional right of access to justice by an injured party is clearly a right that would be engaged, as both the use of anonymity, and the expense currently involved in obtaining the identity of an anonymous defendant, would appear to create obstacles to justice.[35] The fact that online platforms do not require documents that verify users' identity when signing up to use the platform creates further difficulties for an applicant seeking Norwich Pharmacal relief. After obtaining what information the respondent has in respect of the proposed defendant, it often transpires that such information does not provide much assistance in establishing their true identity.[36] The plaintiff may therefore find themselves in the unsatisfactory position of having borne the costs of a plenary application, only for the information provided to be of no evidential value.

e) Potential difficulty with the statute of limitations

A further adverse consequence of being obliged to apply for Norwich Pharmacal relief to obtain the identity of anonymous online users is the delay that this can cause to the plaintiff being able to institute proceedings against the correct defendant. This potential prejudice was recently alluded to in *Blythe v The Commissioner of An Garda Síochána*.[37] In circumstances where a plaintiff wishing to institute proceedings in defamation must do so within one year[38] of the defamation having been published online, a delay on the part of an online platform in responding to a request for information concerning the identity of the proposed defendant is clearly problematic.

This issue was recently addressed by the High Court in a case involving a former Leitrim TD who had been the subject of allegedly defamatory material on social media.[39] Due to the failure of Norwich Pharmacal orders to provide information that identified the wrongdoers, the Court was willing to allow 'Persons Unknown' to be joined to the defamation

proceedings, meaning they could be instituted before the statute became an issue. The difficulty with this, however, is that the plaintiff has had to make Norwich Pharmacal applications in the High Court, an application to join Persons Unknown, and will be faced with a further application to substitute the correct defendant(s), incurring considerable costs before proceedings have even been instituted against the correct wrongdoer. This is clearly an unsatisfactory state of affairs from a plaintiff's point of view.

How this area of law could be reformed

a) Refine the threshold test

It is unclear whether the 'prima facie' standard is that which is required to ground the application in general terms, or whether it is a test to be later applied when the Court, in exercising its ultimate discretion, is considering the issue of a defendant's expectation of confidentiality in respect of the information. A definitive judicial statement would be welcome.

b) Provide clarity as to the manner in which costs will traditionally be awarded

The policy of the UK courts to oblige an applicant to bear the cost of Norwich Pharmacal applications appears unjust, placing as it does an unnecessary obstacle in respect of access to justice before a victim of online harm. While the courts in this jurisdiction have not taken such a position, there is still a lack of clarity from the applicant's perspective as to whether they will be obliged to at least bear their own costs. A judicial pronouncement that, in the absence of circumstances which permit a departure from the rule, costs will traditionally follow the event – the 'event' in this case being an order to disclose information that the respondent failed to provide voluntarily – would be welcome.

c) Provide for the application in the Court Rules, and allow for it to be brought before the Circuit Court

Related to the issue of costs, the inability to obtain Norwich Pharmacal relief from the Circuit Court is regrettable.[40] In the majority of reported decisions involving applications against online platforms, there is rarely any substantial argument on the facts, and once the applicant has established evidence of being wronged, the respondent tends not to raise any objection. It is unclear as to why this procedure requires an applicant to incur the expenses involved in bringing plenary proceedings to the High Court, and the incorporation of such an application into the rules of both the Superior Courts and the Circuit Court is suggested.

d) Provide a mechanism whereby online platforms must take greater responsibility for adjudicating in such applications

The forthcoming Online Safety and Media Regulation Bill provides an ideal opportunity for legislative action in this regard. One of the purposes of the Bill is to create an Online Safety Code, regulating the manner in which online service providers, such as the large social media platforms, deal with harmful content. The following provisions could be considered:

1. Platforms should oblige users to provide verifiable identification when joining as a means of discouraging unlawful behaviour online. This will, at the very least, result in the obtaining of a Norwich Pharmacal order not proving to be a futile exercise for the applicant.
2. The terms and conditions under which online platforms operate should indicate that if a user chooses to operate anonymously, information as to their identity may be disclosed if an applicant establishes a satisfactory case that the online user has infringed their rights.
3. Platforms should be required to set up a division to deal specifically with requests to identify anonymous online users. The test that it applies in respect of whether such information should be provided would be based on the current test employed in Norwich Pharmacal proceedings. Should the request be turned down, a right of appeal to an independent body – similar to Facebook's recently formed 'Oversight Committee' – should be available.[41]

e) Amend the statute of limitations

For the purposes of the limitation period, a provision similar to section 50 of the PIAB Act 2003 could operate in respect of a claim against an anonymous online user. The period beginning on the making of a request to the online platform for information concerning the wrongdoer's identity, and ending upon a response being received from the platform either providing such information, or stating that they are unwilling to so, should be disregarded for the purposes of Section 11 of the Statute of Limitations Act 1957.

Conclusion

There is nothing of itself objectionable about a decision of the English High Court, born of analogue times, continuing to be followed in the digital 21st century. The common law has repeatedly shown itself to be robust and adaptable enough to be relevant to technologies that could not have been envisaged when decisions were first handed down.

But there is a strong argument to be made for the fact that the Norwich Pharmacal procedure comes from a time when the anonymity of defendants was an uncommon issue, which is no longer the case, due to the widespread use of anonymity by users of the internet. As the cost of litigation is often cited as an obstacle in obtaining access to justice, it is unsatisfactory that a further obstacle should be put before plaintiffs whose personal rights have been violated, by obliging them to bring a plenary action to the High Court, particularly in circumstances where it may well turn out to be a futile exercise.[42]

Concluding with the original decision upon which the jurisdiction is based, Lord Cross suggested that in a case with similar facts to the one before him, the respondent would most likely accede to the original request for information "without putting the applicant to the expense of obtaining an order".[43] This is a suggestion that has not been followed by online platforms, whose default position appears to be a refusal to disclose such information without a court order.

The question of expense may be dealt with through the availability of the relief in the Circuit Court, and by a definitive judicial declaration as to the right of an applicant to obtain a costs order in their favour following the granting of relief. The very necessity of bringing such an application, however, is worthy of review, with the forthcoming Online Safety and Media Regulation Bill providing an ideal opportunity to do so.

References

1. *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133.
2. *Norwich Pharmacal v Customs and Excise Commissioners* (1973) AC 133, 175.
3. As Peart J. stressed in *Muwema v Facebook* [2018] IECA 104, at para 2: "It is not an order made as of right, even where there is prima facie evidence of wrongdoing shown to exist on the part of the person whose identity is sought to be disclosed. There may in any particular case be countervailing facts and circumstances which would warrant a refusal of an order".
4. In *Collier v Bennett* [2020] EWHC 1884 (QB), this was explained as: 1) has a good arguable case been made that a legal wrong has been committed; 2) was the respondent mixed up in the wrongdoing; 3) can the respondent provide information necessary to enable the ultimate wrongdoer to be pursued; and, 4) is disclosure from the respondent an appropriate and proportionate response in all the circumstances of the case?
5. It could be to: identify a party who is infringing another's intellectual property rights, as per the original Norwich Pharmacal proceedings; identify a co-worker who made a complaint that had led to an employee being dismissed, as per *P. v T. Ltd* [1997] 1 WLR 1309; or, obtain disclosure of information from the stock exchange about alleged unlawful market manipulation, as per *Burford Capital Ltd v London Stock Exchange Group Plc* [2020] EWHC 1183 (Comm).
6. See, *inter alia*, *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675; *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm), para 46; and, *Hickox v Dickinson* [2020] EWHC 2520 (Ch), para 36.
7. *In Hickox v Dickinson and anor* [2020] EWHC 2520 (Ch), the High Court stressed at para 50 that: "In all Norwich Pharmacal applications the claimant's case is partly inchoate, that is the very point of the relief". See also *P. v T. Ltd* [1997] 1 WLR 1309.
8. See, *inter alia*, *Parcel Connect v Twitter [2020] IEHC 279.* This does not necessitate legal proceedings to be instituted, as negotiations to settle the claim with the defendant will also suffice. In *GoldenEye and ors v Telefonica* (UK) [2012] EWCA 1740, the Court of Appeal stressed that: "It is not necessary for a claimant for Norwich Pharmacal relief to demonstrate an intention to commence proceedings. In small claims of this kind a negotiated settlement is both effective and preferable".
9. See, *inter alia*, *Ramilos Trading Ltd v Valentin Mikhaylovich Buyanovsky* (2016) EWHC 3175 (Comm). In *GoldenEye and ors v Telefonica* (UK) [2012] EWCA 1740, the English Court of Appeal described the test as being "had arguable wrongs been committed against the claimants?", para 7.
10. *Megaleasing and ors v Barrett and ors* [1993] IRLM 497.
11. *Megaleasing and ors v Barrett and ors* [1993] IRLM 497, 504. In this regard, see also *Doyle v The Commissioner of An Garda Síochána* [1999] 1 IR 249 and *Ryanair v Johnston* [2006] (unreported, High Court, July 12, 2006).
12. *Blythe v The Commissioner of An Garda Síochána* [2019] IEHC 854.
13. *O'Brien v Red Flag* [2017] IECA 258.
14. *EMI Records Ireland Limited v Eircom Limited and anor* [2005] 4 IR 148.
15. The 'prima facie' test was also recently followed in *O'Brien v Red Flag Consulting Limited* [2017] IECA 258 and *Parcel Connect v Twitter* [2020] IEHC 279.
16. "I am satisfied that whether the right to confidentiality arises by statute or by contract or at common law, it cannot be relied upon by a wrongdoer or a person against whom there is evidence of wrongdoing to protect his or her identity. The right to privacy or confidentiality of identity must give way where there is prima facie evidence of wrongdoing". *EMI Records (Ireland) Ltd and ors v Eircom Ltd and anor* [2005] 4 IR 148, 152.
17. See: https://www.oireachtas.ie/en/debates/debate/select_committee_on_justice/2020-12-01/3/, section 14.
18. "Norwich Pharmacal applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party," *Totalise v The Motley Fool* [2001] EWCA Civ 1897, para 29.
19. Lord Cross held that "the full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant". *Norwich Pharmacal v Customs and Excise Commissioners* (1973) AC 133, 199. See also the recent decision in *Jofa Ltd v Benherst Finance Ltd* [2019] EWCA Civ 899, in which the Court of Appeal held that: "While accepting that there can be no absolute rule in the matter, I find it hard to envisage circumstances in which it would be just to award costs against a respondent to a Norwich Pharmacal application..."
20. The Court may depart from this position, however, if it finds that the respondent has no legitimate issue in relation to disclosing the information voluntarily. See *Totalise v The Motley Fool* [2001] EWCA Civ 1897, para 30.
21. See, *inter alia*, *Totalise v The Motley Fool* [2001] EWCA Civ 1897, and *JSC BTA Bank v Ablyazov and crs* [2014] EWHC 2019 (Comm).
22. *Blythe v The Commissioner of An Garda Síochána* [2019] IEHC 854.
23. "Having heard the parties further as regards the costs of the proceedings, including the motion, those follow the event in favour of the plaintiff". In respect of the costs of compliance with the order, the court factored in the behaviour of the

References (continued)

defendant towards the request for discovery, before concluding that no order for costs should be made in that regard. *Blythe v The Commissioner of An Garda Síochána* [2019] IEHC 854, para 35.

24. See, *inter alia*, *Parcel Connect v Twitter* [2020] IEHC 279, in which the Court concluded at para 25 that there "will be no order as to costs".
25. See: https://www.independent.ie/irish-news/courts/social-media-influencer-who-claims-she-is-being-stalked-online-granted-court-order-requiring-facebook-to-provide-her-information-to-identify-alleged-trolls-39491575.html.
26. See, *inter alia*, *G v Wikimedia Foundation Inc [2009] EWHC 3148 (QB); Muwema v Facebook* [2017] IEHC 69; and, *Parcel Connect v Twitter* [2020] IEHC 279, para 13.
27. Directive 2000/31/EC.
28. In *Muwema v Facebook Ireland Ltd* [2017] IEHC 69, the respondent explained its traditional stance of remaining neutral in applications for Norwich Pharmacal relief, on the basis that "the court is the appropriate arbiter as to whether or not the application is meritorious, a role Facebook is not in a position to fulfil".
29. There does not appear to be anything in Facebook's terms and conditions of use that prevents them from sharing information that identifies anonymous users when requested to do so by a third party who feels their rights have been violated. In its privacy document, Facebook states that: "We access, preserve and share your information with regulators, law enforcement or others ... in response to a legal request, if we have a good-faith belief that the law requires us to do so. We can also respond to legal requests when we have a good-faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards". Available from: https://www.facebook.com/privacy/explanation. Twitter's Privacy Policy is phrased in similar terms – available from: https://twitter.com/en/privacy, para 3.3.
30. A press release recently issued by Twitter stated that: "Pseudonymity has been a vital tool for speaking out in oppressive regimes, it is no less critical in democratic societies. Pseudonymity may be used to explore your identity, to find support as victims of crimes, or to highlight issues faced by vulnerable communities". See: https://www.irishtimes.com/sport/soccer/twitter-won-t-prevent-anonymous-users-in-fight-against-racism-1.4489929.
31. In *The Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB), the English High Court rejected the proposition that the plaintiff could establish a legally enforceable right to operate anonymously on the internet.
32. In *KU v Finland* (App No 2872/02) (December 2, 2008) ECHR, the ECtHR stressed at para 49 that the right of internet users to maintain anonymity "should yield on occasion to other legitimate imperatives, such as the prevention ... of crime or the protection of the rights and freedoms of others". Likewise, the English High Court held that even in circumstances where the issue of privilege may apply, it was not impermissible for a solicitor to reveal the identity of a client to an applicant who wished to pursue the latter for defamatory comments made on a blog, holding that "the provision of an individual's name, address and contact number cannot, without more, be regarded as having been made in connection with legal advice". *SRJ v Person(s) Unknown, D & Co* [2014] EWHC 2293 (QB).
33. *Kennedy and ors v Ireland and ors* [1987] 1 IR 587, at 592.
34. General Data Protection Regulation, Article 94(2)(e).
35. This was recently referred to in *Blythe v The Commissioner of An Garda Síochána* [2019] IEHC 854, para 6.
36. In *Parcel Connect t/a Fastway Couriers and anor v Twitter* [2020] IEHC 279, the respondent platform position was "it has nothing to say as to what the information should be and does not warrant that such information as it has will be sufficient to allow the plaintiffs to establish the true identity of the owner and operator of the account," at para 20.
37. The Court noted that "if the limitation period is going to expire imminently and the plaintiff is not given the necessary information to institute proceedings within that period, it is nonsensical to suggest that he is not prejudiced". *Blythe v The Commissioner of An Garda Síochána* [2019] IEHC 854, para 19. See also *Proudfoot v MGN Ltd* [2019] IEHC 871, para 41.
38. The Court has discretion to extend this period by a further 12 months, as per section 38(1)(a) of the Defamation Act 2009.
39. See: https://www.leitrimobserver.ie/news/home/605560/ex-td-frank-o-rourke-allowed-join-person-unknown-to-defamation-proceedings.html.
40. In England and Wales, for example, such applications may be made in the County Court, as well as the High Court.
41. While this independent Committee, created by Facebook in 2020, deals with appeals from the author when their content has been removed, or from users who have failed to have the content of others removed, it does not appear that it will entertain appeals in respect of decisions not to identify anonymous users. Its scope should be extended to enable it to hear such appeals.
42. See fn 36.
43. *Norwich Pharmacal v Customs and Excise Commissioners* (1973) AC 133, at 199.

To break the lock or not?

This article addresses the question of whether a commercial landlord, exercising the option to re-enter a demised premises following the forfeiture of a lease with a tenant, is permitted by law to break a lock on the tenant's door in effecting that re-entry.

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Young Bar Article Competition

The question, while niche, is in need of an answer in this jurisdiction and the answering thereof could have significant implications for commercial landlords who are in difficulty with covenant-breaching tenants as a result of a slowdown in trading activity caused by the Covid-19 pandemic. Two judgments from 2020 in this jurisdiction seemingly come to contradictory conclusions on the issue and, remarkably, the only legislation that offers any guidance on the question is the Forcible Entry Act of 1381, which is still in operation in this jurisdiction. This article highlights the state of the law with regard to this question and, unsurprisingly, suggests that some clarification or updating of the law is required.

Commercial landlords who, having forfeited a lease with a covenant-breaching tenant, wish to retake possession of the demised premises by means of physically re-entering the premises (often described as a 'self-help remedy' for landlords) find themselves in an unenviable and legally uncertain position. It is conceivable, even probable, that some commercial landlords will experience difficulties with tenants in the coming months who cannot make their rental payments but who nonetheless do not wish to vacate the premises. In such a scenario, the landlord, perhaps because the premises in question are in a prime city centre location and they are anxious to secure another tenant quickly, may find the option of commencing ejectment proceedings unpalatable due to the time and risk inherent in such a course (and indeed cost, if the tenant is impecunious). As such, a landlord may opt for the extra-judicial, self-help remedy of re-entering the premises physically and securing possession in that

fashion. This course of action will almost inevitably entail the act of forcing or breaking a lock to gain entry to the premises. This article proposes to highlight just how fine the line is between lawful re-entry and unlawful re-entry for such landlords and, furthermore, to highlight how that line has become obscured in the wake of the recent, contradictory judgments. Lastly, the article will consider the role that the 1381 legislation, still on the statute books, may have in the interpretation of the law in the immediate future.

When is physical re-entry lawful?

Wylie warns that: "Landlords intending to re-enter without judicial proceedings must beware of infringing the forcible entry legislation, especially if the tenant refuses to give up possession peaceably".[1]

A lawful re-entry, therefore, is one that must not fall foul of the forcible entry legislation. The legislation to which Wylie refers in this regard comprises the Forcible Entry Acts of 1381, 1391, 1429 and the Forcible Entry Acts (Ir) of 1634 and 1786.[2] This position, however, contrasts with a more liberal position that has developed in the UK, and which was set out by Hill and Redman in the following way:

"It is sometimes asserted that the use of force negates a forfeiture as physical re-entry. This is incorrect: peaceable re-entry includes a re-entry using reasonable force, such as breaking into locked premises. Even use of excess force does not negate the forfeiture, but merely exposes those involved to risk of civil or criminal proceedings".[3]

Indeed, earlier case law in the UK suggests that the use of reasonable force by a landlord in physically re-entering a premises was accepted by the courts as entirely lawful. One such example is the decision in *Hemmings v Stoke Pages Golf Club*,[4] where the 'force' used in re-entering the premises involved carrying the tenant's protesting wife across the threshold while she remained seated in her armchair, and where such force was deemed to be reasonable and lawful.[5]

The question of what constitutes a peaceable and lawful re-entry in this jurisdiction arose in the 1980s in *Sweeney Ltd v Powerscourt Shopping Centre Ltd*.[6] In that case, a shopping centre landlord had issued a forfeiture notice to a tenant who had been in breach of covenants to pay annual rent and service charges. The landlord, in effecting re-entry, used its master key and re-entered the property in question on a Sunday when there was no one in the shop. The tenant applied for an interlocutory injunctive relief, allowing it to retake possession. Carroll J. refused the application and held that the landlord was perfectly entitled to forfeit the lease in this manner, observing:

"Judge Deale, in his book *The Law of Landlord and Tenant in the Republic of Ireland*, put it as follows at p. 261: 'If the lessee does not give up possession peaceably, the lessor may re-enter. He may not use force, for this is a criminal offence. What is required is an unequivocal act showing the lessor's intention to re-enter for the breach of covenant, and to determine the lease by forfeiture…' I am satisfied that what was done by the defendants in regaining possession was peaceable entry".[7]

Carroll J. went on to offer some *obiter* comments in support of her decision, in a passage that must be of considerable gratification to any commercial landlord contemplating physical re-entry following the forfeiture of a lease:

"At the present time the amount of rent payable for prime city locations is very high and the arrears owed here are very large. The commercial viability of a shopping centre may well depend on all the tenants paying their rents and service charges promptly… Why should a lessee have a 'free ride' as far as rent and service charges are concerned for as long as it takes a lessor to bring an action in the Circuit Court and then wait for an appeal to the High Court? The undertaking concerning damages that has been given by the plaintiffs is meaningless as the damages will be the equivalent to the rent and service charges for which liability already exists".[8]

Following from this judgment, several commentators took the position in Ireland to be that, so long as only minimal damage was caused in the re-entry of the premises, the physical re-entry was lawful. One such commentator posited the following:

"In Ireland, however, it appears that physical re-entry would not be an acceptable method of determining a lease where same was resisted by the tenant, or would cause more than minimal damage to the property…"[9]

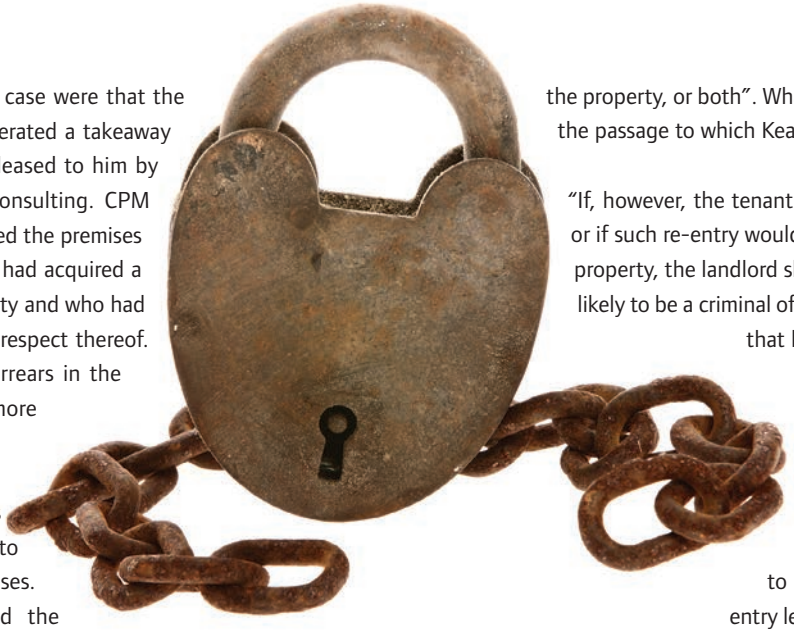
This position, however, was refuted by Allen J. in the recent decision of *ILG Ltd v Aprilane Ltd*.[10] Describing a suggestion "made repeatedly in articles published in the *Conveyancing and Property Law Journal* and the textbooks" that a landlord can effect a physical re-entry provided no more than minimal damage was caused to the property, Allen J. found that there was no judicial authority for such a position. The learned judge reaffirmed the position, as espoused by Carroll J. in *Sweeney*, that a landlord simply may not use force in re-entering a premises, for that would be a criminal offence. Allen J. then offers the following:

"Without finally deciding the point, I am extremely sceptical of the argument that whether an entry is forcible or not might turn on the degree of force used, or the extent of damage done to the property – whether by the drilling, forcing or cutting of locks or whatever".[11]

This position accords with the earlier *dicta* of McKechnie J. in *Harrisrange Ltd. v Duncan*,[12] where the learned judge stated as follows:

"No re-entry is to take place unless it, and the method used, is lawful and in accordance with law. The procedures available are quite adequate to vindicate any person's rights and access to the courts for that purpose. Those who refuse to avail of such rights and such access can only intend to steal a march on the rule of law. This should not be allowed to happen".[13]

Two months after the decision in *Aprilane*, the issue of peaceable re-entry was once more before the courts in the case of *Hafeez v CPM Consulting*



Ltd.[14] The facts of that case were that the plaintiff, Mr Hafeez, operated a takeaway restaurant in premises leased to him by the defendant, CPM Consulting. CPM Consulting had purchased the premises from Havbell DAC, who had acquired a mortgage on the property and who had appointed a receiver in respect thereof. The plaintiff fell into arrears in the payment of rent by more than seven days. Under the lease agreement with the defendant, this entitled the defendant to re-enter upon the premises. The defendant entered the plaintiff's takeaway restaurant at 10.30am on a Monday morning, when it was closed, and took possession of same. The plaintiff submitted at hearing that the defendant's re-entry was not peaceable (and was therefore invalid) as the defendant did not have a key to the premises and must have forced the lock. Keane J., who had not been referred to the judgment of Allen J. in *Aprilane*, observed as follows:

"[I]t was submitted on behalf of Mr Hafeez that the forfeiture is also invalid because the re-entry was not peaceable in that, since CPM did not have a key, a lock on the door of the restaurant premises must have been forced. While I do not doubt that, in that limited sense, CPM's re-entry may have been forcible, it is difficult to see how it was not peaceable. In the edition of his *Landlord and Tenant Law* already cited, Professor Wylie suggests (at para 24.18) that, for the purpose of the Forcible Entry Acts, 'forcible entry' entails entry that is effected against physical resistance or that causes more than minimal damage to the property, or both. I know of no contrary authority and none was cited. There is no evidence before me of anything more than minimal damage to the restaurant premises by, at most, breaking – and, presumably, immediately afterwards repairing – a lock".[15]

This position unfortunately lends some obscurity to the question as to what is and isn't lawful in the context of physical re-entry. On the one hand, the judgment of Allen J. in *Aprilane* can be reduced to reaffirming the position of Carroll J. in *Sweeney*, which in turn affirms the earlier position of Judge Deale, that a landlord may not use force in re-entering a premises, for that would be a criminal offence. On the other hand, the judgment of Keane J. suggests that a valid re-entry may indeed be both forcible and peaceable. This arguably suggests that a degree of reasonable force, in line with the earlier-cited academic commentary and case law from the UK, is now permissible in this jurisdiction.

Of equal importance in the judgment of Keane J. is the reference to Wylie's supposed characterisation of 'forcible entry', for the purposes of the Forcible Entry Acts, as meaning [*per* Keane J.] "entry that is effected against physical resistance or that causes more than minimal damage to the property, or both". What Wylie in fact writes at paragraph 24.18, the passage to which Keane J. refers, is the following:

"If, however, the tenant resists physical re-entry by the landlord, or if such re-entry would cause more than minimal damage to the property, the landlord should refrain as an attempt to use force is likely to be a criminal offence under the 'forcible entry' legislation that has existed from earlier times".[16]

While Prof. Wylie states that entry by the landlord: i) in the face of physical resistance from the tenant; or, ii) in a manner that causes more than minimal damage to the demised property, is likely to be a criminal offence under the forcible entry legislation, he does not state that such acts by a landlord are exhaustive of the acts that constitute 'forcible entry' under the forcible entry legislation, as Keane J. appears to suggest. It seems that a broader definition of 'forcible entry' is provided for in the forcible entry legislation – to which attention must now be given.

"None from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in (peaceable) and easy manner."

Forcible entry legislation

The forcible entry legislation to which Wylie refers comprises the following: the Forcible Entry Acts of 1381, 1391, 1429; the Forcible Entry Acts (Ir) 1634 and 1786; and, the Forcible Entry and Occupation Act 1971.

Starting with the most recent, the Forcible Entry and Occupation Act of 1971 provides for an offence of forcible entry only where the offender is not the 'owner' of the land within the meaning of the Act. 'Owner' is defined very broadly and includes both a tenant and a landlord, and so the Act is irrelevant in the context of this discussion, save to say that this Act did not have the effect of repealing earlier forcible entry legislation.[17]

The Forcible Entry Acts of 1391, 1429, and 1786 have been repealed in this jurisdiction.[18,19] The Forcible Entry Act of 1634 survives in this jurisdiction via section 2(1) of the Statute Law Revision Act 2007 but is not relevant to the present issue of defining 'force'.[20]

This leaves The Forcible Entry Act of 1381 – formally entitled The Forcible Entry Act 1381 (5 Richard 2 Statute 1 Chapter 7). The Act of 1381 was given effect in Ireland via Poyning's Act of 1495. While Poyning's Act was repealed via the Statute Law Revision Act of 2007, section 9(3) of the 2007 Act operates so as to keep the Act of 1381 on the statute books, notwithstanding the repeal of Poyning's Act. The Act of 1381 is also

expressly retained by Section 2(1) and Schedule 1 of the Statute Law Revision Act 2007. The Act of 1381 provides as follows:

"None from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in (peaceable) and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment" [emphasis added].

Of importance is that it is no defence under this Act that the person guilty of forcible entry was entitled to possession or had a legal right of entry.[21] Some elucidation on the nature of a forcible entry offence under the Act of 1381 is provided by Archbold's *Pleading, Evidence & Practice in Criminal Cases* (36th ed., Sweet and Maxwell, 1966) at page 1,306, which states:

"The prosecutor must prove the forcible entry. An entry 'with strong hand' or 'with a multitude of people' is the offence described in the statute. Therefore, an entry by breaking the doors or windows, etc., whether any person is in the house or not, especially if it is a dwelling-house, is a forcible entry within the statute".

The learned barrister and legal scholar goes on to write:

"But an entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out and then shutting the door upon him, or the like without further violence (1 Hawk. c. 64, s. 26); or an entry effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence, will not support an indictment for forcible entry…there must be such force or show of force that is calculated to prevent resistance (*R v Smyth* 5 C & P, 201)".

While Archbold's comments are helpful, it remains the case that the Act of 1381 is not without its interpretive difficulties for the commercial landlord wondering whether or not he or she can break a lock in effecting a lawful and peaceable re-entry to a property.

Conclusion

What is certain from the foregoing is that a landlord cannot physically remove a tenant from a property and that any physical resistance from a tenant will negate a landlord's ability to re-enter the premises lawfully. A landlord, such as the landlord in *Sweeney*, who holds a key to the demised premises and who can therefore enter without force will likely, on the authority of that judgment, have such a re-entry deemed lawful. The extent of damage done to the tenant's property in effecting a physical entry is arguably not the appropriate test if the comments of Allen J. in *Aprilane* are to be followed; rather, the test is simply whether unlawful force was used or not, in the entering of the premises. As to what constitutes unlawful force, the Forcible Entry Act of 1381, still in operation in this jurisdiction, forbids of any entry using "strong hand" or "a multitude of people". Archbold's commentary on the Act of 1381, while teasing out some acceptable and unacceptable uses of force, doesn't quite provide commercial landlords with an answer as to whether or not they can break a tenant's lock in this jurisdiction and still have their re-entry deemed peaceable. In these circumstances, the law is in want and need of clarification, be it from the bench or from this century's lawmakers.

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9. Cannon, R. Forfeiture for breach of covenant by a tenant—the need for reform. *Conveyancing and Property Law Journal* 2007; 12 (1): 5-12, at 5.
10. [2020] IEHC 420.
11. At para 27.
12. [2003] 4 IR 1.
13. [2003] 4 IR 1 at 21 – gratefully adopted from Canny, M. Forfeiture by peaceable re-entry: barely legal bullying or an essential remedy for landlords. *Conveyancing and Property Law Journal* 2007; 12 (4): 94-99.
14. [2020] IEHC 536.
15. At para 36.
16. Wylie, J.C.W. *Landlord and Tenant Law (2nd ed.)*. Bloomsbury, 1998, at 195.
17. *Ibid* at 195, fn. 93; and the remarks of Carroll J. in *Sweeney* at 504.
18. The Acts of 1391 and 1429 were repealed by Section 2(1) of the Statute Law Revision Act of 2007.
19. The Act of 1786 was repealed by Section 16 of the Criminal Law Act 1997.
20. In short, it provides that if a party has been indicted of forcible entry and that party has been in occupation or quiet possession of the lands entered upon for a period of three years or more before being so indicted, and the party's estate is not determined, there shall be no restitution. See: http://www.irishstatutebook.ie/eli/1634/act/13/enacted/en/html.
21. See the judgment of Lord Phillimore in *R v Mountford* [1972] 1 QB 28 at para 13; and, *Halsbury's Statutes*, Volume 18, page 406.

Covid-19 restrictions and the free practise of religion in Ireland

The Covid-19 pandemic ushered in a global shutdown and engendered legislative provisions, Government 'guidance' documents and penal sanctions regulating hitherto uncontroversial human behaviour in an effort to prevent the spread of the virus. Leaving aside the serious global pandemic generating said provisions, Ireland has not witnessed this level of restriction upon public religious gatherings since the days of the Penal Laws. This article argues that restrictions on fundamental rights such as the freedom of religion should remain under close scrutiny, particularly in times of national difficulty where additional powers are amassed on the part of the Government in the 'common good'.

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Third place in the inaugural
Young Bar Article Competition

This article examines the legislative and other provisions seeking to curtail freedom of religion under the guise of the Covid-19 restrictions. It considers whether the law in this area is fit for purpose, particularly whether it achieves the important goal of clarity. It further considers that the unstated purpose of these laws, as of any law, is to uphold the Constitution. It therefore questions whether the restrictions these laws impose on the freedom of religion protected by Article 44 of the Constitution comply with the proportionality doctrine.

Background to the Covid-19 restrictions

Comparable to the snowstorm hitting the unprepared and ill-equipped State of Texas in February 2021, freezing essential infrastructure, emptying the shelves of supermarkets and inhibiting travel,[1] the Covid-19 virus took governments by surprise on a global scale in 2020. This insidious yet invisible force froze services in the retail sector, blighted the economy, engendering the loss of millions of jobs,[2] and wrought house confinement on populations on a global scale. Governments grappled to deal with a virus whose origins, characteristics and level of contagion were largely unknown. They floundered beneath the weight of the responsibility of maintaining their limited healthcare systems and preventing the loss of life on a mass scale. The world watched in horror at the rising death toll in Italy.[3]

In the fear that gripped the globe, citizens of nations voluntarily acceded basic civil liberties and consented to the restriction of fundamental human rights, in an effort to curb the onslaught of the virus. The Irish Government sought ways to limit the impact of the virus and prevent a crisis within the healthcare sector. In doing so, a flurry of legislation and 'guidance' documents were engendered. The Irish Government sought to respond to a constantly changing situation and protect citizens while constantly learning about the effects of the virus. They acted quickly and firmly to an unprecedented and difficult situation.

Yet whether pandemic, terrorist threat or armed invasion, there is simply no enactment of legislation or Government policy that should remain impervious to scrutiny. It is perhaps particularly in times of national difficulty that the value in which our society holds basic civil liberties and human rights is exposed. It is in these times, where the amassing of greater powers on the part of the Government is deemed to be in the common good, that governments should be held to close account. The pandemic-engendered restrictions on the freedom of religion in Ireland beg such scrutiny.

Freedom of religion as a human right

It is worth considering at this juncture the importance of internationally recognised human rights as a concept. The American Declaration of Independence of 1776 declared that said rights were endowed upon mankind by their Creator.[4] The notion of "unalienable" rights recognised in said Declaration of Independence[5] is a golden thread woven among seminal human rights instruments. The Universal Declaration of Human Rights recognises the "inherent dignity" of the "human family" and their "equal and inalienable rights".[6] The same words are reproduced in the International Covenant on Civil and Political Rights 1966.[7] The Irish Constitution seeks to assure the freedom and the dignity of the individual.[8] The term 'inalienable' is defined in the *Oxford English Dictionary* as "unable to be taken away or given away".[9] Human rights are, by their nature, neither the gift of the Government nor objects of cursory retraction.

Leaving aside the undeniably serious socio-political background of the 2020-2021 'lockdown', Ireland has arguably not witnessed this scale of restrictions upon religious liberties since the days of the Penal Laws. One particular such law, named an 'Act to prevent the further Growth of Popery', provided expressly for the repression of religious freedom of assembly.[10] It targeted the congregations of faithful adherents at places of pilgrimage and empowered authorities to label gatherings of "vast numbers", "meetings" and "assembles" to be adjudged riots and to be unlawful, and to be "punishable as such" in a "diligent" manner.[11]

Why is freedom of religion important? Is there anything that renders it different to a social club or other extracurricular activity? Is there anything that renders it deserving of special protection on the part of the State and should it inspire particular reticence on the part of our political representatives before restricting its free practice? The European Court of Human Rights (ECtHR) has explained freedom of thought, conscience and religion, protected in Article 9 of the European Convention on Human Rights as:

"one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it".[12]

In contrast to the Penal Laws, the Covid-19 provisions have not sought to single out a particular religion and repress its public gathering. Rather, they have equally restricted freedom of public gathering to worship across all religions. This makes said restrictions unprecedented in Ireland.

The law: the Covid-19 'provisions'

The first Act dealing with the Covid-19 pandemic was the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020 (hereinafter the 2020 Act). It was signed into law by the President on March 20, 2020.[13] The stated purpose of this law was:

"to make exceptional provision, in the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the disease known as Covid-19 and in order to mitigate, where practicable, the effect of the spread of the disease known as Covid-19".[14]

Section 10 of the 2020 Act amended section 31 of the Health Act 1947. It gave power to the Minister for Health to make regulations "for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19".[15] The Minister was given power to impose restrictions upon travel to/from/within the State, powers requiring persons to remain in their homes and to prohibit "events" that "could reasonably be considered to pose a risk of infection with Covid-19 to persons attending".[16] An "event" was defined as a "gathering of persons, whether the gathering is for … religious … reasons".[17] It was further specified that the Minister may exempt specified classes of individuals who perform essential services.[18] Thereafter, a series of at least ten sets of regulations were promulgated, lasting for defined periods of time,[19] and regulating human behaviour.

Criminal provisions

The 2020 Act stated that an individual who contravened a provision of a regulation made by the Minister that is stated to be a penal provision would be guilty of an offence.[20] It provided that it is an offence to fail to comply with a direction of a Garda who suspects that a person is contravening a regulation stated to be a penal provision.[21] It gave powers to the Gardaí to direct compliance with a penal provision.[22] It provided that failure to comply with a direction is an offence.[23]

The regulations in place up to April 13, 2021,[24] provided in Regulation 8(1) that "relevant events" shall not be organised or caused to be organised. Regulation 8(3) provided that this was a penal provision. A "relevant event" was defined as "an event held, or to be held, for social, recreational, exercise, cultural, entertainment or community reasons".[25] Regulation 4(1) provided that an applicable person shall not leave his or her place of residence without reasonable excuse. Regulation 4(3) stated that this was a penal provision.

Other legislative provisions provide powers to the Gardaí to enter any premises without a warrant at any time and make such inspection as proper for the purposes of giving a direction.[26] Failure of compliance can further result in "an immediate closure order".[27]

A number of regulations thereafter provided fixed payment fines for the breaching of various provisions of the regulations, for instance the

restrictions of movement of relevant persons in relation to travel from place of residence.[28]

Provisions regarding religious services during 'level 5'

Up until May 10, 2021, SI 168/2021 was in place.[29] Regulation 4 provided that a "minister of religion or priest (or any equivalent thereof in any religion)" had "reasonable excuse" to leave his relevant travel area to "lead worship or services remotely through the use of information and communications technology".[30] The Government website, under the heading 'Religious Services', merely stated that "services will be held online" and that "places of worship remain open for private prayer".[31] The Schedule to SI 168/2021 defined "essential service". Among these services include various aspects of retail, financial and legal activities, agriculture, public administration and a number of other sectors. Apart from funeral services attended by 10 people, religious services were nowhere to be found on said list.

'Guidance' documents during restricted opening of religious services

During a brief reprieve over the December 2020 Christmas period, SI 2020/560 was in place,[32] permitting the minister of religion or priest (or any equivalent thereof in any religion) to lead worship services.[33] While outlining that "current Government guidelines must be adhered to", detailed 'guidance' was provided in a Health Service Executive (HSE) document on the requirements that must be adhered to in the carrying out of religious services.[34] It was for instance mandated that services should not exceed one hour in time. It was further provided that "congregational singing, choir singing and carol singing is not permitted"[35] and that "musical instruments that are physically blown into should not be used".[36] While couched in strong mandatory terms, it was stated that "this guidance document provides advice for religious leaders".[37] A similar document applying to the recent opening of places of worship has been published as of April 28, 2021.[38]

The law: is it fit for purpose?

Clarity

I have approached a review of this area of 'law' with some trepidation, as the 'law' is ephemeral and elusive, a quagmire of legal provisions and Government advice that is difficult to untangle. If daunting for a legal professional, how much more the layman on the street, whose hitherto uncontroversial and lawful behaviour, including the practice of fundamental human rights, has overnight potentially become a criminal offence? For law-abiding citizens who seek to uphold the provisions but obviously wish to operate within whatever scale of normalcy is legally permitted, this presents serious problems. It has come to the point where places of religious worship seeking to operate any form of services should consider seeking the advice of a legal professional.

Remote religious services

Pursuant to the regulations outlined above, a minister of religion or priest was permitted to lead worship services using remote technology. However, clearly the undertaking of a broadcast is a technical venture requiring personnel with such technical skills. The regulations were silent about whether other personnel could be involved in this endeavour. This must be considered against Regulation 4(1) of SI 2020/701, which restricted an individual from leaving his/her place of residence without reasonable excuse, and which was stated to be a penal provision.

Criminal sanctions

Clarity in the law is of even greater import when, as in the present circumstances, criminal sanctions are at play. According to the seminal case of *King v Attorney General* [1981] IR 233, in order to be lawfully convicted of an offence, it is necessary that the ingredients of and acts constituting the offence are specified with precision and clarity.[39] The court in that case bore the complaint against the relevant law that it was arbitrary, vague and difficult to rebut.[40] As noted by Byrne and McCutcheon, precision in statutory rules allows those who are affected by them to know "exactly that which is required of them and to plan their activities accordingly".[41] Certainly, provisions seeking to regulate everyday behaviour as restrictive and wide-reaching as the Covid-19 restrictions should be presented with clarity and precision.

In-person religious services

Matters are further obfuscated by lack of clarity on the extent of the legal requirements placed upon religious observants, a confusion caused by the nature of Government publications. The above-referenced HSE document is labelled 'guidance' but dictates detailed mandatory requirements upon religious observants. This document is obviously not a piece of enacted legislation, but as a result of the language employed it is simply unclear to religious bodies whether these are legal requirements or merely advices on the part of the Government.

An important element of any law is that it is presented with clarity in order that citizens can modify their behaviour pursuant to it. The fitness of purpose of the Covid-19 restrictions on freedom of religion is called into question when: (i) the law is constantly changing; (ii) permissible activity is unclear against the backdrop of the threat of criminal sanctions; and, (iii) Government bodies publish non-legislative documents detailing mandatory requirements minutely regulating every aspect of religious services. Lack of clarity regarding the extent of an individual's legal obligations, and which behaviour attracts criminal sanctions, places the fitness of the 'law' into question.

Proportionality

The stated purpose of the Covid-19 provisions is to curtail the spread of the virus. However, the unstated purpose of any law is to uphold the Constitution, to which every legislative enactment is subject.[42] The fitness for purpose of a law must be considered in light of the requirements of the Constitution, particularly when it comes to fundamental rights. Freedom of religion is protected in Article 44 of the Constitution, which

states "the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen".[43] Article 44 is not couched in absolute terms, and so it is helpful to consider a doctrine of law that may assist in reviewing Government restrictions upon this right, such as the doctrine of proportionality.

The case of *Heaney v Ireland* [1994] 3 IR 593 set out a possible yardstick for measuring the permissibility of restrictions on the exercise of constitutional rights. The proportionality test is a test containing notions of minimal restraint on the exercise of protected rights.[44] The means of restriction must be proportional – they must: (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the rights as little as possible; and, (c) be such that their effects on rights are proportional to the objective.[45] While described as a "term of art",[46] the proportionality doctrine was noted by the Supreme Court in *Minister for Justice and Equality v Ostrowski*[47] to be a "valuable assessment method".[48] It was held that it was important that the impact upon a citizen's fundamental rights by the action of a public body be as minimal as possible.[49]

Impair the right as little as possible

There is no doubt that the Government is justified in imposing restrictions of some form to prevent the spread of the virus. However, it is questionable whether the right of freedom of religion has been impaired as little as possible since the start of the pandemic. Religious services have been relegated to a screen broadcast for many months. Was there any way physical meeting could have been permitted while minimising the spread of the virus? This author is not aware of any restriction on the amount of time an individual can spend in a supermarket. Could shorter religious services with limited numbers have been a safe way of meeting? Could social distancing, regular cleaning and the wearing of masks have mitigated the risk of transmitting the virus while permitting people of faith to practice the fundamental requirements of their religion? These questions should have been seriously asked and investigated, and not simply cursorily dismissed.

Have efforts to minimally restrict freedom of religion been made?

The Government, in its 'Resilience and Recovery 2020-2021, Plan for Living with COVID-19' document, requires that church services move online during levels 3, 4 and 5.[50] Religious services are listed at page 10 of this document as "other controlled social events" after physical activity and cultural events the Government wishes to support as part of a response to "mental strain that many people are experiencing". There appears to be a limited recognition of the fundamental importance of freedom of religion, as distinguished from mere cultural and physical activities. Courts in the United States,[51] Scotland[52] and Germany[53] have recognised that special provision should be made for freedom of religion amidst the Covid-19 pandemic.

Conclusion

The ECtHR has eloquently given words to the importance of the freedom of religion as one of the "foundations"[54] of a democratic society. Free practice of religion is of indescribable importance to people of faith informing the very "identity of believers and their conception of life".[55] Its restriction should be treated with the utmost care by those who wield penal powers.

While recognising the grave loss of life and deep tragedy that the Covid-19 pandemic has wrought across the globe, it is vastly important that the Government restrictions upon free practice of religion impair this fundamental right as little as possible despite these difficult circumstances. Government publications that seek to link religious freedom with cultural events and physical activity communicate a lack of recognition of the fundamental importance of the free practice of religion, as guaranteed by Article 44 of the Constitution.

The lack of clarity regarding the precise nature of the legal requirements set out for members of religious communities and the extent to which activity attracts penal provisions is a matter of some concern and places the fitness for purpose of the Covid-19 restrictions into question. The law should be clear, particularly when it seeks to regulate behaviour that has not been regarded as criminal since the time of religious persecution during the Penal Laws.

The fitness for purpose of a law cannot be examined in a vacuum excluding consideration of the important fundamental rights at stake. The Covid-19 provisions may be effective in preventing the spread of the virus, but do they take the trouble to do so in the least restrictive way possible? The requirements of a free and democratic society, of which freedom of religion is a central component, demand that this should be so.

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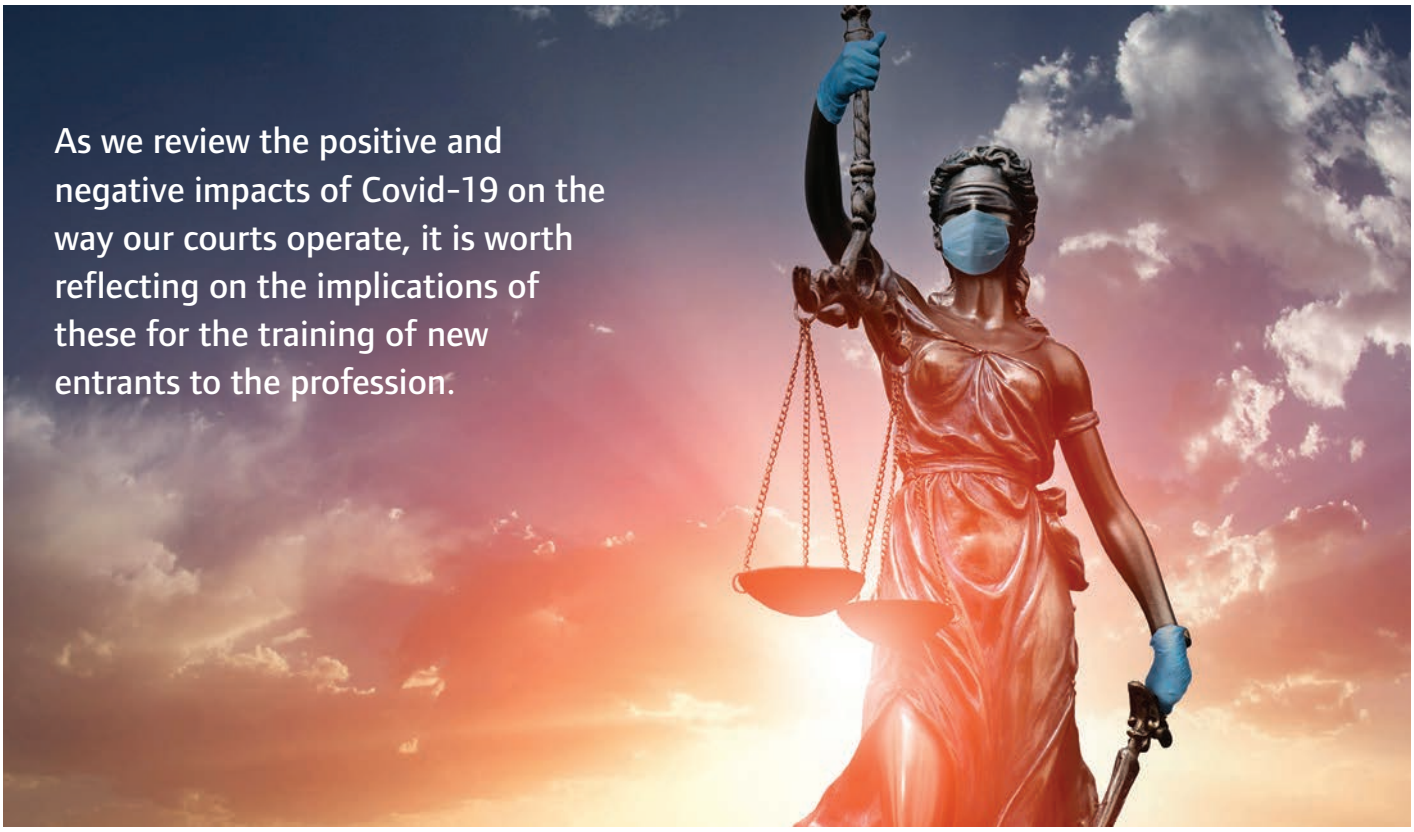

Remote courts and pupillage in the wake of Covid-19

This edition of *The Bar Review* publishes the winning entries of the inaugural Young Bar Essay Competition, an initiative to showcase the expertise and creativity of emerging talent at the Bar. It also offers an opportunity to reflect on the training of new entrants to the profession.

Much has been said about Covid-19 and its role as a catalyst in advancing traditional working methods in legal systems worldwide. In the words of legal futurist Richard Susskind, the pandemic has presented an "unscheduled experiment" for an improved process in the delivery of legal services. It is an opportunity to see what works well and what does not.

So far, this enthusiasm is less apparent among legal practitioners but that might be because there is little research to date on the impact of remote hearings on the administration of justice. In England and Wales, the Civil Justice Council concluded in their review of the impact of the changes mandated by their Government's Covid-19 response, that "the majority of [lawyer] respondents felt that remote hearings were worse than hearings in person overall and less effective in terms of facilitating participation".[1]

Anita Finucane BL

Participation

The word participation stands out, not just for court users, but its value for legal practitioners. As much as remote hearings have presented a more detached experience for established practitioners, they have presented an exclusively online training experience for new entrants to the profession.

As the legal year draws to a close, it is worthwhile reflecting on the value of physical court hearings for the training of new entrants. Hybrid courts are beneficial to the efficient administration of justice and the practice of law, but the question remains as to what is lost for new entrants and their advocacy training if the usual motion lists remain online. Pupils are less likely to experience the informal learning that occurs in courtrooms and the related opportunities for visibility, chance encounters with solicitors and the collegiality of the profession. They are less likely to participate in a way that the pedagogy of pupillage envisages.

Pupils have nonetheless emerged through this pandemic with an important skillset, a fluency in technology and remote advocacy, along with proven resilience and swift adaptability. As we embrace new systems, as a profession, we must also find ways to maintain key elements of traditional training of newly qualified barristers. A skilled advocacy profession is in the long-term interest of the administration of justice and our clients.

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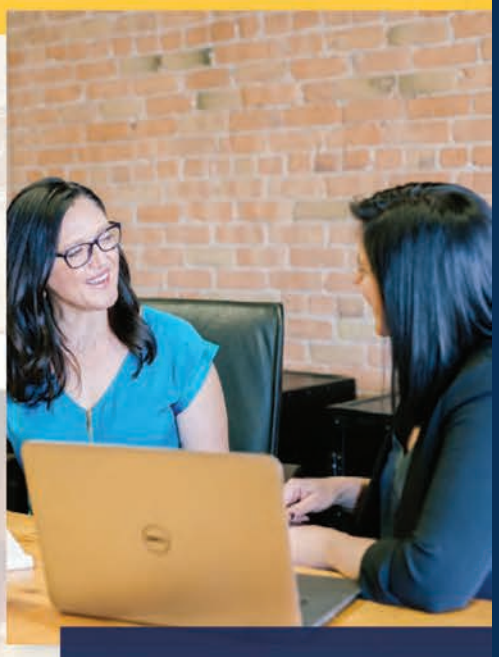

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