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THE BAR REVIEW

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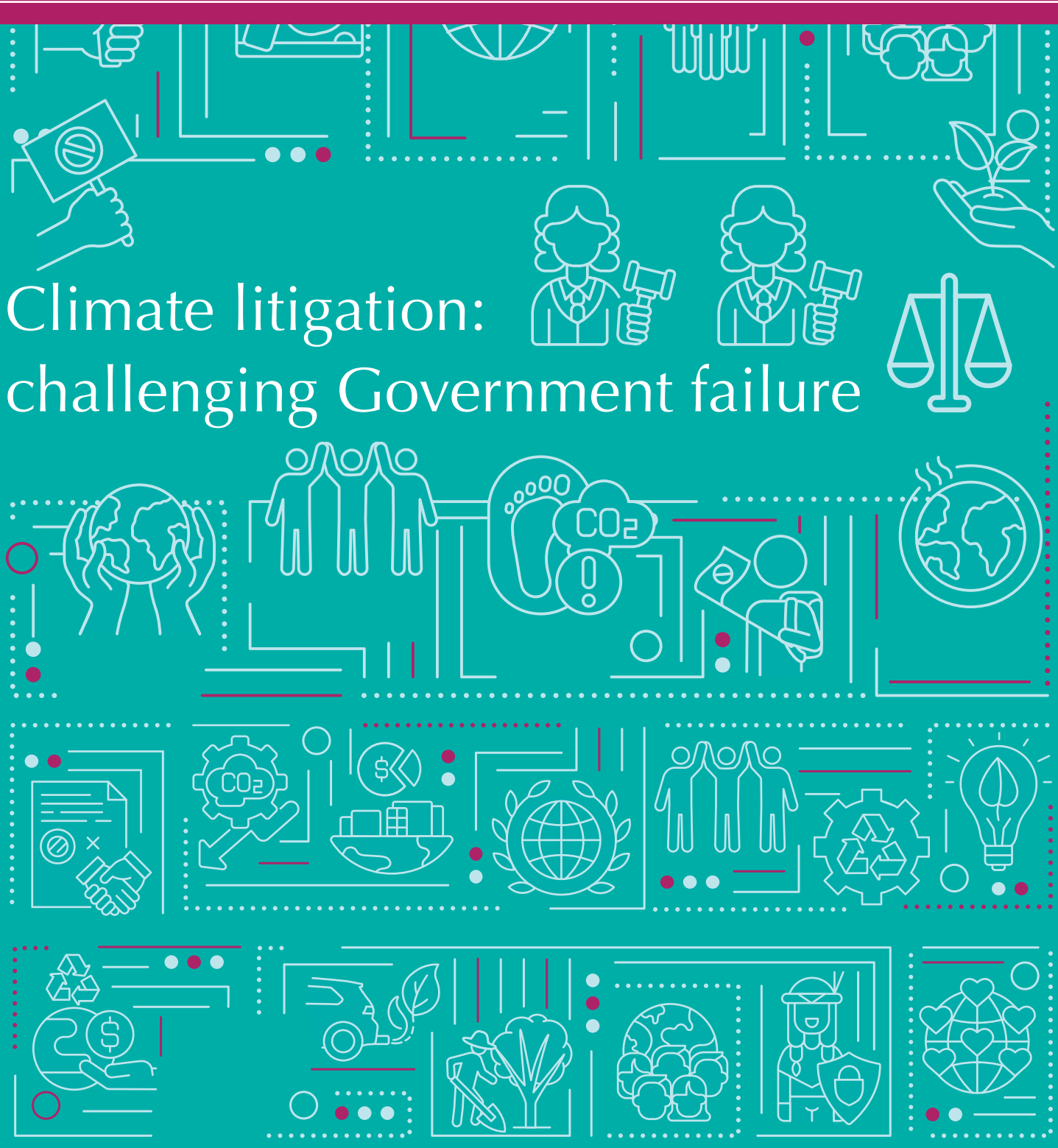
Climate litigation: challenging Government failure



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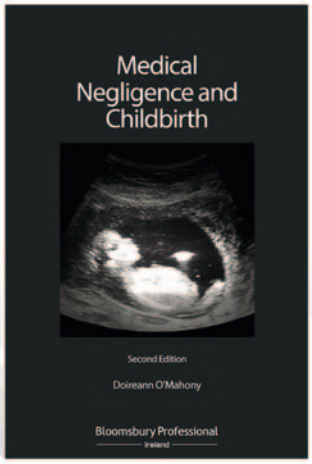

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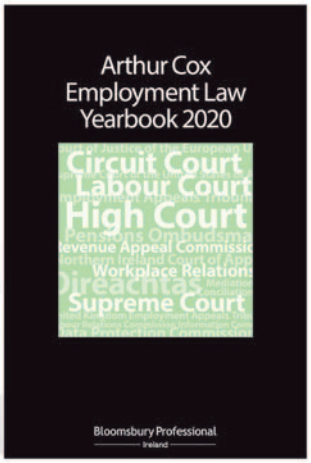

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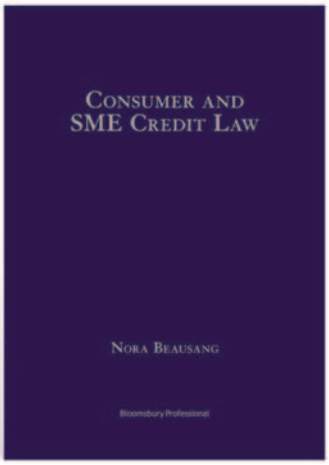

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The Bar Review
The Bar of Ireland
Distillery Building
145-151 Church Street
Dublin DO7 WDX8

Direct: +353 (0)1 817 5025
Fax: +353 (0)1 817 5150
Email: therese.barry@lawlibrary.ie
Web: www.lawlibrary.ie

PUBLISHERS

Published on behalf of The Bar of Ireland by Think Media Ltd

Editorial: Ann-Marie Hardiman
Paul O'Grady
Colm Quinn
Design: Rebecca Bohan
Tony Byrne
Tom Cullen
Advertising: Paul O'Grady

Commercial matters and news items relating to *The Bar Review* should be addressed to:
Paul O'Grady
The Bar Review
Think Media Ltd
The Malthouse,
537 NCR, Dublin DO1 R5X8
Tel: +353 (0)1 856 1166
Fax: +353 (0)1 856 1169
Email: paul@thinkmedia.ie
Web: www.thinkmedia.ie

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Papers, editorial items, and all queries regarding subscriptions should be addressed to:
Therese Barry at: therese.barry@lawlibrary.ie

End of an editing era

The Council of The Bar of Ireland continues its work on behalf of members, while it's the end of an era at *The Bar Review*.

This is the last edition of *The Bar Review* that will be overseen by our Editor, Eilis Brennan SC. Eilis has been Editor of *The Bar Review* for nearly 20 years. She has now reached a point where her career as a Silk no longer allows the time required to act as editor.

Eilis came to *The Bar Review* with a background in journalism, both in the UK and Ireland, during which time she worked for Bloomberg and RTÉ. In addition, she worked in corporate law in America for a period of time. *The Bar Review* is the flagship publication of The Bar of Ireland and we, as a profession, have been most fortunate to have had Eilis as our prescient Editor, and for such a lengthy period of time. All who have worked alongside Eilis at *The Bar Review* have remarked on her leadership, judgement and influencing skills. Above all else, Eilis as Editor always had the interest of the profession at heart. Thank you Eilis, your contribution to our profession is deeply appreciated.

Council business

Members who are not involved on a day-to-day basis with either the Bar Council or its Committees or working groups can be forgiven for sometimes thinking: what is the Bar Council doing for me? One of the articles in this edition of *The Bar Review* sets out a high-level summary of Government policy that will impact on the profession in the coming years.

Monitoring Government policy is one of the key roles of the Council. The Council, with the support and input of the executive staff, keep abreast of, and respond to, policy issues that affect the profession on a regular basis. Members who volunteer their time to debate and discern policy positions on behalf of the profession can attest to the volume and intensity of the work involved in engaging with each topic. The numerous submissions made by the Council (published on our website) in response to a range of issues over the last few years gives some indication of just how active the Council is in the policy and public affairs arena.

2022 is likely to see a further increase in the level of activity from the Council and its Committees as the Government intends to launch several initiatives where engagement will be necessary with the Council. Such initiatives include the commencement of the long-overdue review of civil legal aid, the publication of the family law reform strategy, and the implementation of the various recommendations set out in the Report of the Review of Administration of Civil Justice.

Implementation of the Strategic Plan, October 2021-October 2024

In November 2021, the Council approved our new three-year strategic plan, and a series of working groups have already been set up in order to advance some of the actions referred to in that plan. So far, six working groups have been formed:

1. Direct Access Working Group – to promulgate guidance for members who opt to provide direct access that will be enabled by the Legal Services Regulation Act 2015.
2. Council Composition Working Group – to review the composition of the Council membership to ensure that it is representative of the make-up of the Law Library.
3. Professional Fees Working Group – to take a fresh look at this area to consider any structural changes that should be sought, such as the inability of the profession to sue for their fees and the ongoing issue of late payment of fees.
4. Subscriptions Review Working Group – to conduct a periodic review of membership subscription structure and rates.
5. Property Working Group – to develop a long-term masterplan for the estates portfolio.
6. Desk/Seating Working Group – to undertake a full review of allocation of desk facilities having regard to any behavioural changes in how people work arising from the pandemic.

Finally, I would like to take this opportunity to wish all colleagues and their families a peaceful and safe Christmas, and a fruitful New Year.

Maura McNally S.C.

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

Changing legal landscapes

This edition looks at significant changes in the legal landscape in a number of areas, and welcomes a new *Bar Review* editor.

Climate change is undoubtedly one of the single most important challenges facing citizens of this planet. And while the impetus for initiatives to protect the environment must come from elected officials worldwide, there is a growing reliance on the courts as a means of forcing action where governments and parliaments have baulked at the challenge. We take a look at recent judgments that point to the emergence of an interventionist trend in the approach of domestic courts in Europe to the issue of climate change.

Staying with global affairs, we take a close-up look at Ireland's role within the UN and the aims for its stint on the Security Council. Ireland's Permanent Representative to the UN, Geraldine Byrne Nason, shares her experiences in the domestic and diplomatic civil service, and explains what Ireland has to offer on the international stage.

In the area of personal injury litigation, recent decisions from the higher courts have emphasised the need for practitioners to draft pleadings with specificity and to ensure that all allegations pleaded must have a factual and evidential basis such that they are capable of being properly maintained at trial. Together with new rules of court, which provide for stricter time limits in respect of delivery of pleadings, the result is a fast-changing landscape for personal injuries actions.

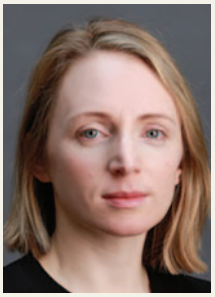
Having had the very great privilege and pleasure of editing *The Bar Review* for a great many years, I am now delighted to hand over the baton to Helen Murray BL, who has been appointed to succeed me. Helen brings a wealth of journalistic and legal expertise, and I wish her every success and fulfilment in the new role.

Finally, a word of thanks to all who have supported me as Editor, in particular, Chief Executive Ciara Murphy, the team at Think Media, Chair of the Council of The Bar of Ireland Maura McNally SC, and all who have served past or present on the Editorial Board. I thank you and salute you all for the wise words and many kindnesses that have made the role so memorable.

Happy Christmas.

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

New editor appointed to *The Bar Review*



Helen Murray BL has been appointed as the new Editor of *The Bar Review*. Helen will replace Eilis Brennan SC, who has stepped down after almost 20 years as Editor.

Originally from Belfast, Helen studied English and Drama at Queen Mary College, University of London, and the Central School of Drama, before completing a Master's Degree in Journalism in Dublin City University. Her first job was with the *Irish News* in Belfast before moving to Dublin in 2000, where she worked for *The Sunday Tribune* as a reporter, Education Correspondent and, finally, Features Editor of the *Tribune Magazine*.

In 2008, Helen completed the Diploma in Legal Studies at the King's Inns, and she graduated from the Barrister-at-Law degree course in 2009. She was called to the Bar in 2009 and has been working mainly in general practice, personal injury and family law. She is based in Dublin, but has also worked on the South Eastern Circuit. Commenting on her appointment, Helen said: "*The Bar Review* is essential reading; it is a valuable resource for members, providing insights and updates on the changes and developments in the law. I am honoured to be appointed as Editor, and I look forward to working with my colleagues on the Editorial Board so that we might continue the excellent work of my predecessor, Eilis Brennan SC, and produce a publication that members want to read".

IACBA Bursary awarded

The Immigration, Asylum and Citizenship Bar Association (IACBA) is delighted to award the 2021 IACBA Bursary for the Advanced Diploma in Immigration and Asylum Law at King's Inns to Mariana Verdes BL. In this inaugural year, after Covid delays last year, the committee decided to award a second bursary as an exceptional measure, which was won by Olaniyi Oriade BL. Both recipients demonstrated excellent commitment to this area of law and to the IACBA. The Association wishes them well in their studies.

IACBA Bursary winners Olaniyi Oriade BL (left) and Mariana Verdes BL (right) with Denise Brett SC, Chair of the IACBA.

Specialist Bar Association news

The **Probate Bar Association (PBA)** held its first breakfast briefing on October 26, chaired by Vinog Faughnan SC. Laurence Masterson BL provided an overview of practice and procedure in the non-contentious probate list.

Denise Brett SC chaired the **Immigration, Asylum and Citizenship Bar Association's (IACBA)** first webinar of the legal year on October 28. Matthew Holmes BL discussed the historical and legal significance of the *State (Goertz) v Minister for Justice* [1948] IR 45. The IACBA held its Annual Conference on November 26, which included presentations from Mr Justice Donal O'Donnell, Chief Justice; Ms Justice Síofra O'Leary, Vice President of the European Court of Human Rights; and, Mr Justice Bay Larsen, Vice-President of the Court of Justice of the EU.

The **Construction Bar Association (CBA)** held its first Tech Talk of the series on October 27, chaired by James Burke BL. Richard Stowe, partner at Beauchamps LLP, considered the recent decisions of Mr Justice Simons in *Aakon Construction Services Ltd*. On November 10, Keith Kelliher delivered a Tech Talk on the Construction Contracts Act 2013 – five years on.

On November 4, the **Employment Bar Association (EBA)** opened the legal year with a breakfast briefing. Anthony Kerr SC discussed the impact of the Supreme Court on the evolution of labour law in Ireland. The 2021 EBA Annual Employment Law Conference was opened by Alex White SC on December 10, and chaired by Mr Justice Senan Allen. Speakers included: Eileen Barrington SC; Mark Connaughton SC; and, Cliona Kimber SC.

In November, the **Sports Law Bar Association (SLBA)** held a webinar on 'Winner All Right or A Beaten Docket? The Gambling Regulations Bill'. Chaired by John O'Donnell SC, Jim O'Callaghan TD, Pádraig Ó Ríordáin of Flutter, and Aoife Farrelly BL discussed the main provisions of the Bill. On December 3, the SLBA held its Annual Conference – 'Hosting Major Sports Events'. Chaired by Susan Ahern BL, the opening address by Cian Ó Lionáin, Assistant Secretary General, Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, highlighted the Government support and impending consultation on major events. The Conference proceeds were donated to the Irish Justice Community Response to the Afghan Crisis.

David Conlan Smyth SC chaired the **EU Bar Association's (EUBA)** first webinar of the legal year on November 18. The webinar gave insights from the European and Irish perspective, in the Irish court and up to the Luxembourg courts, dealing with the procedures along the way, with presentations from Brian Kennedy SC and Eileen Sheehan, Référendaire, CJEU.

The **Planning, Environmental and Local Government Bar Association (PELGBA)** enjoyed a presentation from David Browne BL on November 30 on 'Recent Developments in Planning And Environmental Law Cases 2020/21'. The webinar was chaired by James Connolly SC.

Reáchtáil **Cumann Barra na Gaeilge** a gcead chomhdháil ar líne. Bhí cainteoirí láirithe san aireamh: An Breitheamh Nuala Butler; Diarmaid Mac Mathúna – Gaelgram; Barry Lysaght BL; Julie O'Farrell, Cúirt Bhreithiúnais an Aontas Eorpaigh; Colm Mac Aodhain – Baile Átha Cliath; Máire Ní Shúilleabháin – Corcaigh; Seán Ó Cearrbhaill – Gaillimh; agus, An Breitheamh Cian Ferriter comhrá i mBéarla le Aled Roberts, Comisiynydd y Gymraeg – Welsh Language Commissioner

Cathoairleach: Sara-Jane O'Brien BL agus Gary Moloney BL

An téama: Foghlaim & Feabhas: Foclóireacht, Téarmaíocht, Ceartúchán, Aistriúchán, Teicneolaíocht, Cailíochtaí, Foinsí; Taithí & Dearcadh an Aturnae; agus, The Welsh Experience.

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'Celebrating a Century' gala dinner

To mark the centenary of the call of the first women to The Bar of Ireland – Averil Deverell BL and Frances Kyle BL – the Honorable Society of King's Inns and The Bar of Ireland hosted a gala dinner event, which included guests of honour Mr Justice Donal O'Donnell, Chief Justice, The Right Honourable Dame Siobhan Keegan, Lady Chief Justice of Northern Ireland, and Ms Justice Mary Irvine, President of the High Court.

In Plain Sight

The event also marked the launch of 'In Plain Sight', a portraiture initiative that seeks to celebrate the achievements and enhance the visibility of women in the field of law, and who have demonstrated significant leadership, influence and contribution to legal practice and education. Currently there is a notable under-representation of female subjects displayed in the collections of The Bar of Ireland and King's Inns despite the existence of numerous influential women in law. Only three portraits of female subjects exist, the latest of which was commissioned in 2020. Commissioned portraits will hang at King's Inns and The Bar of Ireland. Further details are available at: https://www.lawlibrary.ie/inplainsight/.

To donate to this initiative, visit https://ti.to/BarofIreland/CelebratingACentury.

Pictured at the gala dinner event were (from left): Hugh Mohan SC, Chair of The King's Inns; Ms Justice Mary Irvine, President of the High Court; Mr Justice Donal O'Donnell, Chief Justice of Ireland; The Right Honourable Dame Siobhan Keegan, Lady Chief Justice of Northern Ireland; and, Maura McNally SC, Chair of the Council of The Bar of Ireland.

A graphic of Averil Deverell BL and Frances Kyle BL at The Bar of Ireland offices on Church St in Dublin was part of a wider project to honour these pioneering women who paved the way for generations of female barristers. Averil Deverell BL image: ©Liz Goldthorpe; Frances Kyle BL image: Courtesy of School of Law, Trinity College Dublin.

Law Book of the Year

The Special Criminal Court: Practice and Procedure by Alice Harrison has won Law Book of the Year 2021 at the Irish Law Awards. Published by Bloomsbury Professional Ireland, *The Special Criminal Court: Practice and Procedure* is the first general textbook in four decades to cover all aspects of the Special Criminal Court. According to the publisher, it is a comprehensive and detailed review of the Court's rulings, legislative developments, and procedural and evidential rules.

Alice Harrison, winner of Law Book of the Year 2021.

Human Rights Award

We are delighted to announce that the recipient of the 2021 Human Rights Award is MASI, the Movement of Asylum Seekers in Ireland, who received the Award via a virtual ceremony held on November 25.

The annual Human Rights Award is awarded by the Human Rights Committee of The Bar of Ireland in appreciation of outstanding contributions in the field of human rights.

From left: Joseph O'Sullivan BL, Chair of The Bar of Ireland's Human Rights Committee; Lucky Khambule, MASI – the Movement of Asylum Seekers in Ireland; Bulelani Mfaco, MASI – the Movement of Asylum Seekers in Ireland; and, Maura McNally SC, Chair of the Council of The Bar of Ireland.
Picture: Conor McCabe Photography.

Celebrating a century of equal opportunities legislation

The Honorable Society of King's Inns has held a number of events as part of the 'Celebrating a Century' programme.

CELEBRATING A CENTURY OF EQUAL OPPORTUNITIES LEGISLATION

Above: Celebrating a Century mark, designed by King's Inns.
Left: Pictured at the launch of the creative residency programme were (from left): Renate Ní Uigín, Librarian, The Honorable Society of King's Inns; Mary Griffin, CEO/Under Treasurer, The Honorable Society of King's Inns; Iseult Byrne, CEO, Dublin City Council Culture Company; Michael Cush SC, member of the Advisory Committee; Tracy Geraghty, Project Manager, Dublin City Council Culture Company; artist Jesse Jones; and, Aalia Kamal, Head of Engagement, Dublin City Council Culture Company.

Introduction

Over 100 years ago, in December 1919, the first piece of equal opportunities legislation entered the statute book. Known as the Sex Disqualification (Removal) Act, 1919, it enabled women to join the legal, accountancy and veterinary professions, and take up senior roles within the civil service, for the first time. As the centenary of the enactment approached, King's Inns was conscious of wanting to mark, not only key milestones such as the call to the Bar of the first two women, but also the wider societal impact of the legislation. King's Inns established the 'Celebrating a Century' commemoration programme in 2019 with support from other organisations, principally The Bar of Ireland, the Law Society of Ireland and the Irish Women Lawyers Association (IWLA). An event series was proposed, aimed at recognising the Act's impact on society over the past 100 years and speculating on what the future might hold for the next 100 years. 2019 saw the launch of many events highlighting the trailblazers. The Library and Information Service of The Bar of Ireland curated an online exhibition of the first 100 women called to the Bar in Ireland. The IWLA, in partnership with Hanna Fine Art, released a print by Stephen McClean. The print was signed by Mary Robinson, the first woman President of Ireland, and Ms Justice Susan Denham, the first woman Chief Justice of Ireland. The IWLA also ran a blog competition asking participants to write a short post taking inspiration from the commemoration programme. The Library of the Law Society of Ireland completed a digital archive about the first 100 female solicitors to qualify. The Department of Justice hosted a talk on Thekla Beere, the first female Secretary General of a Government Department, along with a panel discussion on 'Creating the inclusive workplace of the future'.

Celebratory dinner

On November 30, 2019, nearly 200 guests were welcomed to King's Inns. Dr Mary McAleese, former President of Ireland and Honorary Bencher of King's Inns, was invited as the keynote speaker and delivered a powerful, frank and thought-provoking speech on 'Celebrating a centenary of women in law'.

Creative residency

In 2019, King's Inns formed a new and exciting partnership with its neighbours on Henrietta Street, Dublin City Culture Company, initiating a creative residency programme.

Visual artist Jesse Jones was the recipient of the inaugural award. Jesse's work had always had a strong connection to law and activism, and in continuation of this interest for the creative residency, she planned to collaborate with legal advisors, key workers and activists to create a new work. Jesse wrote about her time at King's Inns: "Dining at King's Inns was one of my first true understandings of the sense of tradition and community that King's Inns symbolises. One of the best experiences in their great dining hall was the 'Celebrating a Century' dinner … Sitting between incredible women who have been working in law as barristers, judges and advocates, hearing their passion for how it can impact people's lives, disrupt the status quo, yet also give people a sense of compassion in some of the most difficult moments of their lives".

Jesse was able to use her experiences from King's Inns in other projects and exhibitions.

This could be seen in an exhibition at Kunsthal Gent in Belgium called *Syllabus*, where she worked with Máiréad Enright, Senior Law Lecturer at Birmingham Law School and an alumna of King's Inns.

The final result of her engagement with and time at King's Inns is due to be launched soon; it builds on her previous work and was further inspired by equality and the role of women within the law and society.

Ending

The years ahead will be an exciting time as King's Inns continues to celebrate the impact of this legislation on society, acknowledging the contribution of all people to the professions and the public service.

To learn more about this series, visit kingsinns.ie/celebratingacentury.

The measure of a country

Ireland's Permanent Representative to the United Nations, Geraldine Byrne Nason, speaks about her career, the value of multilateralism, and Ireland's role on the UN Security Council.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

As a postgraduate student at the then St Patrick's College Maynooth, Geraldine Byrne Nason had no particular ambition to enter the diplomatic service until it was suggested to her by her lecturer, Prof. Peter Connolly. She joined the Department of Foreign Affairs and began a career that has taken her from Dublin to postings all over Europe, culminating in her current role as Permanent Representative to the United Nations (UN) in New York, which she took on in 2017.

Unusually for a diplomat, Geraldine's career has moved between the diplomatic service and the international civil service, including stints with the OECD in Paris, and as Ambassador to the EU in Brussels. She also spent time in the Department of An Taoiseach during the economic crisis, where she was Secretary General to the Economic Management Council. These postings gave her a unique view of the relationship between foreign and domestic policy: "In Brussels, I was the ambassador that looked after the business of the whole of government, so rather than focus on foreign policy, I was responsible for work on agriculture, on energy, on environment and climate. I became absolutely convinced that there's nothing entirely foreign and nothing entirely domestic. At the OECD I was Director for Public Policy, but worked in particular on a programme that involved building the capacity of new EU member states. Working in the Taoiseach's Department during our economic crisis, where the relationships off the island were as important as those on the island, really grounded me in the sense that as a diplomat, your role is a varied one, but has huge links to the domestic policy agenda".

Global security

Geraldine took up her current post with a brief to lead what she describes as a "once in a generation" campaign that saw Ireland elected to the UN Security Council for a two-year term, beginning in January 2021. It was a tough campaign; Ireland was in what was locally referred to as the 'race of death', competing with Norway and Canada for two seats on the Council. Geraldine says that this forced the Irish team to really focus on what Ireland could bring to the table: "The UN Charter has the maintenance of international peace and security at its heart, and the very high ambition that you're saving succeeding generations from the scourge of war. You translate that into reality every day you sit at the Council table. We saw this as Ireland's opportunity to step up, and as not just an opportunity, but an obligation to play our role".

Ireland has had a seat at that table for almost a year now, and the Irish mission has spent that time making good on its election campaign themes of partnership, independence, and empathy. The challenge, says Geraldine, is to use those themes to make a practical impact on the ground in areas that have been catastrophically impacted by conflict, keeping the humanitarian tradition in Irish foreign policy front and centre. This vocation, as Geraldine describes it, fed directly into the Irish mission's work, with Norway, to negotiate cross-border access for humanitarian aid for Syrian refugees at the Turkish-Syrian border, work that was completed in July. The crisis in Ethiopia is also a major focus: "This is not a climate problem. It's not a failure of any of the other systemic issues. This is a conflict situation, particularly in northern Ethiopia, that is now reaching the stage where the whole future of Ethiopia, its stability, but also the stability of the region, is in question. Ireland has been leading in a very consistent and coherent call for not just a ceasefire, but for humanitarian access and political dialogue".

Finally, the team is also committed to Ireland's longstanding peacekeeping role, and to developing this to meet a new generation of challenges: "People know us as peacekeepers, they listen to us, so what we've tried to do is to forge a new path in terms of the challenges that are out there for our peacekeepers on the ground. During our Presidency, we delivered on a really important, ground-breaking piece of work on what we call 'transitions'. When peacekeepers are leaving and the political peacebuilding phase begins, there can be a risky cliff, and we've seen vulnerable people become victims of that".

Presidency

Ireland took on the Presidency of the Council for the month of September 2021. The Presidency is an opportunity for countries to highlight the issues on their agenda, and climate and security was a major focus for Ireland, with An Taoiseach Micheál Martin chairing a high-level meeting with heads of state and

Proud of her roots

A very proud native of Drogheda, Co. Louth, Geraldine Byrne Nason graduated from the then St Patrick's College Maynooth in 1980 with a degree in English and Irish, and completed a master's in English in 1981. She joined the Department of Foreign Affairs in 1982. She was Director for Governance at the Organisation for Economic Co-operation and Development (OECD) in Paris in the 1990s, and has served at the UN in New York, Vienna, Geneva and Helsinki. She served as Second Secretary General of the Department of An Taoiseach from 2011 until 2014, the highest ranking female civil servant in the country at that time. She was appointed Irish Ambassador to France and Monaco in 2014, and took up her current role in 2017.

Geraldine lives in New York with her husband Brian and their 21-year-old son. Her work at the UN leaves little time for relaxation (she says she is currently spending her down time preparing for Ireland's role post Security Council membership), but she does enjoy reading when she gets the chance: "I was a student of literature so unlike a lot of my colleagues, I tend not to read textbook foreign policy. I love to read fiction and literature. The last book I read was *Apeirogon* by Colum McCann, and it related to the Middle East, a big priority for us. But I'm now building up a stack of books". She also enjoys attending baseball games at Yankee Stadium with her son, who's a huge New York Yankees fan.

government, including US Secretary of State Antony Blinken, on that issue. The Irish mission used the event to introduce work on a resolution on climate and security. Geraldine says that this feeds into a general expansion of the understanding of security issues on the Council, already begun with its work on women, peace and security: "I'm optimistic that, along with Niger, a country that knows all too well what climate and security means every single day, we will bring this across the line".

Another major focus was on hosting an inclusive Presidency: "It really matters to us that we hear other voices, that we're not in the Security Council bubble talking to each other. We insisted that we have the voices not just of civil society, but particularly of women in civil society. Of the 17 briefers that we brought to the Council during our Presidency, 16 were women. That was the golden thread that ran through that month".

This 'golden thread' took on particular importance as Ireland's Presidency also coincided with the crisis in Afghanistan precipitated by the withdrawal of foreign troops from the region and the subsequent return to power of the Taliban. The Irish mission found itself at the centre of the UN's response, and Geraldine is proud of its work: "I think we were regarded as having handled the political tensions and the humanitarian challenges very carefully. We have consistently focused on the humanitarian aspects, and particularly on the role of women in Afghanistan, as one of the key indicators of the gap between what the Taliban say and what they do".

The media focus on Afghanistan has abated somewhat, but the work of the UN goes on, and Geraldine admits that there is a long way to go: "I think the jury is out. We have said from the beginning directly to the Taliban that we will judge them by their deeds, not by what they say. At the moment, they are facing into a catastrophe in the run-up to winter, where their economy has imploded and the humanitarian situation is now, by the UN's reckoning, potentially the worst in the globe. We are working to try and redefine the UN's own mandate. There's a need for an important decision of the Security Council as to how it will engage with the authorities in Afghanistan. The next months are crucial. We want to make sure people have food and medical supplies. We certainly will want to see that human rights are respected. And for us, human rights are women's rights, women's rights are human rights, so there can be no papering over these issues. These are very hardnosed political choices that will have to be made. There can be no question of recognition for the Taliban until we see what they mean by inclusive government".

Women at the table

The focus on women's rights is not a new one for Ireland: "Gender equality is a cornerstone of Irish domestic policy, and certainly of Irish foreign policy as well. Our view is that women have to have a role in shaping a response to conflict situations that usually, frankly, they had no role in creating. We would argue that the monopoly on the creation of peace shouldn't be left to those who made war". Geraldine chaired the UN's Commission on the Status of Women from 2018 to 2019, and Ireland chairs the work of the Security Council on women, peace and security, along with Mexico. In addition to Afghanistan, there have been discussions with Libyan representatives on the role of women in their upcoming elections, and interaction with representatives from Mali and Somalia, working to ensure that women are involved at every stage, not just in communities, but as candidates in elections and participants in negotiations. Geraldine feels strongly that this "concrete and tangible" work does make a difference, in continuing to raise the issues, in inviting women to be part of the UN's work, and in listening to and supporting women who speak out about inequalities in their countries: "We organised an 'Arria', an informal meeting of the Security Council, where we brought the UN as an institutional system to the table and insisted that where the UN is leading peace negotiations, they absolutely must have women in the delegations. It takes a lot for a woman, a human rights defender or a member of civil society, to sit at the Security Council table and say: 'We are not being represented. We're not getting the access that we need'. We support the courage of the women, as well as insisting that the UN assumes its responsibility".

Multilateralism

There will always be those who question the value of the UN when disputes and tensions, especially between the more powerful nations, delay and prevent actions and resolutions. Geraldine strongly believes, however, in the power and value of multilateralism in today's world: "If ever there was a context where multilateralism mattered, more perhaps than just before the UN was formed, it matters now. We're dealing with issues that have, to put it bluntly, no other place to be resolved. Big issues like terrorism, like climate, like immigration, cross borders. They don't carry passports. The UN plays an enormous role in providing the international legal framework where we can bring these bigger issues together and where, frankly, a voice like Ireland has a credibility that far

A generation of trailblazers

Joining the Department of Foreign Affairs just six years after the end of the Marriage Bar, Geraldine entered a profession where there were very few women in senior positions: "There was one female ambassador in the Department of Foreign Affairs when I joined, so the idea of 'if you can't see it, you can't be it': there was very little of it to see. But at the same time, what I took from it was that this was an unbridled opportunity. I was part of the first generation of women who could look forward to a career, a full career, hopefully to get to ambassadorial level, but also look forward to marriage and a family if I chose to do that, which was not a choice that women going before me had. It was a privileged position to be in. I've had extraordinary support from my female peers. With male colleagues, I think it was probably refreshing to feel that the country they were representing abroad was reflected in the diplomatic team they were leading".

outweighs our size or our perceived impact. Our own role in peacekeeping has been extraordinary in managing calm in a situation like UNIFIL, for example, for almost four decades, where Lebanon, currently in a very fragile situation, depends on peacekeepers from Co. Louth, from Co. Cork, from Co. Donegal, being on the ground. That, for me, is what multilateralism is all about".

Bridge builders

In Ireland, we often talk about, and take pride in, being a little country that 'punches above our weight', so it's fascinating to hear Geraldine speak to her experience of this on one of the world's biggest stages: "We play an outsized role. This isn't born of any pride in what I'm doing or what the team here is doing. It's born of the reaction we see from people. 128 countries wanted to see us sit at that table. It's a very sensitive role to give to a country of five million people. We're in a position of trust, and we're only there because people recognise that we have a capacity to be that player that can push others' interests before our own".

It's a delicate role at times: "We tend to try and be a bridge builder, which is a critical role at the Security Council. We're not a member of a military alliance, so we are independent players in that sense. We're very clearly EU partners – we reflect EU common foreign and security policy in everything we do – but we have that added value of being an independent and constructive goodwill player at the table. Someone recently said to me in the context of the Security Council, 'Ireland is our conscience here', and I think that was a big compliment to Ireland because we do try to play that role in a way that other countries can't or won't.

"It's a courageous thing for the country and for the Government. You take on a role like this and you realise you will have to adopt positions that not everyone will agree with, and indeed, some of the countries who are being discussed at the Council aren't always happy because, of course, if we're to be helpful, we have to shine a light on some of the issues that are disturbing and that need solutions".

At the end of 2022, Ireland's time on the Security Council will come to an end, and Geraldine wants our legacy to be visible in practical results on the ground: "The first thing I hope we can say is that we had impact, that we made a difference, and we've been true to our values. The way I measure that every time we sit at the table is, are we speaking up for human dignity and for the individual in that conflict situation? Are we saving lives? Because that's what you can do at the Security Council. Some days it's very frustrating and you feel the Council just does not come together. People pay attention when the Council speaks with one voice, and those are the days where I feel that it shines through: what we're trying to do here makes a difference whether people are suffering from famine, conflict, or both. It's that focus on human dignity and saving lives that will, I think, be the measure of us at the end".

Government policy and its impact on the Bar

A number of policy changes are currently in development, which will likely impact on the Law Library and the work of barristers in Ireland.

Ciara Murphy
Chief Executive

Jess Furney
Policy & Public Affairs

Throughout the course of the last decade, the advent of the Legal Services Regulation Act was viewed as one of the biggest disruptors to the legal profession in Ireland. A decade since formation of the new independent legal services regulator was first mooted, a recent survey of members of the Law Library suggested that the majority of members believe that the Legal Services Regulatory Authority (LSRA) has improved standards in the provision of legal services since it was established, but that it is too early to comment on the overall impact of its introduction. While the impact of the LSRA on the provision of legal services and the profession will take some time to play out, there are a range of other policy matters that are now coming to the fore where the profession will have a significant interest in their development and implementation. This article provides a high-level overview of those policy areas that will undoubtedly impact on the profession in the coming years.

Department of Justice Action Plan 2021

Earlier this year, the Department of Justice launched its first annual action plan, 'Justice Plan 2021'[1] – to be updated every year – with over 200 actions for implementation. Its five overarching goals are to:

- tackle crime, enhance national security and transform policing;
- improve access to justice and modernise the courts system;
- strengthen community safety, reduce reoffending, support victims, and combat domestic, sexual and gender-based violence;
- deliver a fair immigration system for a digital age; and,
- accelerate innovation, digital transformation and climate action across the justice sector.

The actions to which the Department of Justice has committed where the Bar has an immediate interest include:

Review of the Civil Legal Aid Scheme

This is due to commence shortly and will consider proposals for reform across a variety of areas, including financial eligibility. The Scheme supports those in need of legal advice and representation who do not have the financial means to access same. Such a review has been long sought by The Bar of Ireland, among many others, and is a welcome development.

Implementation of the Report of the Review of Administration of Civil Justice (Kelly Report)

While this Report was published some time ago (December 2020), a plan for implementing the recommendations set out in the Report is expected before year end. There are in excess of 90 recommendations in the Report, many of which have the potential to improve aspects of the civil justice system that will undoubtedly contribute to creating efficiencies and lowering costs. It is expected that a focus on judicial review and discovery will be prioritised in the implementation plan. Justice Plan 2021 states:

"Legal costs in Ireland are prohibitive and act as a barrier to people exercising their rights before the courts. We know too the effect these high costs and complex systems have on our economy and our competitiveness, whether those are the cost of buying a house, enforcing a contract or purchasing insurance. The introduction of new scales of legal costs will bring down such costs and provide greater certainty on what people can expect to pay for legal services. We will assess if these scales should be binding, except in limited circumstances".[2]

Chapter 9 of the Kelly Report addresses litigation costs[3] and notes that the Review Group had examined various options by means of which the mandate given to it to recommend a reduction in levels of litigation costs might be achieved. However, the Group was unable to reach a consensus regarding recommendations on how to reduce litigation costs. A majority of the Group members recommended the drawing up of non-binding guidelines for costs levels, while a minority of Group members recommended that a table of maximum costs levels be prescribed by a new Litigation Costs Committee, which could be derogated from in exceptional circumstances.

Notwithstanding the majority recommendation of the Review Group, the Justice Plan 2021 goes on to state that work will commence "to introduce new scales of legal costs which would be independently drawn up, in order to reduce legal costs and to provide greater certainty to the users of legal services in relation to cost". The Department will "complete a detailed examination of the recommendations contained within the Peter Kelly report

on legal costs. As part of this work, we will carry out a detailed economic and legal evaluation, which will include examining making such scales binding, except where both parties agree to opt out". The Bar of Ireland will seek to be consulted as part of this evaluation process when commenced.

Implementation of the O'Malley Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences

This publication, which is welcomed by The Bar of Ireland, recommended that:

"All solicitors and barristers whose work involves interaction with victims of sexual crime should receive special training. It is clearly not necessary that all legal practitioners should receive such training, as many will not be engaged in criminal law practice. At a minimum, it is desirable that all practising lawyers dealing with sexual offence cases should undergo a foundational course of training, and that all should have completed it by a date to be agreed with the two professional bodies – the Law Society and the Bar Council. We recommend that the completion date should be not later than the beginning of the legal year 2021-2022, but preferably sooner. It is further recommended that each such practitioner should be required to earn a certain number of CPD points in that specific area on a regular basis, say every two years. The foundational course should require attendance at a prescribed number of seminars delivered by appropriate specialists. The subject matter of these seminars should include dealing with vulnerable witnesses in court (with a special emphasis on the questioning of such witnesses), obtaining the best evidence from vulnerable witnesses and the dangers associated with stereotyping of victims of sexual crime. As in the case of judicial studies, it is strongly recommended that some at least of the seminars on this foundational course should be delivered by counsellors, probation officers and also by professionals from other jurisdictions that already have well-established training systems of this kind".

Delivery of multidisciplinary training, as set out by the O'Malley Report, through our comprehensive continuous professional development (CPD) programme, and in particular, our Advanced Advocacy Training for members of the Law Library, is already well underway.

Family law reform

This includes the establishment of a new Family Courts System where the aim is to greatly modernise the family justice system and expedite court proceedings. Under the new National Development Plan 2021-2030, funding has been secured for a family law complex on Hammond Lane in Dublin. Development of the draft Family Law Justice Strategy is already underway, and it is expected to be published in February 2022 along with a new Bill. The Bar of Ireland has made a number of submissions and has participated in a range of consultative groups to input into this new family law strategy.

Judicial numbers and skills review

A commitment made in the Programme for Government to review the numbers and types of judges needed to ensure the efficient administration of justice over the next five years is already underway. This review will be looking at the need for specialist skills, the impact of Covid-19, and the extent to which efficiencies in case management and working practices could help in meeting additional service demands and/or improving services and access to justice. The Department of Justice has engaged the OECD to conduct research on judicial resourcing in Ireland that will include an assessment of the workload of the courts.

The Council made a submission to the Judicial Planning Working Group in July 2021. One of the key points highlighted in that submission is that the number of judges per inhabitant in Ireland remains the lowest in the EU, which has an impact on the efficiency of the Irish justice system:

"The justice system budget and the number of judges remain below EU average. While the budget per capita for the justice system, which was EUR 55.7 in 2018, has constantly increased in the last years, the budget as a percentage of GDP has stagnated".[4]

This trend is still reflected in the most recent EU Justice Scoreboard published on July 8, 2021.[5]

Review of the Defamation Act 2009

The Defamation Act 2009 has been undergoing statutory review by the Department of Justice for five years, which is to result in a report of proposed amendments within the next few months. The Department's stated aim is "to ensure a balanced approach to the right to freedom of expression, the right to protection of good name and reputation, and the right of access to justice". Preparation of a general scheme of a new defamation law will follow the report's publication.

The Council made a submission to the Department of Justice in respect of this review in 2016. There has been significant criticism of the current law, not only from media interests but also negative commentary from the European Commission. It is anticipated that the proposals from the Department will seek to address difficulties and concerns in relation to a number of procedural issues, including the "offer of amends" procedure, which is perceived as being ineffective. More fundamentally and controversially, there have been loud calls from certain quarters for the removal of juries in defamation cases, and it is anticipated that the proposed amendments will make recommendations in this regard. The Council established a working group earlier this year for the purpose of drafting a position paper to aid our engagement with the Scheme of Defamation (Amendment) Bill that is due to be published in the coming months.

Courts Service Modernisation Programme

The Courts Service recently established a Courts Service Modernisation Programme Legal Practitioners Engagement Working Group, which includes representatives of the Council for the purpose of acting as a "key collaborator with the Courts Service in progressing the Modernisation Programme of Work as part of the delivery of the Courts Service Strategic Vision 2030". High on the agenda of the Working Group is the family reform programme, the civil reform programme, and information and communications technology (ICT).

The role of the working group is to "provide advice and identify subject matter experts/members of the wider legal community to provide feedback and engagement on Modernisation Programme initiatives and change projects from a legal practitioner perspective, to act as a sounding board on proposed improvements and Modernisation Programme activities, to keep colleagues informed and encourage adoption of proposed changes, and to promote the broader reform activities and benefits with colleagues within the legal profession, the justice sector and wider civil society, identify potential shared common areas for reform, act as champions for change, and help drive engagement for future reforms within the wider legal professional community".

The profession has an important role to play in this process. The Council representatives on this working group will work on behalf of members to ensure that the Courts Service Modernisation Programme has regard to the views of practitioners. This will require a high level of continuous proactive engagement from the Council representatives.

Changes to the education of legal practitioners

In November 2020, the LSRA issued a report, 'Setting Standards: Legal Practitioner Education and Training',[6] on implementing standards for legal education and training. This report proposes a new statutory framework for the education of lawyers, which would be overseen by a Legal Practitioners Education and Training Committee (LPET Committee). The framework envisages more structures for both professions' CPD, as well as an overarching Competency Framework for entry to practice. The Justice Plan 2021 notes the intention to "publish an implementation plan to give effect to the LSRA Report on the training of legal professionals and commence implementation" before the year end. Our primary focus as we move forward is that of our educational offerings available through the Bar's CPD programme. Having consulted stakeholders in education and training on this, the Bar continues to determine how we can effectively quality manage and impart our professional standards both before and upon entry to the profession. Ensuring that what we teach and how we teach it is fit for purpose to protect the consumer is key. The Bar of Ireland is also in the process of preparing our CPD offerings to be ready to allow us as an organisation to attain accredited status from the LSRA when available. Quality assurance markers include learning management systems, needs assessments, valuation of our programmes, and feeding into a continuous improvement type of model of providing service.

Access to the profession

In May 2021, the LSRA commenced a public consultation under section 34(1)(d) of the Legal Services Regulation Act 2015 as part of its preparation of a report to the Minister for Justice, who requested the Authority to "consider the economic and other barriers faced by young barristers and solicitors following their qualification from the King's Inns and the Law Society, respectively, and to submit a report with recommendations for her consideration". In making her request to the LSRA at the time, Minister Helen McEntee stated that this research was part of her plan to increase diversity across the justice sector, including the legal professions. The LSRA has been asked to pay particular attention to equity of access and entry into the legal professions, and the objective of achieving greater diversity within the professions, and to make recommendations for change. The Minister asked the Authority to examine:

- the remuneration of trainee barristers and solicitors;
- the other costs associated with joining each profession;
- the information available to prospective trainee barristers and solicitors on available masters and solicitors' firms;
- the information available on the terms and conditions available, and how they are selected; and,

- any other barriers faced by young barristers and solicitors, including the ability to take maternity leave.

In June 2021, the Council made a submission[7] in response to this consultation and the Council put forward 11 recommendations throughout the course of the submission that would address the challenges in building and maintaining a career at the Bar and support the goal of achieving greater diversity within the profession. Engagement with the LSRA on this report will continue in the months ahead.

Funding the administration of criminal justice

Since 2016, the Council of The Bar of Ireland, through the Criminal State Bar Committee, has been engaging with Government in relation to a process to unwind professional fee cuts that were imposed on barristers who provided services to prosecute and defend cases throughout the criminal courts during the period 2008-2011. Up until 2008, the professional fees paid to criminal barristers were linked to the increases applied under public sector pay agreements. All other groups of workers who were subjected to the emergency cuts throughout the justice system have since had their cuts reversed and no other group of workers in the State is having to endure pay rates at 2002 levels.

As a direct consequence of the deep cuts, ranging from 28.5-69%, that were applied to the professional fees paid to criminal barristers during the period 2008-2011, a career choice for recently qualified junior barristers in crime has become unattractive when compared to opportunities in other areas of law. The evidence shows that two-thirds of barristers who commence a career in criminal law leave after only six years in practice, and that this is as a direct consequence of the deep cuts that were applied during the FEMPI years. A skilled and experienced criminal prosecution bar can only emerge after many years of practice in the junior ranks of criminal defence law. It takes many years of practice at the Bar to acquire the necessary experience to effectively and skilfully prosecute serious cases on behalf of the State and it is imperative that newly qualified, talented barristers are encouraged to practise in the area of criminal law. One significant form of such encouragement is to be fairly and reasonably rewarded for their services.

Both the Office of the Director of Public Prosecutions (DPP) and the Department of Justice have each indicated their support for such fee restoration since July 2018. Unfortunately, the Department of Public Expenditure and Reform has resisted any meaningful and constructive engagement over the last five years. In May 2021, the Criminal State Bar Committee mounted a lobbying campaign with elected representatives to have this matter addressed at a political level. A series of meetings took place with justice spokespersons and media were briefed on this issue, resulting in coverage in the national press and broadcast media. To date, the Minister for Public Expenditure and Reform has not facilitated a meeting with the profession and there was no provision made in Budget 2022 to restore the fee cuts. The Criminal State Bar Committee will continue its campaign to address the professional fees paid to barristers who provide services to prosecute and defend cases throughout the criminal courts.

Ireland for Law

Ireland for Law is the Irish Government's international legal services strategy. The strategy has been created to represent and position Ireland's international legal services industry, and seeks to promote Irish law and Irish legal services to the international business community, particularly in areas where Ireland is already a world leader, including aviation finance, funds, insurance, tech, pharma and life sciences. Ireland is now the leading English-speaking common law jurisdiction in the EU. Following Brexit, businesses have come to recognise the benefits of being able to combine common law procedures and legal principles with ease of enforcement in all EU member states. Our Commercial Court has a proven track record in ensuring the efficient, just and expeditious resolution of complex domestic and international business disputes. Ireland for Law is working with the key stakeholders and with the support of our diplomatic and trade missions around the world to demonstrate to the international business community and others safeguarding their legal interests the advantages of using:

- Irish law for their business contracts;
- Irish law for legal advice and transactions; and,
- Irish dispute resolution for their business disputes.

The Ireland for Law initiative is a forward-looking opportunity and aims to maximise the present and emerging opportunities for Ireland as an international legal services provider. Information about the initiative and what it will mean for the future of the legal profession in Ireland is available at www.irelandforlaw.com.

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LEGAL UPDATE

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

Animal health and welfare (miscellaneous provisions) bill 2021 – Bill 136/2021
Betting (prohibition on use of credit cards) bill 2021 – Bill 125/2021 [pmb] – Deputy Thomas Gould
Credit union (amendment) bill 2021 – Bill 134/2021 [pmb] – Deputy Marian Harkin
Defective dwellings bill 2021 – Bill 121/2021 [pmb] – Deputy Francis Noel Duffy
Health (inspection of emergency homeless accommodation and asylum seekers accommodation) bill 2021 [pmb] – Deputy Eoin Ó Broin
Health (pricing and supply of medical goods) (amendment) bill 2021 – Bill 122/2021 [pmb] – Deputy Pádraig O'Sullivan
Finance bill 2021 – Bill 132/2021
Irish corporate governance (gender balance) bill 2021 – Bill 124/2021 [pmb] – Deputy Emer Higgins
Maternity care (Covid-19) bill 2021 – Bill 126/2021 [pmb] – Deputy Peadar Tóibín
Organisation of working time (workers' rights and bogus self-employment) (amendment) bill 2021 – Bill 127/2021 [pmb] – Deputy Louise O'Reilly
Property services (land price register) bill 2021 – Bill 129/2021 [pmb] – Deputy Cian O'Callaghan
Road traffic and roads bill 2021 – Bill 128/2021

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Planning and development (amendment) (large-scale residential development) bill 2021 – Bill 141/2021
Protection of private residences (against targeted picketing) bill 2021 – Bill 139/2021 [pmb] – Senator Malcolm Byrne and Senator Fiona O'Loughlin
Protection of the native Irish honey bee bill 2021 – Bill 133/2021 [pmb] – Senator Vincent P. Martin, Senator Mark Wall, Senator Fintan Warfield, Senator Paul Gavan, Senator Gerard P. Craughwell, Senator Alice-Mary Higgins, Senator David P.B. Norris, Senator Niall Ó Donnghaile, Senator Lynn Boylan, Senator Mary Seery Kearney, Senator Róisín Garvey and Senator Erin McGreehan
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Defence (amendment) bill 2020 – Bill 2/2020 – Committee Stage – Report Stage
Finance (European stability mechanism and single resolution fund) bill 2021 – Bill 106/2021 – Committee Stage – Report Stage

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Bills and legislation
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Say what you mean and mean what you say…and make it quick

A renewed focus on the Civil Liability and Courts Act 2004, along with the new Rules of the Superior Courts, have significant implications for the operation of personal injury litigation.


Veronica McInerney BL

Sara Moorhead SC

Recent decisions of the High Court and the Court of Appeal serve as reminders to practitioners of the need to adhere strictly to the statutory requirements prescribed by the Civil Liability and Courts Act 2004 in personal injuries actions. These recent decisions make clear that all allegations pleaded must have a factual and evidential basis such that they are capable of being properly maintained at trial, and that pleadings should be drafted with specificity and particularity. While arguably preventing a "perfect ambush",[1] both by ensuring that the actual issues between the parties are clearly defined and by establishing at an early stage that there exists clear evidence supporting a *prima facie* case in relation to all matters pleaded, this renewed focus on the 2004 Act makes the drafting of pleadings more protracted, with the "cover all bases" approach, which was previously seen as "part of the art of pleading",[2] no longer permitted by the Courts. Together with the new Rules of the Superior Courts, which provide for stricter time limits in respect of delivery of pleadings (which became operational on November 13, 2021), the result is a changing landscape for personal injuries litigation.

Pleadings

A number of recent decisions have made it abundantly clear that the practice of drafting personal injuries summons in *"boilerplate"*[3] form, the drafting of blanket denial defences (where such denials are capable of being particularised), and the making of allegations in pleadings without a factual or evidential basis, will not be allowed by the Court and, indeed, those who perpetuate such pleading could find themselves, at best, the subject of criticism by the Court, and at worst at risk of an award of aggravated damages or an award of higher costs being made against them.

What sanctions can be imposed on a defendant who makes an allegation that is not then substantiated by evidence?

In the principal judgment[4] of Simons J. in *Michael Doyle v Marie Donovan*,[5] the Court considered what sanctions could be imposed for litigation misconduct. The proceedings had been instituted in the Circuit Court, arising out of a road traffic collision. The plaintiff had appealed the decision of the Circuit Court and was seeking, *inter alia*, an award of aggravated damages arising from the defendant's defence. The defendant had pleaded that the plaintiff was guilty of contributory negligence for deliberately causing the collision. Liability had been maintained in the Circuit Court; however, on appeal to the High Court, the defendant conceded liability and the case proceeded as an assessment. The Court considered at length the manner in which the defendant conducted the defence of the proceedings in the Circuit Court, with Simons J. noting that "on cross-examination the defendant declined to stand over the plea that the collision had been deliberately caused… the most that was suggested in evidence is that the plaintiff had braked suddenly, and this may have been negligent".[6] The plaintiff argued that the Court should mark its disapproval of the manner in which the defence of the proceedings had been conducted; more specifically, it was submitted that the plea to the effect that the plaintiff had deliberately caused the collision involved an imputation of dishonesty and criminality.[7]

In considering the question of whether the defendant's conduct justified the making of an award of aggravated damages against the defendant, the High Court concluded that this was not an appropriate case to make such an award. In the first instance, the Court referred to the Civil Liability and Courts Act 2004, which made it a criminal offence to give false evidence, and the Court stated that the creation of these criminal offences meant that it is not normally necessary or appropriate for the Court to impose an additional sanction by way of making an award of aggravated damages. Secondly, the complaint made by the plaintiff at its height was confined to the manner in which the case had been pleaded in the defence, an allegation that was not pursued in the Circuit Court, was not put to the plaintiff in cross-examination, and the defendant herself declined to stand over the allegation when she was cross-examined. Moreover, the defendant subsequently conceded liability before the hearing of the appeal. Finally, to award aggravated damages to sanction litigation misconduct would give rise to an asymmetry between plaintiffs and defendants as it could only be used against defendants. Simons J. stated that the usual measure taken by a court that disapproves of the manner in which litigation has been conducted, is to make an appropriate costs order. It was open to the Court, in principle, to award costs on a higher scale, a sanction that he felt would be sufficient in most instances where there had been litigation misconduct, and he concluded that reliance on the jurisdiction to award aggravated damages on the basis of litigation misconduct alone should be reserved to exceptional cases.

The second judgement of Simons J. in this case addresses the costs of these

proceedings.[8] In considering the plaintiff's application for costs on a higher scale, Simons J. adopted the legal principles as set out in the judgment of the High Court (Barniville J.) in *Trafalgar Developments Ltd v Mazepin*,[9] where the Court stated that one of the circumstances that might trigger an award of costs on the higher basis, is where a party makes a claim of fraud or dishonesty against the other side, without ensuring that there exists clear evidence supporting a *prima facie* case in relation to such a claim.

The Court found that "the plea that the plaintiff deliberately caused the collision between the two vehicles, is one which imputed fraud and dishonesty to the plaintiff. Unless there was evidence to substantiate same, this plea should not be included in the personal injuries defence, and certainly should not have been verified on affidavit".[10] No evidence was adduced in support of this plea, and neither the defendant nor her insurer offered any explanation as to how the plea came to be made. The Court found it "very concerning in circumstances where the defendant's evidence before the Circuit Court strongly suggests that the plea had been included on the initiative of the insurer and not the defendant herself".[11] The Court noted, however, that the defendant did not seek to stand over the allegation before the Circuit Court and conceded liability before the High Court, factors that "had taken much of the sting out of the allegation". However, it remained the case that the defendant had never sought to amend the defence, nor to correct the verifying affidavit, and the Court was satisfied that the defendant and her insurer "had engaged in precisely the type of litigation misconduct which justifies the making of an order of costs on a higher basis".[12]

When will aggravated damages be appropriate?

While aggravated damages were not deemed to be appropriate in the above case, in the earlier case of *Stokes v Dublin County Council*[13] the High Court did make such an award. This case can, however, be distinguished from the above case, where the Court here found that while the defendant did not directly put to the plaintiff that this was a fraudulent claim, it was obvious from the content and tenor of the questions put to the plaintiff, that the Court was being invited to draw that conclusion.[14] Barr J. held that he did not think that this allegation was established on the evidence before the Court and further found that the plaintiff was entitled to be compensated for the upset caused to him by virtue of the nature of the unsuccessful defence, and awarded the plaintiff €5,000 as aggravated damages.

The need for particularity and precision in pleadings

Pleadings were again the subject of detailed consideration by the Court in *Crean v Harty,*[15] a decision of the Court of Appeal where Collins J. considered the application of the Civil Liability and Courts Act 2004[16] and in particular section 13(1)(b),[17] which obliges a defendant in a personal injuries action to particularise any denials pleaded in their defence. The plaintiff in this case, Mr Crean, had undergone a total hip replacement in October 2015. The operation was performed by the first named defendant, Mr Harty. Mr Crean did not allege that the surgery was performed negligently, but rather his claim was that the surgery was performed without his informed consent. In his personal injuries summons, he claimed that the procedure involved significant additional risks by reason of the fact that he had two previous surgeries on his right hip, in particular the risk of nerve damage, and the plaintiff claimed that he was not warned of those risks.

Separate defences had been delivered by the first defendant and the second and third defendant, which were stated by the Court to be "in materially identical terms".[18] The first named defendant included a plea at 3(b) of his defence that: "The first named defendant denies that they failed to obtain the plaintiff's informed consent prior to surgery on 7th October 2015".[19] At 3(c) of the defence, the first named defendant further denied each and every particular of negligence and/or breach of duty alleged. The plaintiff's solicitors wrote to the first named defendant's solicitors seeking full and detailed particulars of, *inter alia*, the information and advice provided to the plaintiff prior to the said surgery. The defendants declined to provide particulars, stating that it was not permissible to raise particulars upon a denial.

The plaintiff brought a motion to compel the provision of the particulars, which was refused by Cross J. in the High Court. This was appealed by the plaintiff, who argued that the defendants had failed to give the statutorily prescribed particulars under section 13(1)(b) of the 2004 Act, which the plaintiff submitted required the defendants to give full and detailed particulars of the denial in paragraph 3(b) of their respective defences without which, it was submitted, the plaintiff was at risk of "perfect ambush"[20] at trial. Collins J., in considering the defendants' basis for refusing same, found that "a straight denial – perhaps more accurately described as a bald denial – appears to be precisely what this part of section 13(b) is targeted at".[21] The defendants submitted that the requirements of section 13(1)(b) were complied with by pleading a straight denial defence and that the particulars as sought by the plaintiff impermissibly sought evidence.

The Court, in arriving at its decision, made reference to sections 12, 13(1)(b) and 14 of the 2004 Act. The Court found that while the disputed plea in the defendants' defences was negative in form it was, in substance, a positive plea to the effect that the defendants in fact obtained the plaintiff's consent prior to the index surgery. Indeed, the Court noted that the defendants accepted that had the pleading been expressed in such terms, the plaintiff would be entitled to the particulars. The Court thus held that quite apart from the provisions of the 2004 Act, the plaintiff was entitled to the particulars, as absent such particulars, the plaintiff would not know the case he had to meet at trial. The plaintiff had also pleaded various specific risks, which he claimed he should have been advised of, and the Court found that the plaintiff was unaware of what the defendants' position was in respect of those pleas. Collins J. concluded that applying the established principles of pleading, without consideration of the 2004 Act, the plaintiff was entitled to the particulars. Further, if he was wrong in that conclusion, the provisions of the 2004 Act put the matter beyond doubt. While acknowledging that there may be circumstances where it is not possible to give particulars of a denial, the Court stated that where it was possible, section 13(1)(b) mandated the provision of such particulars.

To plead or not to plead…that is the question

In the decision of Noonan J. in the Court of Appeal in *Naghten (a minor) v Cool Running Events Ltd*,[22] the focus was on the various pleas of contributory negligence contained in the defendant's defence. In this case, the plaintiff, then ten years old, fell while skating at the defendant's ice rink and suffered an injury when another skater skated over her hand. The High Court in this case found that the defendants had failed to take reasonable care and were negligent in the management of the rink, and that the accident was reasonably foreseeable in the circumstances.

The defendant appealed to the Court of Appeal on the essential ground (among others) that the finding of the trial judge amounted to an error of law. In his judgment, Noonan J. considered the defence, which pleaded general traverses and

also raised a number of pleas of contributory negligence including, *inter alia*, a plea that the plaintiff was the author of her own misfortune and failed to have regard for her own safety, and that her mother failed to exercise reasonable supervision and control over her, failed to have regard for her safety, and failed to seek proper treatment and steps to alleviate her pain and suffering.

The Court noted that despite the express plea in the defence, "at no time during the course of the trial was any suggestion made to the plaintiff or anybody else that she had, by her actions, caused or contributed to the accident".[23] The Court found that while such a plea might be excusable if there was some reasonable basis for concluding that there was blameworthy behaviour on the part of the plaintiff, no such issue arose in this case because the defendant had the opportunity of observing the CCTV footage of the plaintiff skating for the best part of an hour, as well as consulting with the staff on duty on the day. The Court noted that if these staff members had witnessed any inappropriate behaviour on the part of the plaintiff, presumably they would have been called to give evidence and Noonan J. found that "the defendant must therefore have known that there was no question of the plaintiff misbehaving or doing anything that could remotely be regarded as contributing to this accident".[24] On this basis, he found it impossible to hold that this plea was properly made in the defence.

The Court further found that the same must necessarily apply in relation to the allegations made against the plaintiff's mother and, for the same reasons, the judge found that the defendant must have known that there was no basis for any plea that the accident was caused or contributed to in any way by her negligence in circumstances where "the CCTV recording showed the plaintiff's mother as being barely able to skate, let alone supervise her daughter who clearly did not need such supervision".[25] The Court concluded that the plea was advanced without any evidential basis. The Court found that "to suggest to any parent that he or she failed to have regard for the child's safety is distressing. To compound that by suggesting that the same parent negligently failed to take any steps to alleviate her child's pain and suffering is doubly upsetting and hurtful".[26] Noonan J. further noted that the defendant's only witness as to fact expressly distanced himself from these pleas under cross-examination and no explanation was forthcoming as to how each of these pleas came to be made in the defence. Further, the pleas were not withdrawn and no apology was offered. He stated that "…the days of making allegations in pleadings without a factual or evidential basis, if they ever existed, have long since passed,"[27] making reference to section 14 of the Civil Liability and Courts Act 2004. He further stressed that while the focus of section 14 is most commonly on plaintiffs, it applies with equal force to defendants, and that careful consideration is required before pleas of the kind are advanced.[28] Finally, Noonan J. reiterated the duty on lawyers to advise deponents, before affidavits of verification are sworn, of the serious consequences that may ensue if what is sworn transpires to be incorrect.[29]

In the more recent decision of Collins J. in *Morgan v ESB*[30] (where he agreed with the judgment of Noonan J.), the Court again stressed the need for greater specificity in relation to pleadings from both the plaintiff and defendants. He analysed sections 10-13 of the 2004 Act, which he had previously considered in *Crean v Harty*.[31] He then reiterated his view that these provisions "are clearly intended to ensure that parties (including defendants) plead with greater precision and particularly so that, in advance of the trial, the actual issues between the parties will be clearly identified".[32] He also noted the "very significant innovation" under section 14 that pleadings be verified on affidavit both by plaintiffs and defendants, stating that "the intended effect of section 14 would be greatly undermined if parties were permitted to continue to plead claims in wholly generic terms".[33] In considering the pleadings in the instant case, Collins J. commented that the majority of the particulars of wrongdoing contained in the summons were "in boilerplate form, expressed in such generic terms as to be utterly uninformative".[34] He referenced pleas such as "the ESB failed to provide a safe place of work".[35] Since the 2004 Act, he stated that this model of pleading is not permissible, comparing such pleas to the equivalent of a "Trojan Horse, which can, as needed, be sprung open at trial to disgorge a host of new and/or reformulated claims".

What of the plaintiff who attempts to advance a different case at trial to that which is pleaded?

In the decision of Hyland J. in the case of *Irish v Irish*,[36] pleadings were again considered in detail. Here the Court refused to allow the plaintiff to advance a different case at trial to that which was pleaded, and prohibited the plaintiff's witnesses from giving evidence relevant to matters that did not arise on the pleadings. The plaintiff in this case had taken a claim for damages against his brother arising from an injury, which the plaintiff sustained while worming cattle on his brother's farm. According to the plaintiff, a bullock, "went cracked"[37] when he put the injection into him, knocking the plaintiff's wrist against a fence, which resulted in a broken wrist. This account of events differed to that which had been set out in the report of the plaintiff's engineer, which advanced a different cause for the accident. Mid way through the plaintiff's case, the defendant's counsel made an application, pursuant to the inherent jurisdiction of the Court, to dismiss the plaintiff's case, on the basis that the plaintiff was attempting to advance a case that had not been pleaded. In considering the pleadings, Hyland J. stated that the plaintiff's case was pleaded in a very generic way and that it was difficult to know what the real complaint was from the personal injuries summons.[38] The Court noted that counsel for the plaintiff recalibrated his case (as he described it), withdrawing what the Court described as the core complaint, i.e., that the operation was being carried out in a hazardous manner because animals were being injected in overly close proximity to other unrestrained animals. In its place, the Court noted, was a new case that the defendant was negligent in permitting his brother to inject the cattle through the bars (Hyland J. noted that this was her reformulation of the plea, but it was not identified as such by counsel). The Court found that what he had said was that there was no safe system of work and a lack of supervision, but that these headings do not convey the reformulated case sought to be made against the defendant. Hyland J. stated that "if the case had been properly pleaded from the start, it would have identified at least the components I have set out above and probably much more besides".[39]

Hyland J. found that the given the deficiency in the pleadings, the defendant did not and could not have any idea of the nature of the allegation. She further stated that simply because the matters arise from cross-examination, did not mean that rules in relation to the requirement to fully particularise a case may be dispensed with, referring to the judgement of Noonan J. in *McGeoghan v Kelly and ors*.[40] She stressed the duty of the solicitor to elicit the facts from the client, to instruct counsel, and for the pleadings to be based on those instructions.[41]

While no prejudice was identified by counsel for the defendant, she held that being required to meet an entirely different case at trial in circumstances where an engineer's report had been prepared on the basis of allegations no longer being advanced, cannot but cause some prejudice, even if it is potentially remedied with an adjournment and application to amend. She concluded that the plaintiff was

seeking to make a new case, which was not previously pleaded. Rather than accede to the defendant's application to strike out the claim, which she opined was a draconian measure, she restricted the plaintiff's evidence such that the plaintiff's witness not yet heard could not give evidence relevant to matters not arising on the pleadings. The need for increased precision and particularity undoubtedly makes the drafting of pleadings more protracted. However, under the new Superior Court Rules, practitioners will not have the luxury of time, with strict time limits for the delivery of pleadings and even stricter sanctions for those in default.

Rules of the Superior Courts (Procedure on Default) 2021

Practitioners should be cognisant of the new Rules of the Superior Courts (SI 490/2021), which came into effect on November 13, 2021 (hereinafter "the commencement date"), which significantly alter the procedure on default of pleadings.[42] The main objective of the new Rules is "to reduce the number of court hearings in cases where there is a motion to seek judgment in default of defence and to standardise the time periods for delivering certain pleadings".[43] Under the new Rules, the time for delivery of statement of claim and defence in all cases is eight weeks. Once an application to dismiss is brought, the Court shall on the first motion, order the action to be dismissed. While the Court can extend time in the interests of justice, the only order the Court can make in this regard is an "Unless Order" and in the event that the statement of claim or defence is not delivered within that extended time, the action shall stand dismissed without any further application to the Court.

Parting thoughts…

These new developments should mean greater efficiency in personal injuries litigation. By requiring all parties to set out their stall at an early stage, and by standardising the time periods for delivery of pleadings, the need to issue motions should be reduced, thereby allowing the resolution of matters more quickly. However, this new system is not without its challenges, particularly in complex personal injuries actions or medical negligence actions, which require extensive expert reports before drafting. It is also likely to lead to increased reliance on other provisions of the 2004 Act, most notably section 8 thereof.[44]

To date, this provision is often pleaded but seldom relied on. However, with the arrival of such strict time constraints and the focus on particularity in pleadings, it will be imperative that defendants carry out investigations as soon as possible in order to be in a position to draft their defence in the manner and within the time allowed, thereby increasing the importance of section 8 and early notification by a potential claimant.

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2. *Terence Morgan v Electricity Supply Board* [2021] IECA 29, judgment of Collins J., at paragraph 9.
3. *Terence Morgan v Electricity Supply Board* [2021] IECA 29, judgment of Collins J., at paragraph 9.
4. Simons J. gave two separate judgments. The first addressed the assessment of damages and the question of whether the plaintiff is entitled to aggravated damages, and the second judgment was addressed to the costs of the proceedings.
5. *Michael Doyle v Marie Donovan* [2020] IEHC 11.
6. *Michael Doyle v Marie Donovan* [2020] IEHC 11 at paragraph 2.
7. *Ibid* at paragraph 40.
8. *Michael Doyle v Marie Donovan* [2020] IEHC 119.
9. *Trafalgar Developments Ltd v Mazepin* [2020] IEHC 13.
10. *Michael Doyle v Marie Donovan* [2020] IEHC 119 at paragraph 28.
11. *Ibid* at paragraph 29.
12. *Ibid* at paragraph 31.
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14. *Ibid* at paragraph 66.
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16. Civil Liability and Courts Act 2004. Available from: Civil Liability and Courts Act 2004 (irishstatutebook.ie).
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18. *Crean v Harty* [2020] IECA 364, judgment of Collins J., at paragraph 3.
19. *Ibid*.
20. *Ibid* at paragraph 8.
21. *Ibid* at paragraph 25.
22. *Naghten (a minor) suing by her mother and next friend Teresa Crowley v Cool Running Events Limited* [2021] IECA 17, judgment of Noonan J.
23. *Ibid* at paragraph 47.
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25. *Ibid* at paragraph 49.
26. *Ibid*.
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28. *Ibid* at paragraph 53.
29. *Ibid*.
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31. *Crean v Harty* [2020] IECA 364.
32. *Ibid* at paragraph 23.
33. *Terence Morgan v Electricity Supply Board* [2021] IECA 29, judgment of Collins J., at paragraph 8.
34. *Ibid* at paragraph 9.
35. *Ibid*.
36. *Irish v Irish* [2021] IEHC 464.
37. *Ibid* at paragraph 5.
38. *Ibid* at paragraph 8.
39. *Ibid* at paragraph 15.
40. *McGeoghan v Kelly and ors* [2021] IECA 123.
41. *Irish v Irish* [2021] IEHC 464, at paragraph 22.
42. SI 490/2021 – Rules of the Superior Courts (Procedure on Default) 2021. Available from: pdf (irishstatutebook.ie).
43. Courts Service. Rules of the Superior Courts (Procedure on Default) – new rules to come into operation on the 13th of November. Available from: https://www.courts.ie/news/rules-superior-courts-procedure-default-2021-new-rules-come-operation-13th-november.
44. As amended by Central Bank (National Claims Information Database) Act 2018. Available from: https://www.irishstatutebook.ie/eli/2018/act/42/section/13/enacted/en/html#sec13. Section 8 provides that a claimant who intends to pursue a personal injuries action must send a letter of claim stating the nature of the wrong alleged to the alleged wrongdoer within one month from the date of the cause of action, failing which the Court "shall" draw such inferences as appear proper and shall, where the interests of justice so require, penalise the plaintiff as to costs.

Climate litigation: challenging Government failure

As climate cases against governments increase across the globe, recent judgments in the Netherlands, Ireland and Germany point to the emergence of an interventionist trend in the approach of domestic courts to these vital issues.[1]

Alex White SC

"Climate change is undoubtedly one of the greatest challenges facing all states. Ireland is no different."– Chief Justice Frank Clarke

The Glasgow 'Conference of the Parties' (COP26) concluded on November 13, reporting progress on coal (though with a setback), methane, carbon credit trading, and the objective of "keeping 1.5° alive". There was disappointment and, in some quarters, understandable despair at the mixed and tentative outcome. Oisín Coughlan, director of Irish Friends of the Earth, noted that "Glasgow was a staging post not a finishing line".[2]

Every country in the world faces the impact of climate change (some more starkly and imminently than others). But it is a truism that the climate cannot be stabilised by any one country – no matter how large, powerful or wealthy. Climate change is a global phenomenon. It can only be confronted as a global imperative. Acceptance of this simple truth is what led, in 1992, to the United Nations Framework Convention on Climate Change (UNFCCC), under the auspices of which the annual COPs now take place.

However, sovereign interests remain paramount in this arena just as they do in all global discourse and engagement. This is emphasised in the UNFCCC itself, which reaffirms, in the preamble, "the principle of sovereignty of States in international cooperation to address climate change".[3] So, while global collaboration will continue to be essential, the actions of individual states will remain of critical importance.

International agreements contain limited, if any, enforcement mechanisms. By contrast, domestic legal orders can afford real opportunities to hold states to account for their international commitments.

Climate cases against governments and public bodies are on the increase throughout the world, notably in Europe. Court judgments are typically grounded in the robust scientific consensus on the need to limit global temperature increases.[4] In many high-profile cases, apex courts have found in favour of litigants and ordered states to enhance climate action measures. Indeed, the majority of such cases (58%) taken outside of the US have led to outcomes entailing more effective climate regulation.[5]

Three recent climate judgments are of particular note in this context. These are *Urgenda*[6] (The Netherlands, 2019), *'FIE'* or *'Climate case Ireland'*[7] (Ireland, 2020), and *Neubauer*[8] (Germany, 2021). Taken together, they point to the emergence of an interventionist trend in the approach of domestic courts in Europe to the issue of climate change.

While the comparative analysis of judgments from different jurisdictions and legal systems must always be approached with caution, nevertheless there are striking commonalities here. Most significant was the readiness of the courts in each instance to hold government to account for the sufficiency or credibility of climate action commitments – whether these were contained in legislation, as was the case in *Urgenda* and *Neubauer*, or in a statutorily mandated action plan, as was the case in *FIE*. All three judgments take as a starting point the prevailing scientific consensus on climate change and the necessity for timely action if its effects are to be adequately confronted. Each of the judgments refers to the states' responsibilities under international agreements, notably the COP21 (Paris 2015). These responsibilities have been recognised – explicitly or implicitly – in the domestic legislation of the Netherlands, Ireland and Germany.

Court-mandated reduction in greenhouse gas emissions

On December 20, 2019, the Supreme Court of the Netherlands upheld a District Court order requiring the Dutch Government to implement an emissions reduction, by the end of 2020, of at least 25% compared to 1990. The case was brought by Urgenda, a Dutch climate NGO, together with a number of youth applicants. The judgment was the first in the world to establish a legal duty on a government to prevent dangerous climate change.

The Dutch Court of Appeal (with which the Supreme Court agreed) noted that climate science had "long ago" reached a high degree of consensus that the warming of the earth must be limited to no more than 2°, and that for a "safe" warming of the earth it must not exceed 1.5°C. Otherwise, the Court wrote, there would be a

real risk of dangerous climate change, and it was:

"clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced".[9]

The Supreme Court noted that every country that is party to the UNFCCC, including the Netherlands, has a responsibility to play its part in accordance with its share of the global responsibility to address climate change. As to precisely what was required for the Dutch State to play its part, the various Intergovernmental Panel on Climate Change (IPCC) reports were of relevance, together with the emissions reductions agreed internationally in order to limit global warming. A reduction of 25-45% by the end of 2020 had been targeted as far back as 2007. The Court said that while this may not have established "a legal standard with a direct effect," it did confirm that a reduction of at least 25-40% in emissions was needed to prevent dangerous climate change.[10] Despite this, in 2011 the Netherlands had lowered its 2020 emissions reduction target from 30% to 20%,[11] albeit with a commitment to accelerate reductions to 49% in 2030 and 95% in 2050. But given the international consensus on what was actually required, the Supreme Court observed that:

"…there may be serious doubts as to whether, with the 20% reduction envisaged by the State at EU level by 2020, the overall reduction over the next few decades, which the State itself believes to be necessary in any case, is still feasible…"[12]

It was for the Government to show how the proposed reduction of 20% would be adequate for the achievement of the stated objective, i.e., meeting the targets for 2030 and 2050, and keeping the 2°C and 1.5°C targets within reach. It had not done so, and this failure to justify or explain its policy approach was a critical issue for the Court:

"The State has not provided any insight into which measures it intends to take in the coming years, let alone why these measures … would be both practically feasible and sufficient to contribute to the prevention of dangerous climate change to a sufficient extent in line with the Netherlands' share. The State has confined itself to asserting that there 'are certainly possibilities' in this context."[13]

Although it was emphasised that the specific measures necessary to achieve the target were for the Government, nevertheless the Court was prepared to order a reduction in greenhouse gases by at least 25% (instead of 20%) by the end of 2020, compared to 1990.

European Convention on Human Rights

The benchmark against which the Dutch Court assessed the adequacy of the

relevant legislation was the European Convention on Human Rights (ECHR). The Court found that the Dutch Climate Act did not measure up to the State's responsibilities to vindicate citizens' human rights under Article 2 (right to life) and Article 8 (right to respect for private and family life), given that these Articles are to be interpreted as including a right to be protected against environmental hazards. While the Netherlands, Ireland and Germany are all ECHR signatories, the manner of incorporation into domestic law varies. The Convention has direct effect in the Netherlands, providing the basis for the Court's conclusion that the Dutch Government had fallen short in action to address climate change.

Doing what it says on the statutory tin

In *FIE*, the Irish Supreme Court was not prepared to recognise the existence under Irish law of a right to a clean environment (the door being left open to future consideration of such a claim). However, the action was successful in a critical aspect – namely, a challenge to the Government's Climate Action Plan.

FIE succeeded in its contention that the 2017 Action Plan was inadequate having regard to the obligations contained in the 2015 Act governing such plans. The State had argued that judicial review could extend only to process and not to substance. Clarke C.J. noted that while it was true that the legislation left policy choices to the Government, where the law mandates a plan to do certain things, the courts expect a plan to comply. He stated that:

"…the question of whether a plan actually does comply with the statute in such regard is a matter of law rather than a matter of policy. It becomes a matter of law because the Oireachtas has chosen to legislate for at least some aspects of a compliant plan while leaving other elements up to policy decisions by the government of the day…

"…whether the Plan does what it says on the statutory tin is a matter of law and is clearly justiciable".[14]

There was an essential issue of transparency here. The Act required that the public should have sufficient information to enable them to assess whether the Plan was adequate:

"On that basis, it seems to me that the level of specificity required of a compliant plan is that it is sufficient to allow a reasonable and interested member of the public to know how the government of the day intends to meet the National Transition Objective (NTO) so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in the light of that policy".[15]

Falling short

Examining the Plan in the context of the accepted need for action on greenhouse gas emissions, the Chief Justice concluded that the "level of specificity" required by the Act was absent. He considered that significant parts of it were "excessively vague or aspirational", citing a number of striking examples from the Plan's language concerning the agriculture sector.[16] The plan fell "a long way short" of what was required and was therefore unlawful and not in accordance with the 2015 legislation.[17]

This sense of 'falling short' was a theme common to both the *Urgenda* and *FIE* judgments. The Dutch Climate Act lacked any explanation as to how its emissions reduction target was "feasible" in view of its own stated climate policy objectives. This was where the Court felt able to intervene. Policy is not for judges. But the courts can act to ensure that policy statements, targets and legislative measures have internal coherence and credibility, and are faithful to what the State has said it is setting out to achieve. Thus, the Dutch Supreme Court ordered the State to reduce its emissions targets. In the absence of such an adjustment, future reductions would have to be "more stringent in order to stay within the confines of the remaining carbon budget".[18]

Offloading to the future: a "disproportionate burden"

Such "offloading" of action to the future was also a central theme of the German Constitutional Court's judgment in *Neubauer*. This case was decided on April 29, 2021, and is arguably the most significant climate judgment against a government thus far. Again, it was a case brought by a group of youth complainants, who challenged the constitutionality of emissions reduction targets contained in the Federal Climate Change Act 2019. They argued that the targets violated Article 20a of the German Basic Law – the German Constitution – which guarantees the natural foundations of life for future generations. It was claimed that by introducing a legal requirement to meet the overall goals of the Paris Agreement, while at the same time setting insufficiently specific emissions reduction targets post 2030, the law violated the rights of the youth plaintiffs by irreversibly offloading emission reduction burdens onto the future.

The Federal Climate Change Act, against the backdrop of the Paris Agreement, mandated a gradual reduction in greenhouse gas emissions of at least 55% by 2030 relative to 1990 levels. Annual allowable emission levels were set for different sectors in line with the overall reduction target for 2030. However, no provisions were set out for the period beyond that year. Instead, the Government was mandated to set, in 2025, annually decreasing emission amounts for the period post 2030.

In these circumstances the youth complainants argued that they would be faced with an unreasonable and disproportionate burden in the future. Applying constitutional principles, including that of proportionality, the Court agreed that one generation must not be allowed to consume large portions of the carbon budget, while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom. This, according to the Constitutional Court, was confirmed by the Basic Law, which obliges the State to:

"…treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence…"[19]

The Court acknowledged that the efforts required to reduce greenhouse gas emissions after 2030 will be considerable. Whether these efforts will entail unacceptable impairments of fundamental rights from today's perspective is impossible to determine, the Court stated.

Timely action "nothing short of a constitutional imperative"

However, there is a significant risk of serious burdens, which can only be reconciled with potentially adverse effects on fundamental rights if precautionary steps are

taken to manage the reduction efforts anticipated after 2030. This requires initiating the transition to climate neutrality in good time. And it means that transparent guidelines for the further structuring of greenhouse gas reduction must be formulated at an early stage, providing direction for necessary implementation processes, and conveying a sufficient degree of developmental urgency and planning certainty. It was nothing short of a constitutional imperative that further reduction measures were defined in good time for the post-2030 period, extending sufficiently far into the future. The German legislation had provided for the updating of the emissions reduction pathway in a manner that was insufficient under constitutional law. It was insufficient that the Federal Government was only obliged to draw up a new plan once – in 2025. It would at least be necessary to specify the intervals at which further plans would transparently be drawn up.

An "intertemporal right"

In failing to enact sufficiently specific pre-2030 emissions reduction targets, the State was postponing too much of the burden to the post-2030 period, thus impairing the rights of the youth complainants in *Neubauer*. If the State was serious about arresting global warming, it simply could not fairly or credibly rely on current policies and legislative provisions. And in the absence of radical adjustments, the State could not achieve its stated objectives without adversely affecting the future welfare and fundamental rights of the youth complainants. They and their generation would be required to bear an inordinate and perhaps impossibly dangerous burden. In these circumstances the Constitutional Court ordered the Federal Government to reconsider the targets, clarifying by the end of 2022[20] the emissions reduction targets for the period after 2030.

In its assessment of the adequacy of the Act, the Court applied constitutional principles, including the "right to a future consistent with human dignity". The Constitutional Court characterised such a right as "intertemporal" – entailing "an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations".[21]

Conclusion

All three judgments are important and radical in their own terms. They each demonstrate that governments can be held to their international commitments by national courts. To borrow from Greta Thunberg, "blah, blah, blah" is not to be a substitute for credible action, or for plans that have due regard to inter-generational justice. It may be that in its elaboration of the "intertemporal" character of the rights engaged in *Neubauer*, the German Constitutional Court judgment is potentially the most innovative and far-reaching.

That judgment makes it clear that the postponement of risk works a current injustice to younger citizens who are certain, in the absence of radical state action, to be adversely affected by the future impact of dangerous climate change.

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5. Grantham (2021) op. cit.
6. *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda*. Available from: https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf. The original District Court order was confirmed in the Dutch Court of Appeal, and then appealed by the State to the Supreme Court. It is important to note that the role of the Supreme Court in a "cassation" case is to act as a check on the quality of contested judgments given by courts of appeal – both as regards the application of law, and the legal reasoning behind it. As is generally the case elsewhere, the Supreme Court does not itself hear evidence.
7. *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2020] IESC 49. Available from: https://www.courts.ie/acc/alfresco/681b8633-3f57-41b5-9362-8cbc8e7d9215/2020_IESC_49.pdf/pdf#view=fitH.
8. *Neubauer v Germany*. Available from: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html.
9. Para 4.7.
10. Supreme Court's summary of the Court of Appeal judgment at para 2.3.2.
11. Both figures based on comparison with 1990.
12. Para 7.4.6.
13. Ibid.
14. Para 6.27.
15. Para 6.38.
16. In relation to grassland and cropland management, it was stated that "**we are endeavouring to improve our understanding** of the drivers of emissions from these activities with a view to developing policies and measures to reducing the source of these emissions…**Further investigation will also be necessary** to analyse synergies between these policies and mobilising carbon credits under the LULUCF… **While we cannot be sure what future technologies will deliver**, this is true of every sector…In addition, **continued research and development is needed** to support the development and roll-out of new technologies to reduce greenhouse gas emissions, which highlights the importance of national research and coherence with the EC Horizon 2020 programme and LIFE funding". Para 6.43. Note that the emphasis was added in the judgment.
17. The legislation itself was not challenged or condemned in the Irish case.
18. Para 4.6.
19. Para 193.
20. In the event the German Government acted rapidly, no doubt influenced by the then impending federal elections.
21. Para 183.

Willie Diarmaid Fawsitt BL

June 18, 1949 – November 16, 2021

Willie Fawsitt was born in 1949, the son of Patience and Seán Fawsitt. His father practised at the Bar, mainly in Cork, became Senior Counsel, and then a Circuit Court judge, like his own father, and Willie's grandfather, Judge Diarmaid (Jeremiah) Fawsitt.

Like his grandfather, Willie came to the Bar later in life, in 1996 at the age of 47, having had a wide and varied career in Ireland and abroad, particularly in the USA.

He practised continuously from 1996 (including during his illness in 2020 and 2021, even though he then worked on laptop, phone and awful Zoom meetings, and continued his hope to return to the Bar).

Because he was not able to physically attend work, whether court or consultations, the Covid pandemic did not affect him as much, and I think he thought it would distract solicitors from his physical absence.

As I said, he always hoped, almost to the very end, that he would be returning to his work. He kept his illness very quiet; he did not want solicitors to discontinue availing of his services.

However, Covid was so cruel for him and his family, like so many others. For almost all of his hospitalisation, his wife and family could not visit, and later were very restricted.

Never a bad word

Willie was highly regarded, liked, even loved, by all. I never heard a bad word about him (and he did not speak ill of his colleagues, even those he thought gave him a hard time, or would not settle with him). He was liked by all, from the youngest to the oldest.

The late Maurice P. Gaffney SC was a great pal of his, and Willie looked forward to celebrating his 100th birthday with him, which unfortunately could not proceed.

Willie practised very much in the area of employment law and personal injuries, and took on many difficult stress and bullying cases, difficult because of the nature of the case, the allegations, and the different parties. He mainly practised in the High and Circuit Courts, and also practised in the old EAT (the Employment Appeals Tribunal), Rights Commissioner and the Labour Court, and more recently the Workplace Relations Commission.

He was always prepared to help those who needed, those with very little, those who were not in a position to pay for legal representation. He was persistent, and for the defendants that he opposed (often big corporations), he was relentless. His clients always knew they got a great service and a fair run. He would not turn anyone away.

He was active in many Bar activities, legal and social. He was a great asset to the Bar tennis club, and was also involved, in earlier years, with the Law Library Credit Union, and Labour Party lawyers. He climbed Mount Kilimanjaro with me in 2000, and was such great company. What comes across from his colleagues is that he was regarded as one of life's great gentleman. I heartily agree.

He loved the Bar; he was a barristers' barrister. He loved the Law Library, the Four Courts, restaurant and "back bar" (or inner sanctum) downstairs, Hanley's (now The Dock), Hughes' Pub, for sandwiches and lunch, and late pints, much later, and Ciao Bella Roma.

Family tradition

Just two days before his death, he watched Ireland beat the All Blacks, glass in hand with all his family around him – his wife Anne, his eldest son, Seán (who had so fortunately been able to get back from Melbourne, just as the Covid restrictions eased), his daughter Jane from Cork, and his youngest, Robert.

Willie came from a great tradition. Not only his father and grandfather (on both sides), but his sister, Alice Fawsitt SC, has practised at the Bar since 1978. His beautiful sister Hope was in her final years studying law at UCC, when in 1977 she died at age 21 on the tennis court.

At the time, she was one of the brightest law students, and a tennis player of immense ability.

In his last two years, Willie put considerable time and effort into helping his sister Alice, his cousins Julitta Clancy, and Carol and Ronan Fawsitt, and Murray, in helping research and collate the 100th anniversary of the signing of the Treaty, in which his grandfather Diarmaid (Jeremiah) Fawsitt was so much a vital part (although only recognised very recently).

When I read at his funeral, the words of Saint Paul … "My life is already being poured out like a drink, and the time has come for me to depart. I have fought the good fight to the end; I have run the race to the finish …" – moving words, and appropriate, but pouring out a drink? I gulped. This must have been Willie. He was always re-amending draft pleadings I had settled for him, but surely he would not do this to Saint Paul? No shame! Willie, as ever.

Maura McNally SC, our Chair, who studied with Willie in the King's Inns, spoke movingly before he went to his rest. He is now most likely re-amending my draft notice of appeal to the heavenly courts. He will not let them rest in peace.

We will all miss our pal, my cousin, Willie Fawsitt.

Ercus Stewart

Mícheál Ó Sé BL

Gaeilgeoir, orator, advocate and proud Kerryman, Mícheál Ó Sé left us on October 13, 2021, just short of his 58th birthday, after a tough battle fought with courage and stoicism.

His passing leaves a deep void, most of all for his wife Marie, children Muireann and Piaras, and his brothers and sisters, as well as those who had the good fortune to know him. Mícheál was a gentleman in every sense of the word, a true and loyal friend, utterly sincere, with undoubted integrity. Moreover, he was a great colleague who maintained the highest standards, and a fine lawyer who was appreciated by his many grateful clients.

Enrapturing audiences

We met at a history lecture on our first day in UCG 40 years ago, were called to the Bar on the same day in 1989, and shortly afterwards entered the Law Library together. For a whole generation of students, Mícheál will be fondly remembered from his days in the debating chamber of the famed 'Lit&Deb', the Literary and Debating Society at UCG. From his first utterance, he made an immediate impression. Barrel chested and with serious intent, he would stand and briefly clear his throat to announce his presence. He was gifted with a rich deep voice, which along with his distinctive Kerry lilt, enraptured audiences as he projected like a latter day Daniel O'Connell addressing a monster meeting. The weekly Thursday debates were usually packed to the rafters with a raucous, impatient crowd, who would sit up and listen in anticipation whenever he gave one of his frequent contributions from the floor. In formal debates, he was a passionate and sometimes ferocious orator. He would often begin by gripping the podium with his big strong hands and bellowing forth for several minutes at full volume, denouncing the feeble arguments of opponents, before suddenly taking a step backwards and announcing in a hushed voice, to unintended hilarity, that he was now going to "cool it". He would then proceed calmly, with relentless logic and an impressive vocabulary, to demolish any remaining arguments. A hugely popular figure, it was no surprise when he was elected Auditor of the Society. During his tenure, he garnered for the Lit&Deb the world record in continuous debating, on the motion 'That Ireland is green', an achievement recognised in that year's edition of the Guinness Book of Records. He also represented the college with great distinction in many intervarsity events and was a popular figure wherever he went.

While his advocacy style mellowed in practice, the flame was always capable of being lit if the circumstances demanded it, but only under the most severe provocation.

Force of nature

He also debated in his native Irish, coming as he did from the north face of Mount Brandon, for which he held a huge attachment, and relished spending every summer there, walking the mountains and beaches with his children and other family members. It took a particularly strong force of nature to draw him across the Shannon Estuary to Clare, where he married our colleague, Marie Slattery, and lived a life of great contentment for the past 25 years. He immersed himself in the local community around Ruan, where they settled on a small farm and raised Aberdeen Angus cattle. With the help and expertise of his great friend Tom Howard, he tackled the restoration of the farmhouse and outhouses with great enthusiasm to make it the lovely home it is today. Small wonder then that Mícheál resisted the lure of the Inner Bar or any other advancement, for which he would have been most suited and clearly qualified; he simply never wanted to leave home.

Fitting tribute

The high regard in which he was held in the community was evident from the large attendance and organisations represented in the guard of honour at his funeral. He was particularly involved in the local GAA and took great pleasure and pride in watching the growing skills of his son Piaras, a gifted hurler. Mícheál's wit and acuity was evident to the end as he got to spend his last few days at home with his family. When a discussion arose about how often Piaras, in his younger days, had put the sliotar through a window, Mícheál opened one eye to join in and stated definitively "Two too many!"

A man of great faith, he was fittingly laid to rest just beside the church in Ruan. He was a staunch traditionalist, recognised in the lovely rendition of *Tantum Ergo* by his sister-in-law, Helen, during the Mass. He would also have approved of Muireann's violin recital as the reflection after communion, as her playing always gave him such great pleasure. He was proud too of her choice of legal studies, following in the footsteps of Marie and himself. Mícheál retained a life-long interest in history, particularly great leaders and battles, and was a committed European. He was always ready to tackle any hill or mountain with a stout stick and gusto, as he did for many years with another great friend, Seán Malone, a gifted photographer who managed to capture the essence of Mícheál, complete with his mischievous grin and twinkle in the eye, in the photograph that adorned his coffin. His passing was marked by his many colleagues on the South Western Circuit, who paid warm tributes to him in the courts in which he practised and was held in such high esteem.

To borrow from the sentiments expressed so well in his favourite poem, Faoiseamh a Gheobhadsa *by Máirtín Ó Díreáin – may he find solace now at home amongst his people in the west.*

BG

Membership of the Law Library remains strong despite the pandemic

Despite the reduction in court business and other factors relating to the Covid-19 pandemic, membership of the Law Library increased in 2021.

Ciara Murphy
Chief Executive

A fall in the number of members of the Law Library had been anticipated over the course of the last year owing to the reduction in court business as a consequence of the Covid-19 pandemic. However, that has not transpired and membership numbers are higher in November 2021 than they were in November 2020, with an increase of 1.25% in the general membership. That is 27 additional members year on year. Membership numbers in November 2021, at 2,170, are at their highest level since 2018 (**Tables 1** and **2**).

Table 2: Membership – year of practice and male vs female.

Nov. 2020	F	M	Total	% F	Nov. 2021	F	M	Total	% F
Year 1	26	50	76	34%	Year 1	48	60	108	44%
Year 2	34	56	90	38%	Year 2	25	49	74	34%
Year 3	35	42	77	45%	Year 3	34	53	87	39%
Year 4	36	47	83	43%	Year 4	31	42	73	42%
Year 5	32	46	78	41%	Year 5	33	44	77	43%
Year 6	28	48	76	37%	Year 6	29	45	74	39%
Year 7	34	41	75	45%	Year 7	25	43	68	37%
Year 8	36	46	82	44%	Year 8	33	40	73	45%
Year 9	39	46	85	46%	Year 9	32	44	76	42%
Year 10	21	56	77	27%	Year 10	38	43	81	47%
Year 11	28	38	66	42%	Year 11	17	52	69	25%
Full junior	368	551	919	40%	Full Junior	379	566	945	40%
SC	67	292	359	19%	SC	65	300	365	18%
Total	784	1,359	2,143	37%	Total	789	1,381	2,170	36%

108 newly qualified barristers entered membership of the Law Library in October 2021, which is 33 more than the number of new entrants in October 2020. There were 82 new entrants in October 2019. The average number of new entrants in the preceding three years was 88.

In each legal year, the number ceasing membership of the Law Library hovers around an average of 90 member exits per annum. During the legal year 2020/2021, the number ceasing membership was 91, of whom 49% were female. There are a variety of reasons why barristers cease their membership, including appointment as a judge, pursuit of alternative work opportunities, retirement and personal reasons. Each departing member is invited to indicate their reason for ceasing membership; however, a significant number choose not to provide this information (**Figure 1**).

What are the reasons for the strong level of membership retention?

There is a strong likelihood that the membership retention numbers have been maintained throughout this difficult period as a consequence of the various measures put in place by the Council during 2020 and 2021 to provide financial relief to members. These measures comprised two 'Covid credits' applied to membership subscriptions and a further decision to pay the Legal Services Regulatory Authority (LSRA) levy on behalf of members for a third year. Membership surveys have also demonstrated that members value the range of services available to them through the collective structure of the Law Library at a competitive rate, when compared with the cost of practice outside of the Law Library structure.

Above all else, membership fosters a culture of collegiality and co-operation among independent barristers, which ensures professional support, enforcement of the highest ethical standards, and encouragement of continuous sharing and challenging of ideas and approaches, at all levels of practice.

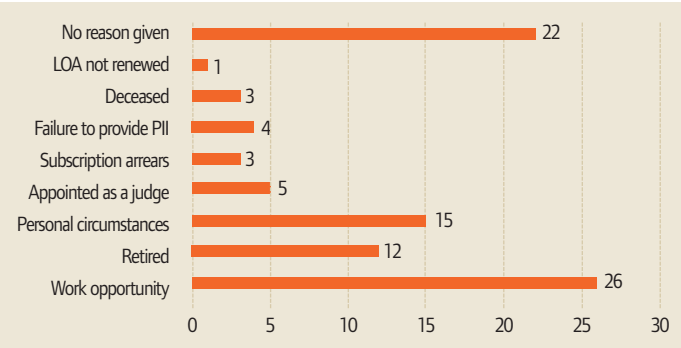

FIGURE 1: Reasons for ceasing membership of the Law Library 2020/2021.

Table 1: Membership – junior vs senior and male vs female.

November 2020	Male	Female	Total	November 2021	Male	Female	Total
Junior counsel	1,067	717	1,784	Junior counsel	1,081 (+14)	724 (+7)	1,805 (+21)
Senior counsel	292	67	359	Senior counsel	300 (+8)	65 (-2)	365 (+6)
Total			2,143				2,170 (+27)

An Update: Irish Justice Community Response to Afghan Crisis

Financial contributions welcome

Thank you!

Since September, when discussions first arose about how the legal community could respond to the emerging crisis, to the formal launch of the Appeal in early October, the response has been overwhelming.

But we still need your assistance!

Safe passage and protection for 10 Afghan female judges and their families has been secured, three families have arrived, with another two whose arrival is imminent.

In line with the community sponsorship model, we hope to match volunteering colleagues for professional and social supports around each family, once we have better understanding of their individual needs and locations.

Pledges of accommodation have been hugely appreciated, and a number of them have been approved for allocation. Further offers of accommodation from the professions or in your networks are humbly accepted.

Urgent Priority: Financial Aid **https://www.irishruleoflaw.ie/afghanistan_appeal**

Food, clothing, health and housing all represent an urgent priority, in order to support our Afghan colleagues establish themselves in Ireland.

Any contribution, no matter how small can be made directly at the above link or by scanning the QR Code with your phone

On the morning of what would become her last day in Court, she hugged her three small children goodbye, leaving them in the care of her mother, fearing she might never see them again. A few hours later, her husband called and then her mother called, both begging her to leave Court because of the approach of the Taliban.

- Afghan Judge, recently arrived

Particular gratitude for the ongoing sponsorship of this Appeal is extended to the leadership of all the contributing organisations.

Further details of the Irish Justice Community Response, and the coalition partners, can be found at: https://www.lawlibrary.ie/afghanassistance/

Mercer

welcome to brighter

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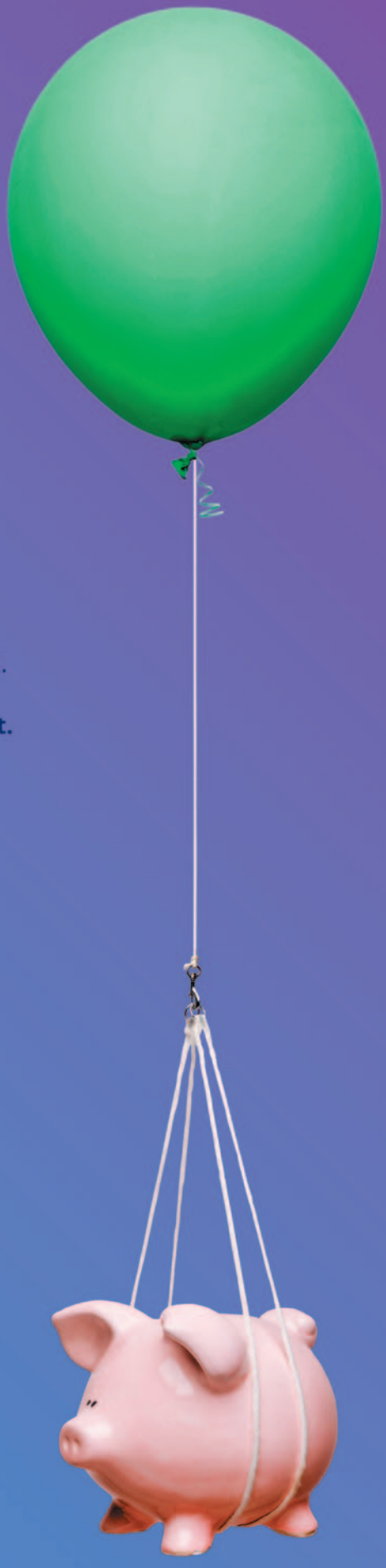
Put money in your pension



Even the terms and conditions are simple. The earnings limit is €115,000 and the amount of relief varies according to your age (see below).

With a pension, you save tax when you put money in and you save tax when you take it out. You can take up to 25% out tax free (subject to conditions) and all investment gains accumulate tax free within your fund.

Remember, prosperity needs to be planned - especially for retirement. Be sure to avail of our help.

The Bar of Ireland Retirement Trust Scheme

Open to all members of the Law Library under 75 years of age.

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

Contact your Mercer Bar of Ireland Pension Team on **01 605 3066** or Grainne McEvoy, Nicola Walshe or Donal Coyne via email at **grainne.mcevoy@mercer.com, nicola.walshe@mercer.com** or **donal.coyne@mercer.com.**

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