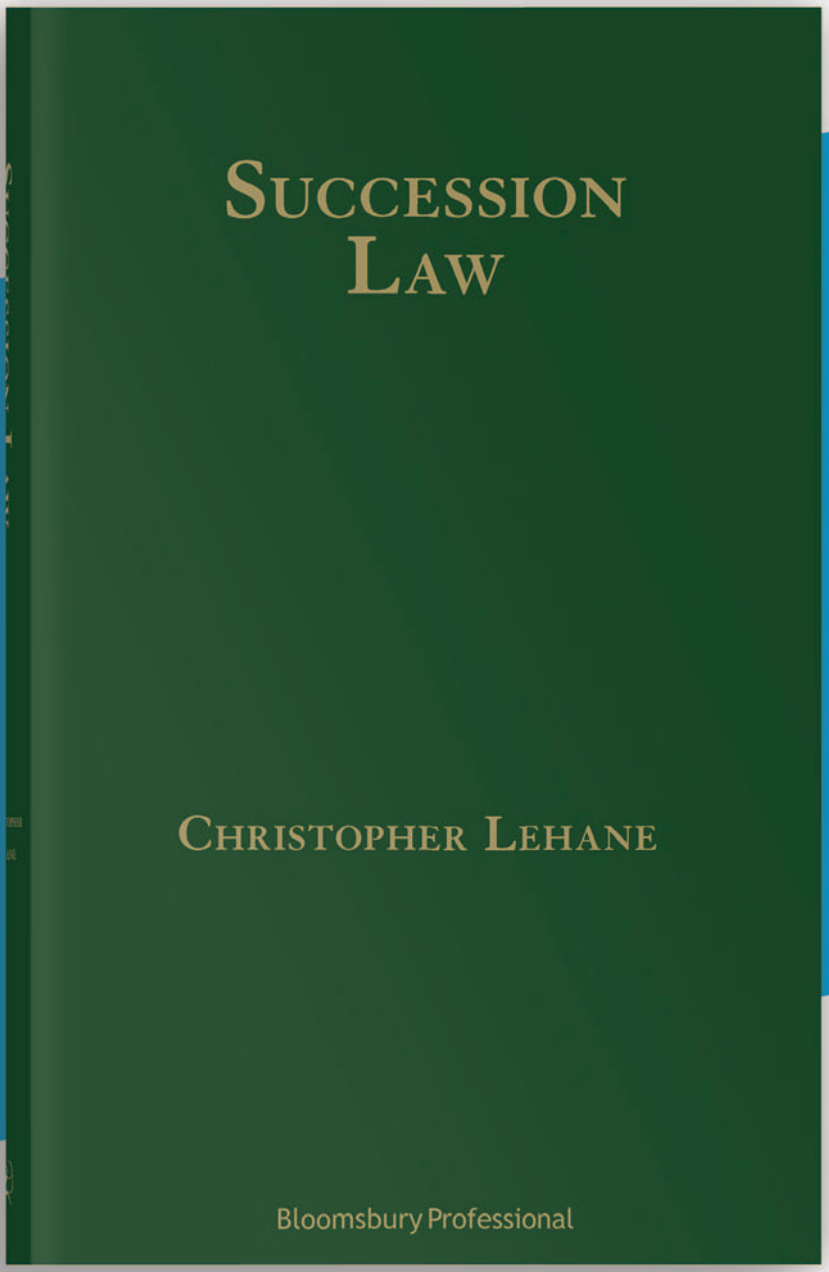
THE BAR
REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

Volume 27 Number 1
February 2022

Clarity on defamation



Succession Law

By Christopher Lehane

This new book provides peerless analysis of succession law with extensive cross-referencing to related issues such as tax, conveyancing, family law, enduring powers of attorney, limitation of actions, estate accounts, private international law and trusts.

It provides the reader with in-depth coverage of key Irish judgments, statutes, court rule provisions and Court and Probate Officer practice directions. This highly practical book includes a chapter on will drafting and estate planning and provides 10 precedent templates covering most testator requirements. Author Christopher Lehane is a practising barrister. He recently retired as an officer of the High Court where he served for 42 years, 22 years of which were spent in the Probate Office and 12 years as Official Assignee in Bankruptcy. He served as Deputy Probate Officer of Ireland for eight years and Assistant Probate Officer of Ireland for five years, administering probate law in Ireland.

Pub Date: Mar 2021 | **ISBN:** 9781526522245 | **Price:** €275 **eBook Price:** €269.77

Order your copy today
Visit us at **bloomsburyprofessional.com**

Bloomsbury Professional Ireland

Succession Law will also be available on our Irish Wills and Probate Online Service. To purchase a subscription, organise a free trial or request a remote demonstration, please email: bpireland@bloomsbury.com

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

www.lawlibrary.ie

Message from the Chair 4

Editor's note 5

News 6
International Women's Day 2022
Afghan Appeal
Specialist Bar Association news

Interview 11
Law in turbulent times

Law in practice 14
Clarity on defamation

Legal Update i

Law in Practice 18
Cyberviolence – the law is not enough 18
Preliminary references – a practical guide 22

Obituaries 26
Frank Callanan SC

Closing argument 27
A practical path to addressing inclusion at the Bar

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

Engagement with the Minister

Representatives of Council met recently with the Minister for Justice to discuss a range of issues of relevance to The Bar of Ireland, and the administration of justice.

A very happy new year to all members of the Law Library. Thankfully, the 'mood music' of Covid-19 seems to have turned another corner and optimism is in the air again. While there were delays in many lists, particularly upon our return in January, recent Government announcements indicate movement in a very positive direction, hopefully resulting in a return to normality.

Immediately before the Christmas break I had the opportunity, along with some Council members, to meet with the Minister for Justice, Helen McEntee TD. The Minister's office facilitates an annual meeting with The Bar of Ireland to discuss a range of matters that are of mutual concern in the justice sector.

I took the opportunity to highlight the ongoing liaison between the Council and the Courts Service to address any obstacles to timely access to justice for all citizens that have arisen under the challenging conditions of the pandemic. For example, the delay in the County Registrar list in Dublin, seemingly caused by the backlog arising during Covid-19 restrictions, is now such that return dates were being given for the year 2023, although since our meeting, the Courts Service has made efforts to bring those dates forward into 2022. I asked the Minister to give consideration to the appointment of a second County Registrar in Dublin, either on a temporary or permanent basis, in order to address the unacceptable backlogs. She advised that the issue of increasing the numbers of Registrars, Deputy Registrars, Masters, etc., was a matter that has arisen in the Judicial Planning Review Group, and the opportunity to make better use of their role in case management was under consideration. It is hoped that the report of the Judicial Planning Review Group will include recommendations in respect of immediate resource needs, together with a medium-term workforce plan over five years for the judiciary, support staff and the office of the Registrar.

Minister McEntee also pointed to the increased funding she had secured for the Courts Service modernisation programme, which was supported by the Department of Public Expenditure and Reform and the Department of Finance, and welcomed the participation of the Bar in the new Courts Service Modernisation Programme Legal Practitioners Engagement Working Group to identify opportunities to improve efficiencies in the operation of the Courts.

Forthcoming reports and State fees

The agenda for the meeting included discussions on a multiplicity of pressing matters, which included: the forthcoming implementation plan for the Kelly Report recommendations – the review of the administration of civil justice; the imminent publication of the new Family Law Justice Strategy and Bill expected in February 2022; the commencement of the forthcoming Review of the Civil Legal Aid Scheme and our desire to be included on that group; and, the Legal Services Regulatory Authority research underway in relation to legal services education and barriers to entry to the legal professions.

A further issue for discussion during the meeting with the Minister was the criminal fee rates payable to barristers, and the fact that the FEMPI cuts have been addressed for every other sector within our society with the specific exception of barristers. I indicated that the Bar continued to be disappointed that the draconian cuts that were applied to the professional fees of criminal barristers during the period 2008-2011 had not been addressed in Budget 2022, and that the Minister for Public Expenditure and Reform had not met with The Bar of Ireland despite repeated requests over the last few years. The difficulties faced by younger barristers in developing their practice, in particular in the District Court, and the challenges in getting paid, were also raised.

Minister McEntee undertook to raise the issue of professional fees again with the Minister for Public Expenditure and Reform. She noted that she had already done so and pointed to the 'fairness' issue highlighted by the Bar. She said that a Criminal Legal Aid Bill was due to be finalised during 2022 that will see the transfer of the administration of criminal legal aid to the Legal Aid Board. She also undertook to further investigate the District Court issue raised.

Overall, the Minister's engagement with those matters detailed on the agenda for discussion, which are all matters of concern to the Bar, was very positive.

On behalf of the Council, I indicated our gratitude for the opportunity to again air our concerns regarding the multiplicity of issues that affect barristers on a day-to-day basis. It was again indicated to the Minister that those concerns have a direct impact upon the constitutional issues of access to justice, law and order, and human rights.

On behalf of the Bar, I acknowledged the Minister's commitment to considering and addressing the various issues raised, not to mention the fact that she afforded us the time to address her directly.

Finally, I would like to wish each and every one of us a healthy and successful term ahead.

Maura McNally SC

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

A valuable resource

Human rights law, defamation and online abuse are among the topics covered in this edition.

The challenges of illiberalism within the EU are among several topics explored in this edition with Gráinne de Búrca, Professor of Law at NYU, who, since her graduation from the King's Inns in 1989, has become one of the most respected scholars in her field of human rights and EU law.

Brian Kennedy SC provides a practical guide on EU preliminary references, charting the steady increase in the number of references made by Ireland in the last 10-15 years, particularly in the areas of criminal law and environmental law.

The murky world of online abuse has come under greater scrutiny by the Department of Justice in 'The Intimate Images Research Report'. Martin Block BL examines the findings of the recently commenced Harassment and Harmful Communications and Related Offences Act, 2020. While there are aspects of online abuse that constitute a criminal offence, for many victims of non-consensual sharing of intimate images their only recourse is via the traditional torts.

Karl Shirran BL looks at two recent High Court judgments that provide clarity on the test for injunctive relief provided in section 33 of the Defamation Act, 2009.

It is a great honour to be appointed Editor of *The Bar Review* and follow in the footsteps of my esteemed colleague, Eilis Brennan SC. I look forward to working with the Editorial Board and Think Media. *The Bar Review* must continue to be a valuable resource for colleagues and anyone who has an interest in law and practice in Ireland.

Helen Murray BL
Editor
The Bar Review

Afghan Appeal – housing still needed

We are now in the fifth month of our Afghan Appeal, and it is fitting to update members as to progress to date, as well as the challenges that continue to call upon the charity and solidarity of the Irish legal community.

Some inroads have been made into settling the judges in Ireland, thanks to help from volunteering colleagues and judiciary with accessing IT and English language instruction, as well as housing. However, housing remains our most pressing and urgent priority. In the absence of housing, these families' progress will be hampered, and their opportunity for advancement delayed. The offers of property have been inspiring; however, mainly due to family configurations, we have only been able to progress four families. We require six more three-bedroom properties, for 12 months.

A stable location for 12 months will provide certainty to the families as well as assisting the Appeal in pinpointing the neighbouring supports.

- Do you have a property that might suit?
- Do you know anyone who might be in a position to provide such a property?
- Is there a property that may require some refurbishment, which we could assist in finishing off for rental?

We are happy to discuss, in confidence, all offers of three-bedroomed properties across the State, and can assist with putting in place the Housing Assistance Payment (HAP), the appropriate agreement, and any other issues that you may wish to raise in respect of this appeal.

If you can help, please contact AfghanAssistance@lawlibrary.ie.

Other developments

Other developments that you might wish to know about include:

- the establishment of support circles, led by members of the judiciary, the Bar and solicitors, with further expansion once they have bedded in;
- we are also grateful for the continued assistance of Irish Rule of Law International and its volunteers;
- we have received laptops from Irish Life and Workday, with any excess going to others in Direct Provision;
- valuable links have been established with local and national support groups, the benefit of which will be become even more apparent as we find homes for these remaining families;
- there has been continuing commitment from all professional bodies to involve, incorporate and support the judges in relevant professional development initiatives; and,
- we are grateful for financial support and donations from members, Bar associations and other groups.

LAW SOCIETY OF IRELAND

BOOK NOW FOR SPRING 2022

LAW SOCIETY DIPLOMA CENTRE

POSTGRADUATE COURSES TO SUIT A BUSY SCHEDULE

Leaders in legal education with professional focus and practical insight

- Flexible learning options
- All sessions are live, interactive and online
- Evening and weekend classes
- All classes are recorded and available to view on demand

SPRING 2022 COURSES - APPLICATIONS NOW OPEN

Diploma in Aviation Leasing and Finance	27 January 2022	€3,000
Certificate in Company Secretarial Law and Practice	1 February 2022	€1,650
Diploma in Employment Law	11 February 2022	€2,600
Diploma in Insurance Law	15 February 2022	€2,600
Diploma in Compliance and Risk Management	16 February 2022	€2,600
Certificate in Data Protection Practice	16 February 2022	€1,650
Diploma in Healthcare Law	17 February 2022	€2,600
Certificate in Charity Law, Trusteeship and Governance	4 March 2022	€1,650
Diploma in Corporate Law and Governance	8 March 2022	€2,600
Certificate in Commercial Contracts	12 March 2022	€1,650
Certificate in Enforcement for Public Bodies	5 April 2022	€1,650

CONTACT DETAILS E: diplomateam@lawsociety.ie | T: 01 672 4802 | W: www.lawsociety.ie/diplomacentre | @LawSocIreland

All lectures and workshops are webcast and available to view on playback, allowing participants to catch up on coursework at a time suitable to their own needs. Diploma Centre reserves the right to change the courses that may be offered and course prices may be subject to change.

Specialist Bar Association news

On December 14, 2021, Catherine Duggan BL, Vice Chair of the **Probate Bar Association** (PBA), chaired a breakfast briefing, in which John Conway from Ormsby & Rhodes, Chartered Accountants discussed discretionary trust tax. The PBA opened the new legal term with a breakfast briefing presented by Mark Tottenham BL entitled 'Writing Wrongs – Expert Evidence in Disputed Handwriting Cases'. The session was chaired by Vinog Faughnan SC, Chair, PBA.

The **Construction Bar Association** (CBA) Sanfey Essay prizegiving ceremony took place online on December 8, 2021. First prize went to Gavin Wilson and second prize to Paul Hughes, while Sean Hurley was highly commended. Chaired by Jonathan FitzGerald, Chair, CBA, and Deirdre Ní Fhloinn BL, members of judging panel included Mr Justice Mark Sanfey and Anthony Hussey, who discussed the high quality of the winning essays. The CBA, in conjunction with Hart Publishing, launched *Residential Construction Law* on January 13, 2022. Jonathan FitzGerald BL opened the event, and speakers included: Mr Justice Michael Peart, former Judge of the Court of Appeal; Philip Britton, former Visiting Professor and Director of the Centre of Construction Law, King's College London; Matthew Bell, Senior Lecturer and Co-Director of Studies for Construction Law at Melbourne Law School, Australia; Kim Vernau, Chair of Women's Pioneer Housing and Non-Executive Director of the Housing Association Property Mutual; Deirdre Ní Fhloinn BL, Special Contributor; and, Kate Whetter, Hart Publishing.
The CBA also held a Tech Talk on January 26, where Donogh Hardiman BL spoke on 'Procurement and state funding – a change in the landscape'. The session was chaired by James Burke BL.

The **Immigration, Asylum and Citizenship Bar Association** (IACBA) held a webinar on January 27. Chaired by Mr Justice Gerard Hogan of the Supreme Court, Rosario Boyle SC and John Gallagher BL gave a detailed presentation on 'Article 40.4.2: Inquiries in the Context of Immigration and Asylum'.
Alex White SC presented his paper 'Taking Governments to Court: Climate Litigation and its Consequences' at the **Climate Bar Association** webinar on December 2, 2021. The webinar was chaired by Clíona Kimber SC. The Association held its inaugural event, 'Climate Bar Symposium: Towards a Model Environmental Law (Cóir Dlí an Chomhshaoil)', online on January 21. The event was split into three sessions. Session 1 was chaired by Ms Justice Marie Baker, Supreme Court. Speakers included Louise Reilly BL on 'Duties and Principles of Environmental Law', Louise Beirne BL on 'Drafting a new Environmental Code – What it would look like and what would it do?', and Deirdre Ní Fhloinn BL on 'Ear to the Ground: What do the Stakeholders say?'
Session 2 was chaired by Former Chief Justice Mr Frank Clarke SC. Speakers included Aoife Sheehan BL on 'Standing Issues in Environmental Litigation', Orla Heatley LLB on 'Class Actions and Representative Actions', and William Quill BL on 'Current Sanctions and New Remedies'.
Session 3 was presented by Bláthnaid Ní Chofaigh of RTÉ, with speakers including Clíona Kimber SC, Conor Linehan SC, William Fry, Rose Wall of the Community Law and Mediation Centre for Environmental Justice, Ian Lumley of An Taisce, and Shirley Clerkin, Heritage Officer, Monaghan County Council.

Pictured at the Climate Bar Symposium were (from left): Ms Justice Marie Baker; Bláthnaid Ní Chofaigh, RTÉ; Orla Heatley LLB; Donnchadh Woulfe BL, Committee Member, Comhshaol/Climate Bar Association; Clíona Kimber SC, Cathaoirleach, Comhshaol/Climate Bar Association; and, Shirley Clerkin, Heritage Officer, Monaghan County Council.

The **Employment Bar Association** (EBA) held its Annual Employment Law Conference on December 10, 2021.The event was opened by Alex White SC and chaired by Mr Justice Senan Allen and Eilis Barry, Chief Executive, FLAC. Speakers and topics included:

- Eileen Barrington SC on 'The Organisation of Working Time Act: time for a snooze?';
- Mark Connaughton SC on 'Collective bargaining now and the Supreme Court judgment in NECI';
- Clíona Kimber SC on 'From Form to Forum – remedies in employment equality law';
- Emma Davey BL on '"Subject to satisfactory completion" – employment rights during probation';
- Cathy Maguire BL on 'Medical Matters: doctors and decisions in employment law';
- Tom Mallon BL on '*Power v HSE*: the end of acting up?'; and,
- Jane Murphy BL on 'Taking and testing evidence in the adjudication of employment disputes'.

International Women's Day 2022

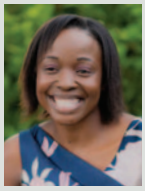
In celebration of International Women's Day 2022, The Bar of Ireland will host an online event on Tuesday, March 8, at 6.00pm. We are delighted to announce that Prof. Louise Richardson, Vice-Chancellor of the University of Oxford, will be our special guest speaker.

Tickets can be booked at https://ti.to/BarofIreland/iwd2022.

In Plain Sight

Work continues on In Plain Sight, with an artist for the current project to be unveiled soon. Donations can still be made via https://ti.to/BarofIreland/CelebratingACentury.

Female lawyers contributing to justice in Malawi



Janet Liabunya
Women Lawyers Association of Malawi/friend of IRLI

Access to justice is not just a right, but a tool for enforcing other rights and ensuring accountability of duty bearers. In Malawi, courts have the power under the Constitution to interpret, protect and promote people's rights in an independent and impartial manner, having regard only to legally relevant facts and prescriptions of the law.[1]

In order for Malawians to benefit from this power of the court, they must identify the injury and select the remedy they want from the court. Effectively, to interact with the justice system and get protection of rights through the courts in Malawi, one is required to have knowledge of the law and the justice system. A person must find the court, they must be able to work with the procedures of the court, and they must understand the language of the court.

Literacy levels among the adult population in Malawi (aged 15 years and over) stand at 65%. Around seven million people in the country cannot read or write.[2] Illiteracy levels among the adult female population, who are the most vulnerable and in much need of protection by and through the courts, are at 42%. Illiteracy severely hampers the ability of most of the population, including women, to interact with the justice system, as most laws are drafted and administered in English. For the majority of the population, who mostly live in rural areas, the closest magistrate court is 25-40km away. Accessing the courts requires covering the cost of transport, food and even accommodation, which most Malawians cannot afford. Because of this situation, and the requirements to access the justice system, the right of access to justice is virtually absent.

Accessing justice in Malawi therefore requires the help of lawyers. With a total number of 637 practising lawyers, and a population of 18 million people (one lawyer to 30,000 people), accessing a lawyer, coupled with the associated cost is, however, not easy.

Through the Women Lawyers Association of Malawi, female lawyers make themselves available to provide legal representation to women and children. Women and children whose rights are violated through violence, exploitation, abuse and neglect can access the courts for protection and redress.

The provision of legal representation by the Women Lawyers Association has also contributed to ensuring the accountability of public bodies for the discharge of their functions in promoting and protecting rights. Increasing the reach of women lawyers will enable more women and children to access justice, enjoy their rights and contribute to the development of the country. Long may our work continue.

References

1. Section 9 of the Constitution of Malawi.
2. UNESCO Institute of Statistics.

Law in turbulent times

Prof. Gráinne de Búrca speaks to *The Bar Review* about the EU's response to the rise of illiberalism, and the challenges facing human rights movements.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Gráinne de Búrca is regarded as one of the leading experts on European Union (EU) law, although the Florence Ellinwood Allen Professor of Law at NYU says it's something she came to almost by accident: "I was working in Oxford, focused mainly on criminal law and jurisprudence, but at that time they urgently needed people to teach EU law. The more I taught it, the more interested I became in it. It has everything: constitutional law, economic law, international law. Teaching and research are closely connected; when you're teaching, you really need to understand the subject. I very quickly got swallowed up by my own interest and became a specialist in the field".

Gráinne's current research interest is the rise of illiberalism in the EU and beyond, and the response of the EU's political and legal mechanisms to this. She focuses particularly on the current tensions with Hungary and Poland, where the ruling parties have become increasingly authoritarian, repressing civil society and freedom of expression, and undermining the judiciary and the rule of law. Gráinne sees these states as the extreme end of a spectrum that has seen far right organisations appear, and increase in prominence, in many countries, and which seems to go against the very purpose of the EU: "The EU was all about breaking down national barriers, transnationalism as the new force of peace and prosperity, with free movement and integration of peoples. But we see the rise of something really challenging to all of that in recent years. My research looks at how the EU is faring as a project of cosmopolitan political and economic integration in an era of rising nationalism and rising illiberalism".

She acknowledges that the very nature of the government by consensus that is the hallmark of the EU means that holding governments like those in Hungary and Poland to account for their actions is difficult and complex. She feels that what she calls the "supranational institutions" – the European Commission, the Court of Justice, even the European Parliament – have begun to take action, and to make clear that the actions of the Polish and Hungarian Governments are incompatible with EU membership and EU law. However, the political and mainly intergovernmental institutions, such as the Council of Ministers and the European Council, have been less successful, and Gráinne is critical of the stance they have taken: "The member state governments themselves and the Council have soft pedalled on this. I think that's had a really bad effect in terms of allowing Poland and Hungary's strong drive towards the authoritarian end of the political spectrum to go unchecked".

She feels that it's both a case of the laws not being stringent enough, and also of the existing laws not being put to use effectively: "Recently, there was a move politically to adopt a form of 'funding conditionality', to make the grant of funds either under the normal structural and cohesion funds (or, in a slightly different way, in the context of the 'next generation' funds, the pandemic stimulus funding) conditional on compliance with 'fundamental EU values' as they're called in the EU Treaty, which include democracy, human rights and the rule of law. But the European Council did a deal to postpone its coming into force until Poland and

The accidental lawyer

Gráinne de Búrca grew up in Dublin. She chose to study law out of an interest in writing and analysis, and a desire to "keep my options open". Her love for the subject grew as she studied however, and after graduating from UCD, that interest in analysis and intellectual argument led her to King's Inns, where she qualified as a barrister in 1989. Rather than take to the courts, she took the academic route, and went to Somerville College, Oxford, as a lecturer in 1990. Her career since has taken her to the European University Institute in Florence, and to Fordham and Harvard Law Schools, before joining NYU in 2011 as the Florence Ellinwood Allen Professor of Law. At NYU, she is Faculty Director at the Hauser Global Law School, and Director at the Jean Monnet Center for International and Regional Economic Law & Justice. While she says there was never a moment when she decided she wanted to spend her career in academia, she has no regrets: "It's a wonderful career, and I'm always recommending it to young law students. For those who are inclined towards ideas and argument, it's got all of the world relevance that some other areas of academia might not have. It's very focused on the policy world and on the world of practice, but at the same time it gives you the freedom to think more deeply beyond immediate problem solving. Working as an academic has been an incredible privilege".

Hungary had satisfied themselves by bringing a challenge to the funding conditionality law before the Court of Justice. There are constant compromises and watering down of this kind. I understand the difficulties, but I think it's a mistake. The democratic backsliding is more corrosive than perhaps they realise. There are real dangers to the EU in not confronting this severe turn against fundamental dimensions of democracy".

She is deeply concerned at the long-term implications of this lack of coherent action: "The longer you have a government of authoritarian tendencies in power, the harder it is to reverse what they accomplish, and the less you confront it and challenge it, the more the authoritarian institutions and practices become consolidated, and that has implications far into the future".

One such implication, which has certainly occupied the minds of legal professionals in Ireland, is the fact that legal decisions in countries that have embraced authoritarian and illiberal policies, including by political capture of the judiciary, can directly affect citizens in other EU countries. Gráinne references a recent case where an Irish citizen won a custody case in a Polish court, only for the Polish Minister for Justice to stage an extraordinary intervention, move the case to a higher court, and have the decision overturned: "It's not a big political issue. It's one person's personal life. But lots of people across the EU are married to citizens from other member states. The more those personal costs are felt by the citizenry, it might bring the political cost of having illiberal and authoritarian member states higher on the agenda. I hope so, because I think it's very depressing to think what Europe might become given the current situation".

She acknowledges that the Irish legal profession has voiced concerns on these issues for some time, citing Ms Justice Aileen Donnelly's referral in 2018 of a European Arrest Warrant request to the Court of Justice of the EU because of concerns about freedom of the judiciary in Poland: "She had the courage and the foresight to draw attention to what was happening, not just as a Polish matter, but as a matter for the legal profession across the EU. Many other judges in other member states have followed her example since then".

Pulling the thread

One of the other major challenges the EU has faced is of course Brexit: "When I was first teaching and researching the EU, when it was growing and expanding, many other states wanted to be part of it. It was never contemplated that a member state would leave, so I think Brexit is having enormous ongoing implications – politically, symbolically, legally, socially, economically, in every way".

In explaining this impact, Gráinne uses the colourful analogy of a piece of multi-coloured knitting: "Then someone says: 'take out the red thread now, the red thread shouldn't be there anymore'. And by taking out the red thread, you might be able to have the red colour as a separate thread, but you'd wreck the piece of knitting and the thread wouldn't be able to keep anyone warm on its own. And I do think there's something to that. Of course, the UK is still a functioning political and economic system and state, but there's been an awful lot of disruption and damage and uncertainty. Maybe this is short term, but maybe not".

She points out, however, that the initial fears of major destabilisation, with more states choosing to leave, have not, so far, been realised: "If anything, there's been a sense in which the chaos of Brexit made it less attractive for other, even Eurosceptic leaders in various member states, to make leaving the EU part of their platform".

Reframing human rights

Gráinne's other main research interest is in human rights law. Her book *Reframing Human Rights in a Turbulent Era*, which was published in 2021, attempts to look at the recent discourse around what she calls the "cathedral" of human rights (alluding to Monet's many different views of Rouen Cathedral) in a new and challenging way: "It's like the metaphor of the blind man and the elephant, that if you only see one part of something complex and that's what you describe, someone else will see something very different. In recent years there's been a real explosion of negativity about human rights and the human rights movement, both in political terms, with the rise of illiberalism and the focus on sovereignty and political power and not on rights, but also intellectually. Left-wing scholars have written scathing commentaries about human rights as having been complicit with the use of force, invoked as a pretext for invasion, or as a western imposition on other parts of the world. Others have accused human rights law and practice as having been complicit with neoliberalism, largely ignoring poverty and redistribution, and focusing instead on freedom of speech and political rights, on issues that are easier and less costly for states to address".

While she accepts that many of the criticisms have some merit, and welcomes robust debate, Gráinne disagrees with many aspects of these arguments, and also feels that they are overstated, exaggerated and potentially damaging: "You could say, well, who cares what academics think? But generations of students study and read this stuff, and I increasingly see the students looking with a jaundiced eye and thinking, 'oh, human rights aren't up to the challenges of today'".

The book seeks to offer what she calls a "corrective" to these bleaker and partial depictions of the human rights system, particularly by drawing attention to the

power of grassroots social movements to effect change, and she presents her arguments in the context of a series of case studies: "I wanted to present an account of human rights that is more focused on what practitioners actually do, not just what governmental actors and international courts do, but also the advocates and the social movements, the people who activate human rights, those whose rights are at stake and who mobilise on behalf of those people".

The book looks at child rights activism and reproductive rights campaigns in Ireland, gender equality and gender justice campaigns in Pakistan, and disability rights activism in Argentina. It makes the argument that these social justice movements interact with the more traditional institutions of human rights law in ways that can ultimately help them to advance their goals: "What I would see, looking at different campaigns that were successful, was the way activists and advocates engaged with international human rights law and domestic human rights law and used it, and the ongoing interaction between a lot of different kinds of actors and institutions over time seemed to help promote progressive change. Law did and does play a role, but it's a particular kind of role. I was trying to think about what it was that made the campaign for recognising reproductive rights in law eventually gain traction in Ireland. It was mostly social mobilisation. It was people feeling that the situation had to change, and taking to the streets, and also the women with tragic stories and impossible dilemmas who were brave enough to tell their stories in public. But some of those women also brought a case to Strasbourg, to the European Court of Human Rights. And then the case had a name, it was a high-profile intervention, it brought attention to that woman and to her untenable situation. And these rulings resonated for lots of countries. So, I think that human rights law played an important role in highlighting cases, emphasising the core of the human issue, emphasising Ireland's outlier status. It wasn't the only factor, but it has its role".

Identity and activism

Another element of modern human rights discourse that greatly interests Gráinne is the concept of intersectionality. A term first coined by the US civil rights activist and academic Kimberlé Crenshaw, intersectionality seeks to describe how characteristics such as race, gender and class 'intersect' with one another, and how these intersections affect power structures and our very conception of rights. It's been a controversial topic at times, but one that Gráinne sees as ultimately positive: "I see it as trying to overcome the competitiveness of identities – all of us are many things. I think intersectionality is a potentially powerful way of creating coalitions and alliances, but it's difficult because campaigning is always easier when you can focus on one issue, or on one dimension of identity".

She acknowledges too that the law has not caught up with this new thinking: "Disadvantage can accrue to people in really unfair ways because of their multiple or different identities. Intersectionality works well as a naming of a problem, but I don't know that we've yet got clear enough or sharp enough ways of addressing those through law, mainly because a lot of discrimination law was created at a time that was focused very much on comparisons and binaries: you're black or white, male or female. I don't think it's something we're going to solve overnight. Law is just one narrow tool and we have to keep reshaping that tool to reflect and promote social change".

The complexity of these issues can also make them difficult to address in broader society. In a world of social media and 'clickbait', where campaigns of misinformation often seem to find purchase so easily, not least because they are actively seeking to ignore the complexity of an issue, how do we educate, and how do we bring nuance? Gráinne feels that it starts with education, and continues with activism: "Education is really important, different types of education at different stages and levels. Activism is a different kind of practice from education per se, although it is a form of education, a form of persuasion. Changing public understanding and changing narratives is crucial, as it was in the reproductive rights campaign or in disability rights campaigns, or for the Travelling community in Ireland, the need to get beyond pejorative stereotypes and try to broaden the discussion, to bring a humane perspective, looking at the dignity of each person. That is a big effort that takes a huge amount of social collaboration and thinking and strategy, to try to achieve awareness and ultimately change".

The role of the academic in this process is one that Gráinne is extremely interested in too, and the discussion on whether academics should maintain a distance from campaigns or public debate, concentrating on teaching and research rather than direct participation, is very much a live debate in the US and elsewhere. Gráinne has experienced this personally, having come in for recent criticism for an open letter she wrote in support of a Polish colleague who publicly criticised the ruling party in Poland and came under pressure from Polish authorities for doing so, including the Government and its allies bringing multiple civil and criminal proceedings against him. Once again, Gráinne welcomes the debate over the proper academic role, but stands over her decision to speak publicly: "I think people can play multiple roles. It's really important that you keep your scholarship as rigorous as possible, as truthful and unbiased as possible, to really pursue and publish what you find. But we all have our values and those values imbue what we do and see".

These debates can of course become quite fraught, in academic life as well as in other areas, and the dreaded term 'cancel culture' has entered our lexicon. Gráinne's experience has been very positive, and perhaps characteristically, she chooses to see the positives in the desire so often at the root of these debates, to represent marginalised groups better, and to address unconscious bias in academia, and in society: "I've been very lucky. Academically, we're given a huge amount of intellectual freedom and freedom to do our research, to teach what we like. There are very active debates at the moment about all kinds of issues around identity, around academic freedom, around the political polarisation here in the US. Certainly, you have to question yourself a lot more, pause before you speak, be really careful about stereotypes, about offending people. I can see it sometimes gets out of hand and there have been some really unfortunate events, but some of the heightened awareness isn't bad. You become more aware that there is often prejudice or stereotyping behind the way we're speaking and thinking. As we've said so many times, it's complex".

International family

Gráinne lives in New York City with her husband Philip, who is Australian, and their two sons Seán (16) and Ross (18). Since the start of the pandemic, they've been doing a lot of exercise, taking daily walks around Manhattan and getting to know all sorts of nooks and crannies of the city, which she says has been fun. Apart from that, her leisure activities include 'reading' books on Audible, and going to the theatre and cinema very regularly (albeit with masks on these days).

Clarity on defamation

Recent case law offers clarity in the interpretation of defamation legislation.

Karl Shirran BL

Two recent cases of the High Court provide clarity in interpreting the test for injunctive relief provided for in section 33 of the Defamation Act 2009 (the 2009 Act), as well as providing useful additional analysis. Before turning to the two cases, this article will briefly consider the introduction of the 2009 Act and its interpretation since enactment.

Background

Section 33 of the 2009 Act, as set out below, contains the statutory test for any court to consider in determining whether (or not) to grant injunctive relief in defamation cases:

33. Order prohibiting the publication of a defamatory statement

(1) The High Court, or where a defamation action has been brought, the court in which it was brought, may, upon the application of the plaintiff, make an order prohibiting the publication or further publication of the statement in respect of which the application was made if in its opinion –

(a) the statement is defamatory, and
(b) the defendant has no defence to the action that is reasonably likely to succeed.

(2) Where an order is made under this section it shall not operate to prohibit the reporting of the making of that order provided that such reporting does not include the publication of the statement to which the order relates.

(3) In this section "order" means –

(a) an interim order,
(b) an interlocutory order, or
(c) a permanent order.

In essence, section 33 codified the test at common law in Ireland for granting injunctive relief in defamation cases. A number of observations can be made in respect of this section. Section 33 leaves a residual discretion with a court to refuse relief sought despite the satisfying of the legislative criteria, as indicated by the word 'may' contained therein. Maher in *The Law of Defamation* draws attention to the historic Irish approach compared with that of the UK. Previously, Irish case law would have considered the criteria contained in section 33 in unison with the requirements for injunctive relief more generally,[1] whereas the UK approach considers injunctive relief in the defamation context through the prism of a distinct and separate test.[2] Further, Cox and McCullough in *Defamation Law and Practice*, point to *Greene v Associated Newspapers*[3] as suggesting that a more onerous test applies in the UK as compared with section 33.[4]

Despite the benefit and clarity that codification provides, section 33 has remained silent in a number of important respects. In *Philpott v Irish Examiner Ltd*,[5] Barrett J. held that it would be "thoroughly illogical" for the defendant to carry the burden of showing an allegation as defamatory, even though the Act neglects to state this expressly. And while it is clear that the overall burden of proving an interlocutory application seeking injunctive relief falls on the applicant, section 33 1(b) is also silent as to which party carries the burden to prove no defence to an action is reasonably likely to succeed. Barrett J. makes clear that a court should be slow to intrude upon a determination that will be made at trial and thus the benefit of any doubt be given the defendant.[6] In practice, there is no undue burden placed on a defendant beyond indicating a defence and showing some basis for the plea by way of affidavit.

In *Muwema v Facebook Ireland Ltd*,[7] interlocutory injunctive relief was refused relating to an unidentifiable individual Facebook account that

was publishing unarguably defamatory statements against the applicant. The applicant was an African lawyer practising from a prestigious Ugandan law firm accused of accepting bribes, staging a break-in of his law firm with the intention of jeopardising a presidential election, and being under constant armed guard. The refusal (in part) was due to the defendant being unidentifiable and as a direct consequence not participating in the matter or presenting a defence via affidavit in the High Court. It can be suggested that for an unidentified defendant to get such a considerable benefit of doubt in the context of particularly damaging imputations is less than satisfactory. Indeed, Binchy J. points to the potential lacuna contained in section 33, where a defamed applicant is left without remedy "unless the author is identifiable and amenable to the jurisdiction of the court".[8] Further, he acknowledges the uncertainty as to whether injunctive relief can be granted outside the strictures of section 33 of the 2009 Act, which the common law provided for heretofore.[9]

Gilroy v O'Leary

The case of *Gilroy v O'Leary*[10] (Gilroy) involved the lay litigant, Ben Gilroy, seeking an interlocutory injunction pursuant to section 33 of the 2009 Act, alleging that a homemade video of the defendant had wrongly linked the applicant with a group called The Sovereign Movement and by consequence suggested the applicant's support for MMS, a discredited belief concerning the health benefits of mixing sodium chlorite with citric acid to treat a broad spectrum of illnesses and conditions. While the applicant denied any knowledge or connection with The Sovereign Movement, he sought the injunction based on his alleged support for the use of MMS. The relief sought was refused as the test per section 33 of the 2009 Act was not met.

As outlined above, Section 33 (1) of the 2009 Act requires a court to be satisfied of two criteria: (a) that in its "opinion" the statement is defamatory; and, (b) that the defendant has "no defence" that "is reasonably likely to succeed".

Cases prior to the enactment of the 2009 Act were consistent in holding that an injunction seeking to restrain publication (or republication) prior to trial would require an applicant to show a clear defamation. In practice, such orders granting prior restraint of publication are a rarity. In *Reynolds v Malocco*,[11] Kelly J., referring to the words complained of, makes clear that there must be "no doubt but that they are defamatory".[12] In *Cogley v Radio Telefís Éireann*,[13] Clarke J. (as he then was), referring to *Reynolds* as the high-water mark for an applicant seeking injunctive relief, also cites the seminal case of *Sinclair v Gogarty*, which held that an injunction would only be granted in "the clearest cases".[14]

Cox and McCullough consider section 33 of the 2009 Act and whether it constitutes a less strict (or less stringent) test than that applied by the common law to date.[15] The learned authors note the court must be "of the opinion" that the statement is defamatory.[16] Furthermore, the second part of the test makes reference to "no defence" being "reasonably likely to succeed",[17] both possibly suggesting a test somewhat less exacting in nature. Indeed, perhaps more surprisingly, Barrett J. in *Philpott* suggests that section 33 might give rise to a stricter test on the basis that subsection (1)(b) requires a court to be satisfied that no defence "is" reasonably likely to succeed.[18]

Allen J., in analysing section 33, makes several useful points. First, he cannot envisage anything that is suggestive of a different standard between the word "is" contained in section 33 and comment that is "unarguably" defamatory (the position of the common law as stated by Barrett J. in *Philpott*).[19] Secondly, he rejects the potential for a court to be of an opinion but not "sufficiently confident" of an opinion to "wield the hammer of injunctive relief" as proposed in *Philpott*,[20] the Court noting that in the assessment of the *Campus Oil* or *Maha Lingham* tests, either the test is met or not.[21] Courts do not go beyond the scope of either test in determining whether it should apply. Finally, the Court holds that section 33 of the 2009 Act was not introduced to be interpreted by reference to a pre-existing test at common law (whether stricter or lesser in nature).[22] The clarity provided by the High Court in this judgment concerning the proper interpretation of section 33 is commendable.[23]

Lidl v Ireland

In *Lidl Ireland GMBH v Irish Farmers Association, Tim Cullinan, and Brian Rushe*[24] (*Lidl*), the applicant sought and was refused an interlocutory injunction preventing further publication (or republication) of two different adverts. The first was published on March 14, 2021, in the *Sunday Independent* and *Irish Farmers Journal (IFJ)*, and the second on March 18, 2021, solely in the *IFJ*. Both adverts were published on the *IFJ* website subsequently. Furthermore, the general thrust of that claimed in each advert was repeated in various radio and print interviews and published on other websites thereafter. The applicant suggested that the adverts gave rise to three broad and distinct claims. These could be distinguished as follows: (1) the applicant's own-brand milk is not Irish despite their claiming to the contrary; (2) the applicant is engaged in unlawful or misleading practices; and, (3) the applicant has misled the public as to the origin of its products.[25] Considerable analysis and debate centred around what was meant by the term "Irish": whether that referred to a product's origin or both origin and processing; whether the applicant was benefiting in marketing "phantom" local creameries and farms as producing its products; and, further, whether customers were confused by the foregoing. The respondent, in support of its case, presented an online survey completed by 733 adults over the period of one week, which it was claimed demonstrated considerable confusion for consumers around the applicant's labelling and marketing of products.[26] Ultimately, the respondents contested the meaning attributed to the relevant adverts by the applicant, suggesting that their principal concern with the applicant's adverts is whether customers are being misled and/or whether grounds exist for investigating same. In any event, they indicated their preparedness to stand over the truth of the allegations.[27]

Despite section 33 of the 2009 Act not expressly stating which party shoulders the burden under the provision, Allen J. emphasises that on applications "such as this the onus is on the plaintiff and the issue is not

whether the defendants have a defence but whether it has been shown that they do not".[28] It is clear that evidence introduced by the defendants must be examined in light of its credibility "which, if accepted, would allow a correctly instructed jury to find that the statements complained of were true".[29] Thus, as already suggested above, while the burden under section 33 ultimately falls on the applicant to discharge in showing a clearly defamatory statement and/or no defence being likely to succeed at trial, the defendant must put forward the basis by which they meet the case in the same way required prior to the introduction of the 2009 Act. Vague or bald assertions by way of defence that may be advanced at trial can likely result in a court ordering pre-publication interlocutory injunctive relief. This approach is consistent with the Law Reform Commission's recommendation on injunctive relief in defamation cases. The Commission was against a court blindly accepting a defence as existing once raised in response to an application seeking injunctive relief.[30]

In *Lidl*, the defendants referred to a report by the economist Jim Power, as well as market research undertaken by the IFA in the form of an online survey, as evidence in support of their case. In determining the weight to be given survey evidence, Allen J. cites the Court of Appeal in *Galway Free Range Eggs Limited v O'Brien*.[31] Costello J. for the Court of Appeal in *Galway Free Range Eggs* acknowledges that survey evidence can be considered in interlocutory applications, with the weight to be attached to such evidence dependent on three factors. These are: (1) whether the relevant subset of society was surveyed; (2) the methodology employed by the survey; and, (3) whether the results can be tested or cross-examined.[32] In *Lidl*, the Court notes that while a wide demographic was surveyed and the results showed the potential for confusion on the part of consumers generally, weaknesses in the methodology include the answers being circumscribed as opposed to open ended, and a general cross-section of society relied on, by comparison to a sample composed of Lidl customers alone.[33] Nonetheless, the Court took the view that the defendants had a *bona fide* case to make based on the evidence presented.[34]

Outstanding issues

Outstanding issues remain after the decisions in *Gilroy* and *Lidl*. First, it is not entirely clear whether section 33 of the 2009 Act, codifying former common law principles, restricts the equitable jurisdiction of the courts where pre-publication (or republication) injunctive relief is sought. For instance, must both arms of the statutory test in section 33 be met before any other relevant criteria be considered in a case concerning the said relief? We see this concern raised by Binchy J. in *Muwema* referred to above. Will the courts be increasingly reluctant to disregard a clear statutory test despite other criteria more pertinent to the facts of a case? What of a set of facts where damages are not adequate or cannot be met on the part of a defendant? Arguably, this was just as relevant to the test at common law. In this respect, the facts of the seminal case of *Reynolds* are particularly noteworthy. *Reynolds* concerned two broad claims made by the defendants in an article for *Patrick* magazine, that: (1) the applicant nightclub owner knew drugs were being sold at his Dublin nightclubs and/or was prepared to turn a blind eye and benefited therefrom; and, (2) he was a homosexual man referred to as a "gay bachelor". Despite not accepting the applicant's interpretation of the publication, the defendants indicated their preparedness to argue justification for the first claim. No such defence was advanced for the second claim. It is evident that Kelly J. considered the fact that the defendant would not be a mark for costs, the reality of the applicant's prior convictions for offences of dishonesty and his owing substantial liabilities, in the likely event that the applicant won, as determinative factors in granting an interlocutory injunction, although the common law test (as it then was) was satisfied in the case.[35] Allen J. questions the logic of a defendant's impecuniosity being a determinative factor in granting or refusing to grant injunctive relief in defamation cases.[36] It will be interesting to see exactly how a future case based on similar facts to *Reynolds* (whether the statutory test is met or not) might be dealt with under section 33 of the 2009 Act.

Interestingly, in *Lidl*, the judgment is suggestive of the statutory "threshold" having to be met before the issues of adequacy of damages and/or a court's discretion arise. The Court states:

"The plaintiff having failed to meet the threshold test for an order under s. 33 of the Act of 2009, the issues as to the adequacy of damages and the exercise of the court of its discretion as to whether there should be an injunction do not arise".[37]

Both parties in *Lidl* addressed the issues of adequacy of damages, whether damages were calculable, and whether the defendants could meet any award made, despite the High Court viewing the arguments as irrelevant.[38]

Secondly, the distinction between prior restraint injunctive relief sought in defamation cases compared with the same relief sought in cases of malicious falsehood could be considered arbitrary. Maher suggests that courts would be unlikely to grant injunctive relief in cases of malicious falsehood, as the cause of action is concerned with recouping calculable financial loss to a person, their trade or business.[39] Thus, the argument goes, damages for malicious falsehood will always be adequate. Whether that distinction is justified, manifesting in two distinct legal tests, in cases concerning a slur on a person's character, is worthy of consideration.

Finally, Allen J. in *Lidl* suggests that the heretofore "common law rule" of damages being the normal remedy for defamation instead of injunctions, may have to be "revisited" given the focus of the 2009 Act and the various remedial orders contained therein. It is clear from section 28 of the 2009 Act as applying to the jurisdiction of the Circuit Court, that any declaratory order pursuant to the section can be made together with a corrective order and/or injunction (but cannot include an award of damages). Section 28 (4) also expressly prohibits any other "proceedings in respect of any cause of action arising out of the

statement" to which the section 28 application relates. However, contrary to that analysis, it could be argued that any award of damages has the effect of safeguarding a reputation that has been lowered in the eyes of the public.

Furthermore, many plaintiffs taking defamation actions will not seek to rely on section 28 of the 2009 Act. Perhaps legislative amendment could provide for potential damages awards alongside any declaratory order up to the Circuit Court threshold of €75,000 (or less).[40] In this way, the section 28 declaratory order for many smaller defamation claims may become a more attractive remedy, potentially facilitating earlier resolution of disputes. This could be viewed as akin to the £10,000 damages threshold for summary disposal of defamation proceedings under the English Defamation Act 1996, which is not provided for in the 2009 Act.

References

1. Maher, J. *The Law of Defamation (2nd ed.)*. Round Hall, Dublin, 2018, at p.388.
2. *Ibid.*, at p.385.
3. *Greene v Associated Newspapers* [2005] 1 All ER 30; [2004] EWCA Civ 1462.
4. Cox, N., McCullough, E. *Defamation Law and Practice*. Clarus Press, Dublin, 2014, at p. 441.
5. *Philpott v Irish Examiner Ltd* [2018] 3 IR 565; [2016] IEHC 62.
6. *Ibid.*, p.583. Cox and McCullough at pp.439-440 make the same point.
7. *Muwema v Facebook Ireland Ltd* [2018] IEHC 519.
8. *Ibid.*, at para 65.
9. *Ibid.* Also, in *Muwema* additional articles were searchable on the internet outlining the same allegations against the applicant, which made the ordering of injunctive relief pointless.
10. *Gilroy v O'Leary* [2019] IEHC 52.
11. *Reynolds v Malocco* [1999] 2 I.R. 203; [1998] IEHC 175.
12. *Ibid.*, pp.209-210.
13. *Cogley v Radio Telefís Éireann* [2005] 4 I.R. 79; [2005] IEHC 180.
14. *Ibid.*, p.85. See *Sinclair v Gogarty* [1937] I.R. 377.
15. Cox and McCullough, at p.436.
16. *Ibid.* However, the learned authors acknowledge that in practical terms little difference is likely to arise. Also, at p.437 of *Defamation Law and Practice* it is acknowledged that the test in section 33 is closer to *Maha Lingham* than *Campus Oil*.
17. It is clear that the second part of the test refutes the application of *Bonnard v Perryman* [1891] 2 ChD 269, in the same way as the common law had in Ireland prior to the enactment of the 2009 Act. *Bonnard* effectively meant that a court would not grant an interlocutory injunction if the defence of justification was raised by a defendant and a court was not satisfied that the defendant would not be able to prove the defence. Only cases of evident libel allowed for the grant of an injunction, where if a jury failed to find the words complained of libellous, a court would set the verdict aside as unreasonable.
18. *Philpott* at p. 581. It should be noted in *Lowry v Smyth* [2012] 1 I.R. 400; [2012] IEHC 22 at p.410, Kearns P. held that the phrase in section 34 (the same as section 33) of the 2009 Act of "reasonably likely to succeed", was akin to the test applicable for applications for summary judgment. This was cited with approval by Allen J. in *Gilroy* at paras 46-48.
19. *Gilroy* at para 24.
20. *Ibid.*, at para 25.
21. *Ibid.*
22. *Ibid.*, at para 28.
23. As an aside, Allen J. at para 55 of the judgment held that the standard applicable pursuant to the respective tests found in sections 28, 30, 33 and 34 of the 2009 Act "is the same for all four" despite references to different words, such as "satisfied", "finding" or "opinion".
24. *Lidl Ireland GMBH v IFA, Tim Cullinan, and Brian Rushe* [2021] IEHC 381.
25. *Ibid.*, at para 9.
26. *Ibid.*, at paras 60-63.
27. *Ibid.*, at para 25.
28. *Ibid.*, at para 53.
29. *Ibid.*, at para 55.
30. Law Reform Commission. Report on The Civil Law of Defamation (LRC 38 – 1991), p. 69.
31. *Galway Free Range Eggs Limited v O'Brien* [2019] IECA 8.
32. *Lidl* at para 59. See *Galway Free Range Eggs Limited v O'Brien* [2019] IECA 8 at para 45.
33. *Ibid.*, at para 64.
34. *Ibid.*, at para 65.
35. Kirwan, B. *Injunctions: Law and Practice (3rd ed.)*. Round Hall, Dublin, 2020, at pp.955-956 agrees with the analysis that the High Court relied on its discretion in granting an injunction in *Reynolds*. *Stanley v Cullen* [1926] 1 I.R. 73 is a case where the common law test for prior restraint of speech was not met but injunctive relief was nonetheless granted. The Supreme Court decided to grant an injunction on the grounds of its discretion. The Court determined that evidence provided by the defendant was supported by "the baldest affidavit", though not entirely sure there was no possibility of a successful defence to the claim at trial should additional evidence be provided. The plaintiff was an election candidate for the Irish Labour Party, meaning that the claim levelled against him by the defendant, that he acted as a "scab" who crossed picket lines during a bakers' strike, had a considerable public interest element on the one hand, with the ability to impart very real harm to his chances of election on the other hand. Arguably, damages would have proved an entirely inadequate remedy in the case. Furthermore, Cox and McCullough at p.439 criticise the judgment of Hedigan J. in *Evans v Carlyle* [2008] 2 I.L.R.M. 359; [2008] IEHC 143, where an injunction was granted for a continuing publication on the gable wall of a house, despite the High Court taking the view that the defence of truth might reasonably succeed. The learned authors suggest that post the 2009 Act, "it seems clear that relief could not be granted".
36. *Lidl* at para 71.
37. *Ibid.*, at para 66.
38. *Ibid.* It is clear from *Cogley* that where an injunction is sought in an action that includes a claim for breach of privacy, a balancing of competing rights will occur, with a focus on the type of information, how the information was obtained, the public interest in receiving the information, and the adequacy of damages.
39. Maher, at p.497.
40. *Ibid.*, at p.428.

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

Volume 27 Number 1
February 2022

A directory of legislation, articles and acquisitions received in the Law Library November 11, 2021, to January 14, 2022. Judgment information supplied by Justis Publishing Ltd.

Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.

ANIMALS

Statutory instruments

Avian influenza (restriction on assembly of live birds) regulations 2021 – SI 592/2021
Avian influenza (biosecurity measures) regulations 2021 – SI 593/2021
Avian influenza (precautionary confinement of birds) regulations 2021 – SI 607/2021
Avian influenza (temporary measures) regulations 2021 – SI 609/2021
Avian influenza (temporary measures) (no. 2) regulations 2021 – SI 618/2021
Avian influenza (temporary measures) (no. 2) (amendment) regulations 2021 – SI 622/2021
Avian influenza (temporary measures) (no. 2) (second amendment) regulations 2021 – SI 641/2021
Avian influenza (temporary measures) (no. 4) regulations 2021 – SI 658/2021
Avian influenza (temporary measures) (no. 4) regulations 2021 – SI 658/2021
Avian influenza (temporary measures) (no. 5) regulations 2021 – SI 672/2021
Avian influenza (temporary measures) (no. 6) regulations 2021 – SI 698/2021
Avian influenza (temporary measures) (no. 7) regulations 2021 – SI 734/2021
Horse and greyhound racing fund regulations 2021 – SI 739/2020
Avian influenza (temporary measures) (no. 7) (amendment) regulations 2021 – SI 768/2021
Avian influenza (temporary measures) (no.7) (second amendment) regulations 2021 – SI 769/2021
Avian influenza (temporary measures) (no.7) regulations 2021 (amendment) regulations 2022 – SI 2/2022

ARBITRATION

Library acquisitions

Klasener, A. *The Guide to Evidence in International Arbitration*. United Kingdom: Law Business Research Ltd, 2021 – N398.8
Schill, S. *International Council for Commercial Arbitration Yearbook Commercial Arbitration, Volume XLVI – 2021*. The Netherlands: Kluwer Law International, 2021 – N398.3

Articles

Burke, J. Judicial review of the adjudication process. *Construction, Engineering and Energy Law Journal* 2021; 1: 11-21
Morgan, K. The primacy of impartiality and the duty to disclose: Halliburton simpliciter. *Construction, Engineering and Energy Law Journal* 2021; 1: 3-10
Ritchie, J., Lavelle, I., O Lionaird, C. "Smash and grab" adjudication in Ireland? *Construction, Engineering and Energy Law Journal* 2021; 2: 4-9

BANKING

Interlocutory orders – Receiver – Mortgagee's agent – Plaintiff seeking a series of interlocutory orders restraining the defendant from interfering with the plaintiff in carrying out his functions and duties as receiver and mortgagee's agent – Whether the case was an attempt to use an interlocutory injunction as a means of attempting to obtain summary judgment – [2021] IEHC 746 – 30/11/2021
Charleton v Hassett

Statutory instruments

National Treasury Management Agency (Amendment) Act 2014 (commencement) order 2021 – SI 608/2021
Central Bank (Supervision and Enforcement) Act 2013 (section 48) (housing loan requirements) (amendment) regulations 2019 – SI 666/2021

BANKRUPTCY

Bankruptcy – Adjudication – Adjournment – Petitioning creditors seeking to adjudicate the debtor bankrupt – Whether there was a compelling basis for an adjournment – [2021] IEHC 767 – 10/12/2021
Beacon Capital Ltd and Baker v Carew
Bankruptcy – Protective certificate – Acknowledgement of debt – Appellant seeking to dismiss the bankruptcy summons and the order adjudicating the appellant a bankrupt – Whether the trial judge was entitled to have regard to a protective certificate as an acknowledgement of debt – 2021] IECA 292 – 03/11/2021
Ennis Property Finance DAC/Pepper Finance Corporation (Ireland) DAC v McLaughlin

BUILDING LAW

Articles

Darling, P. The start of a construction dispute – strategies and lines to take. *Construction, Engineering and Energy Law Journal* 2021; 2: 11-14
Kearney, S. Modern Methods of Construction (MMC) – the benefits of construction in Ireland. *Construction, Engineering and Energy Law Journal* 2021; 2: 16-20
O'Higgins, N. Construction law update: when can a dispute under a collateral warranty be referred for statutory adjudication? *Construction, Engineering and Energy Law Journal* 2021; 2: 22-24

CHARITY

Statutory instruments

Value-Added Tax (refund of tax) (charities compensation scheme) order 2018 – SI 580/2018

CHILDREN

Acts

Child and Family Agency (Amendment) Act 2021 – Act 34/2021 – Signed on November 24, 2021

Statutory instruments

Child and Family Agency (Amendment) Act 2021 (commencement) order 2021 – SI 697/2021

COMMERCIAL LAW

Articles

Hyland, K.P. Execution of judgments: judgment debts and judgment mortgages as perceived security. *Commercial Law Practitioner* 2021; 28 (11): 215-219

Statutory instruments

Legal metrology (general) (amendment) regulations 2021 – SI 584/2011

COMPANY LAW

Debt – Personal guarantee – Liabilities – Plaintiff seeking to enter judgment against the second defendant – Whether the plaintiff had made out a case for the reduced balance referred to in the credit manager's affidavit – [2021] IEHC 764 – 02/12/2021
BWG Foods Unlimited Company T/A Value Centre v Donmour Vending Ltd and James Seymour
Petition – Wind up – Company – Petitioner seeking to wind up company – Whether the company was unable to pay its debts – [2021] IEHC 701 – 10/11/2021
Kilcurrane Business Centre Ltd, In re

Articles

Anders, T. The potential impact of the Okpabi case on the future of the duty of care for parent companies. *Irish Law Times* 2021; 39 (19): 283-288

Statutory instruments

Companies (Rescue Process for Small and Micro Companies) Act 2021 (commencement) order 2021 – SI 673/2021
Companies Act 2014 (fees) (no. 2) regulations 2021 – SI 674/2021
Companies Act 2014 (prescribed form and notice) regulations 2021 – SI 675/2021
Companies Act 2014 (section 897) order 2021 – SI 676/2021
Industrial and Provident Societies Act 1893 (section 14A(1)) (Covid-19) (no. 2) order 2021 – SI 724/2021
Companies Act 2014 (section 12A(1)) (Covid-19) (no. 2) order 2021 – SI 725/2021

COMPETITION LAW

Articles

Carroll, N.J. Mergers and acquisitions in the data age – considering the recent decision in Google/Fitbit with reference to Apple/Shazam. *Irish Journal of European Law* 2021; 23 (1): 278-288
O'Keeffe, S. Transposing ECN+: for some a formality, for others fundamental change. *Irish Journal of European Law* 2021; 23 (1): 249-275

CONSTITUTIONAL LAW

Election – Seanad Éireann – Legislation – Plaintiff seeking a declaration that Irish law is inconsistent with the defendants' obligations under the European Convention on Human Rights – Whether the system for the election of the 43 vocational panel senators, as provided for in the Seanad Electoral (Panel Members) Act 1947, and the system for the election of the six university panel senators, as provided for in the Seanad Electoral (University Members) Act 1937, are invalid – [2021] IEHC 716 – 17/11/2021
Heneghan v The Minister for Housing, Planning and Local Government, The Government of Ireland, The Attorney General and Ireland

Articles

Sullivan, G. Covid-19 restrictions and the free practise of religion in Ireland. *The Bar Review* 2021; 26 (4): 131-135

CONSUMER LAW

Articles

Corcoran, D. An examination of consumer and SME credit, with a particular focus on the growth and regulation surrounding crowdlending and peer-to-peer lending platforms. *Commercial Law Practitioner* 2021; 28 (11): 220-225
Mansfield, C. Come together now: recent developments in collective redress in England and Wales. *Irish Journal of European Law* 2021; 23 (1): 201-217
Meiselles, M. Food for thought – empowering consumers: a critique of EU food labelling law. *Irish Journal of European Law* 2021; 23 (1): 61-86

COPYRIGHT

Articles

Kelly, C., Dr, Kolawole, O. Artificial intelligence as an "inventor" in patent law. *Commercial Law Practitioner* 2021; 28 (10): 199-205

COSTS

Security of costs – Lease agreement – Litigation – Parties seeking security of costs – Whether the plaintiff was likely to be able to pay the defendant's legal costs – [2021] IEHC 706 – 12/11/2021
Airscape Ltd v Instant Upright Ltd
Leave to amend pleadings – Costs – Delivery of defence – Plaintiff seeking costs – Whether the costs of the application to amend pleadings should be made costs in the cause or be reserved to the trial judge – [2021] IEHC 751 – 07/12/2021
Carey v Sweeney (Trading as Paul Sweeney Financial Services) Cantor Fitzgerald Ireland Ltd
Costs – Personal injury – Want of jurisdiction – Second defendant seeking costs – Whether costs should follow the event – [2021] IEHC 721 – 18/11/2021
Crotty v SAS, AB and Swedavia AB
Costs – False imprisonment – Damages – Appellants contesting the provisional view that the respondent should recover all his costs of the appeal – Whether the appellants were entitled to a deduction on the costs awarded to the respondent to reflect the fact that the respondent brought, and failed in relation to, his own cross appeal – [2021] IECA 299 – 10/11/2021
G.E. v The Commissioner of An Garda Síochána, The Governor of Cloverhill Prison, The Minister for Justice and Equality, The Attorney General and Ireland
Costs – Procedural error – Amendment – Defendants seeking costs – Whether there was fault on both sides – [2021] IEHC 795 – 21/12/2021
Generator Source Ltd Liability Partnership (Trading as Diesel Service and Supply) v Igstsp Ltd (Trading as 360 Turbines) Tasiast Mauritanie Ltd Société Anonyme Kinross Gold Corporation
Costs – Measurement – Jurisdiction – Notice party seeking costs – Whether the jurisdiction of the Court of Appeal to measure costs has been ousted by virtue of the coming into force of the Legal Services Regulation Act 2015 – [2021] IECA 262 – 15/11/2021
L.M. v Niall Rooney County Registrar of Waterford, sitting as County Registrar of Cork (sitting as Taxing Master)
Costs – Interlocutory injunction – Disciplinary hearing – Plaintiff seeking costs – Whether costs should follow the event – [2021] IEHC 810 – 17/12/2021
Lally v Board of Management of Rosmini Community School
Judicial review – Procedure – Costs – Parties seeking costs – Whether the general rule was displaced because much of the costs were attributable to a procedural issue upon which the respondents were unsuccessful – [2021] IEHC 711 – 22/11/2021
Murphy v Chief Appeals Officer (Social Welfare Appeals Office), Minister for Employment Affairs and Social Protection
Judicial review – Costs – Proportion – Appellant appealing against award of costs – Whether costs should follow the event – [2021] IECA 252 – 07/10/2021
Nemeth v Topaz Energy Group Ltd
Judicial review – Delay – Costs – Respondent seeking costs – Whether the applicant had been partially successful in the proceedings – [2021] IEHC 753 – 10/12/2021
Roche v Teaching Council of Ireland
Costs – Exclusion of witness – Commercial litigation – Parties seeking costs – Whether costs should follow the event – [2021] IESC 76 – 10/11/2021
Sweeney and The Limerick Private Ltd v The Voluntary Health Insurance Board Ireland
Costs – Public interest – Charitable purposes – Respondent seeking costs – Whether the appeal had a sufficient element of public interest to warrant the court departing from the usual order that costs should follow the event – [2021] IEHC 646 – 12/10/2021
Tearfund Ireland Ltd v Commissioner of Valuation

Library acquisitions

Cook, M.J., Middleton, S., Rowley, J. *Cook on Costs 2022: A Guide to Legal Remuneration in Civil Contentious and Non-Contentious Business*. London: Butterworths LexisNexis, 2021 L89

COURTS

Library acquisitions

Warnock, C. *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy*. Oxford: Hart Publishing, 2020 – L220

Articles

MacGuill, C. Courting change. *Law Society Gazette* 2021; (December): 46-49

Statutory instruments

Rules of the Superior Courts (service in wardship proceedings) 2021 – SI 600/2021

CRIMINAL LAW

Sentencing – Sexual assault – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2021] IECA 294 – 21/10/2021
DPP v A.C.
Crime and sentencing – Sexual offences – Indecent assaults – Appeal against conviction – Amendments to indictment – [2021] IECA 348 – 21/12/2021
DPP v C.K.
Crime and sentencing – Non-fatal offences against the person – Burglary and false imprisonment – Appeal against severity of sentence – [2021] IECA 304 – 08/11/2021
DPP v Daly
Crime and sentencing – Sexual offences – Indecent assaults – Offences against pupils – Appeal against conviction – [2021] IECA 324 – 25/11/2021
DPP v Harte
Acquittal – Sexual exploitation of a child – Question of law – Appellant referring a question of law pursuant to s. 34 of the Criminal Procedure Act 1967 – Whether the offence of sexual exploitation of a child was not a standalone offence but rather required proof that the complainant had been trafficked – [2021] IECA 308 – 18/11/2021
DPP v L.S.
Conviction – Murder – Conduct of legal team – Appellant seeking to appeal against conviction – Whether the appellant's legal team acted contrary to his instructions – [2021] IECA 343 – 21/12/2021
DPP v Lammon
Sentencing – Drug offence – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2021] IECA 281 – 19/10/2021
DPP v Lawlor
Conviction – Obstruction – Case stated – Appellant appealing against the judgment and order of the High Court – Whether the trial judge erred in law by finding that the Gardaí do not have a common law power of entry to effect an arrest for a breach of the peace contrary to common law – [2021] IECA 290 – 28/10/2021
DPP v O'Brien
Crime and sentencing – Sexual offences – Sexual exploitation of a child – Appeal against leniency of sentence – [2021] IECA 313 – 15/11/2021
DPP v O'Regan
Conviction – Murder – Unfair trial – Appellant seeking to appeal against conviction – Whether the trial was unfair – [2021] IECA 306 – 16/11/2021
DPP v Quirke
Crime and sentencing – Sexual offences – Rape – Appeal against conviction – Disclosure of relevant evidence – [2021] IECA 347 – 21/12/2021
DPP v S.Q.
Prosecutions – Criminal damage – Delay – Applicants seeking an order of prohibition preventing the further prosecution of the applicants – Whether the prosecution of the applicants was invalid – [2021] IEHC 819 – 05/11/2021
Ward v The Judges of the Dublin Circuit Criminal Court

Library acquisitions

Lucraft, M. (ed.). *Archbold: Criminal Pleading, Evidence and Practice 2022*. London: Sweet & Maxwell, 2022. First supplement to the 2022 edition up-to-date to 03 September 2021 – M500
Baker, D. *Glanville Williams & Dennis Baker Treatise of Criminal Law (5th ed.)*. United Kingdom: LexisNexis Butterworths, 2021 – M500
Ormerod, D., Perry, D., Lucraft, M. *Blackstone's Criminal Practice 2022 (14th ed.)*. Oxford: Oxford University Press, 2021 – M500

Articles

Buckley, S. Does Ireland have a divergent criminal justice system? A preliminary cross-sectoral analysis of punitiveness in the adult and youth criminal justice sectors in Ireland, 1990-2015. *Irish Criminal Law Journal* 2021; 31 (4): 99-107
Kane, S., Dr. Legislating for hate crime in Ireland. *Irish Criminal Law Journal* 2021; 31 (4): 89-98
Little, C. Getting the balance right. *Law Society Gazette* 2021; (December): 54-57

Acts

Criminal Justice (Smuggling of Persons) Act 2021 – Act 42/2021 – Signed on December 15, 2021

Statutory instruments

Criminal Justice (Terrorist Offences) Act 2005 (section 42) (restrictive measures concerning certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida Organisations) (no. 4) regulations 2021 – SI 687/2021
Criminal Evidence Act 1992 (section 13) (commencement) order 2021 – SI 693/2021
Criminal Justice (Victims of Crime) Act 2017 (commencement) order 2021 – SI 694/2021

DAMAGES

Personal injuries – Damages – Negligence – Appellant seeking damages – Whether the appellant's action required a Personal Injuries Assessment Board authorisation prior to issuing proceedings – [2021] IECA 297 – 09/11/2021
Creedon v Depuy International Ltd
Compensation – Damages – Loss of opportunity – Applicant seeking compensation – Whether a claim arose – [2021] IEHC 652 – 30/07/2021
Ryan v The Minister for Public Expenditure and Reform
Damages – Road traffic accident – Liability – Plaintiff seeking damages – Whether the defendants were liable – [2021] IEHC 689 – 17/10/2021
Ryan v O'Sullivan
Framework agreement – Suspension – Damages – Appellant appealing from the judgment and order granting an application by the respondent for an order permitting the respondent to conclude a Multi-Supplier Framework Agreement for the provision of Irish language translation services – Whether the trial judge ought to have found that damages would be an inadequate remedy for the appellant – [2021] IECA 305 – 12/11/2021
Word Perfect Translation Services Ltd v The Minister for Public Expenditure and Reform

Articles

Crowe, P. Non-material damage and representative actions in data protection law. *The Bar Review* 2021; 26 (4): 112-116

DATA PROTECTION

Articles

Costello, R.Á. EU laws governing data retention in Graham Dwyer v Commissioner of An Garda Síochána. *Irish Journal of European Law* 2021; 23 (1): 119-143
Duff, C. Discovery and DSARs – trends, reform and motivations. *The Bar Review* 2021; 26 (4): 117-120

DEFAMATION

Defamatory meanings – Strike out – Defamatory imputations – Defendant seeking to strike out various defamatory meanings – Whether the defamatory meanings were reasonably capable of bearing the defamatory imputations contended for by the plaintiff – [2021] IEHC 743 – 26/11/2021
O'Brien v Independent Star Ltd

DISABILITY

Statutory instruments

Disability (assessment of needs, service statements and redress) (amendment) regulations 2021 – SI 704/2021
Disability Act 2005 (commencement) order 2022 – SI 3/2022

DISCOVERY

Discovery – Relevance – Proportionality – Appellant seeking discovery – Whether discovery sought was relevant – [2021] IEHC 773 – 10/12/2021
Bazsont Ltd Trading as Starbucks (Liffey Valley) v BVK Highstreet Retail Liffey Property Ltd

DISCRIMINATION

Articles

O'Cleirigh, J., O'Donohoe, K. Ain't no mountain high enough. *Law Society Gazette* 2021; (December): 34-37

EDUCATION

Statutory instruments

Teaching Council (registration) (amendment) (no. 2) regulations 2021 – SI 745/2021

ELECTORAL

Statutory instruments

Electoral (polling schemes) regulations 2021 – SI 648/2021

EMPLOYMENT LAW

Unfair dismissal – Procedure – Judicial review – Applicant seeking an order directing the first respondent to resume the hearing of the claim for unfair dismissal – Whether it was reasonable to direct that the fresh hearing be conducted by a different adjudication officer – [2021] IEHC 667 – 11/11/2021

Burke v an Adjudication Officer the Workplace Relations Commission

Articles

Bruton, C. Flexible working: panacea for gender equality? *The Bar Review* 2021; 26 (5): 161-164

Fanning, A. Hybrid theory. *Law Society Gazette* 2021; (December): 38-41

Fink-Samnick, E. Open the blast doors. *Law Society Gazette* 2021; (December): 22-27

Hallissey, M. The green, green grass of home. *Law Society Gazette* 2021; (December): 42-45

Statutory instruments

Sectoral employment order (construction sector) 2021 – SI 598/2021

Safety, health and welfare at work (general application) (amendment) regulations 2021 – SI 610/2021

Safety, health and welfare at work (general application) (amendment) (no. 2) regulations 2021 – SI 619/2021

Sectoral employment order (electrical contracting sector) 2021 – SI 703/2021

Director of Public Prosecutions superannuation scheme 2021 – SI 770/2021

ENERGY

Statutory instruments

Electricity Regulation Act 1999 (electricity) levy order 2021 – SI 667/2021

Electricity Regulation Act 1999 (gas) levy order 2021 – SI 668/2021

Electricity Regulation Act 1999 (LPG safety licence) levy order 2021 – SI 669/2021

Electricity Regulation Act 1999 (water) levy order 2021 – SI 670/2021

Electricity Regulation Act 1999 (petroleum safety) levy order 2021 – SI 671/2021

EQUITY AND TRUSTS

Library acquisitions

Glister, J., Lee, J. *Hanbury & Martin: Modern Equity (22nd ed.)*. London: Sweet & Maxwell, 2021 – N200

EUROPEAN UNION

Library acquisitions

Caranta, R., Sanchez-Graells, A. *European Public Procurement: Commentary on Directive 2014/24/EU*. Cheltenham: Edward Elgar Publishing Limited, 2021 – W109.6

Hondius, E., Santos Silva, M., Nicolussi, A., Salvador Coderch, P. *Coronavirus and the Law in Europe*. United Kingdom: Intersentia Publishers, 2021 – W86

Articles

Byrne, T. Eurovision. *Law Society Gazette* 2021; (December): 20-21

Gallagher, P. The constitution and the community. *Irish Journal of European Law* 2021; 23 (1): 299-318

Hennessy, D. Service of proceedings on defendants in the UK: the post-Brexit position, *Irish Journal of European Law* 2021; 23 (1): 189-200

Hogan, H. Europe's Louisiana? The sustainability of the Irish opt-out pertaining to justice and home affairs in the aftermath of Brexit. *Irish Journal of European Law* 2021; 23 (1): 27-59

Maher, I. 'The constitution and the community': a reflection. *Irish Journal of European Law* 2021; 23 (1): 295-298

Mooij, A.A.M. The European Central Bank's monetary policy and Central Bank digital currency: can the ECB lawfully introduce a digital euro under its monetary mandate? *Irish Journal of European Law* 2021; 23 (1): 163-187

Steenmans, K. A scoping review of climate finance law within the core legal acts of the EU 2030 climate and energy framework. *Irish Journal of European Law* 2021; 23 (1): 87-118

Acts

Finance (European Stability Mechanism and Single Resolution Fund) Act 2021 – Act 38/2021 – Signed on December 9, 2021

Statutory instruments

European Union (copyright and related rights in the digital single market) regulations 2021 – SI 567/2021

European Union (restrictive measures concerning Syria) (no. 2) regulations 2021 – SI 568/2021

European Union (restrictive measures concerning Sudan) regulations 2021 – SI 569/2021

European Union (restrictive measures concerning the Democratic People's Republic of Korea) regulations 2021 – SI 570/2021

European Union (restrictive measures concerning the Republic of Guinea-Bissau) regulations 2021 – SI 571/2021

European Union (restrictive measures concerning Nicaragua) regulations 2021 – SI 572/2021

European Union (restrictive measures concerning Iran) (no. 2) regulations 2021 – SI 573/2021

European Union (restrictive measures concerning the Republic of Guinea) regulations – 2021 SI 574/2021

European Union (covered bonds) regulations 2021 – SI 576/2021

European Union (common fisheries policy) (point system) (amendment) regulations 2021 – SI 590/2021

European Union (minimum safety and health requirements for improved medical treatment on board vessels) regulations 2021 – SI 591/2021

European Union (restrictive measures concerning Libya) (no.5) regulations 2021 – SI 611/2021

European Communities (road infrastructure safety management) regulations 2021 – SI 612/2021

European Union (manufacture, presentation and sale of tobacco and related products) (amendment) regulations 2021 – SI 614/2021

European Union (commercial vehicle roadworthiness) (roadworthiness certificate and roadworthiness test) regulations 2021 – SI 617/2021

European Union (roadworthiness testing) (national contact point) regulations 2021 – SI 621/2021

European Union (transport of passengers by road) regulations 2021 – SI 624/2021

European Union (marine equipment) (amendment) regulations 2021 – SI 625/2021

European Union (official controls in relation to food legislation) (imports of food of non-animal origin) (amendment) (no. 2) regulations 2021 – SI 638/2021

European Communities (pesticide residues) (amendment) regulations 2021 – SI 645/2021

European Union (restrictive measures concerning Turkey) regulations 2021 – SI 646/2021

European Union (restrictive measures concerning Belarus) (no. 4) regulations 2021 – SI 647/2021

European Union habitats (Carrowmore Point to Spanish Point and Islands special area of conservation 001021) regulations 2021 – SI 649/2021

European Union habitats (Slieve League special area of conservation 000189) regulations 2021 – SI 650/2021

European Union habitats (Slieve Tooey/Tormore Island/Loughros Beg Bay special area of conservation 000190) regulations 2021 – SI 651/2021

European Union habitats (Lough Golagh and Breesy Hill special area of conservation 002164) regulations 2021 – SI 652/2021

European Union habitats (Kilsallagh Bog special area of conservation 000285) regulations 2021 – SI 653/2021

European Union habitats (Corliskea/Trien/Cloonfelliv Bog special area of conservation 002110) regulations 2021 – SI 654/2021

European Union habitats (Ardgraigue Bog special area of conservation 002356) regulations 2021 – SI 655/2021

European Union habitats (Keeper Hill special area of conservation 001197) regulations 2021 – SI 656/2021

European Union habitats (Redwood Bog special area of conservation 002353) regulations 2021 – SI 657/2021

European Communities environmental objectives (surface waters) (amendment) regulations 2021 – SI 659/2021

European Union habitats (Slieve League special area of conservation 000189) regulations 2021 – SI 650/2021

European Communities (environmental noise) (amendment) regulations 2021 – SI 663/2021

European Union (restrictive measures concerning Belarus) (no. 5) regulations 2021 – SI 688/2021

European Communities (carriage of dangerous goods by road and use of transportable pressure equipment) (amendment) regulations 2021 – SI 711/2021

European Union (internal combustion engines for non-road mobile machinery) (gaseous and particulate pollutant emission limits and type-approval) regulations 2021 – SI 735/2021

European Union (restrictive measures concerning Ukraine) (no. 4) regulations 2021 – SI 740/2021

European Union (restrictive measures concerning Iraq) (no. 7) regulations 2021 – SI 741/2021

European Union (railway orders) (environmental impact assessment) (amendment) regulations 2021 – SI 743/2021

European Union (good agricultural practice for protection of waters) (amendment) regulations 2021 – SI 749/2021

European Communities (minimum conditions for examining agriculture plant species) (amendment) (no. 2) regulations 2021 – SI 752/2021

European Communities (minimum conditions for examining of vegetable species) (amendment) (no. 2) regulations 2021 – SI 753/2021

European Union habitats (Black Head-Poulsallagh Complex special area of conservation 000020) regulations 2021 – SI 758/2021

European Union habitats (Lough Lurgeen Bog/Glenamaddy Turlough special area of conservation 000301) regulations 2021 – SI 759/2021

European Union habitats (Rusheenduff Lough special area of conservation 001311) regulations 2021 – SI 760/2021

European Union habitats (Lough Hoe Bog special area of conservation 000633) regulations 2021 – SI 761/2021

European Union habitats (Moneybeg and Clareisland Bogs special area of conservation 002340) regulations 2021 – SI 762/2021

European Union habitats (Bellanagare Bog special area of conservation 000592) regulations 2021 – SI 763/2021

European Union habitats (Callow Bog special area of conservation 000595) regulations 2021 – SI 764/2021

European Union habitats (Drumalough Bog special area of conservation 002338) regulations 2021 – SI 765/2021

European Union habitats (Corbo Bog special area of conservation 002349) regulations 2021 – SI 766/2021

European Union habitats (Crosswood Bog special area of conservation 002337) regulations 2021 – SI 767/2021

European Union (Markets in Financial Instruments) (Amendment) Regulations 2022 – SI 6/2022

EVIDENCE

Exclusion of evidence – Statutory interpretation – Non-Fatal Offences Against the Person Act 1997 s.25 – Respondent seeking to adduce evidence of a certificate – Whether the certificate was inadmissible hearsay – [2021] IESC 74 – 03/11/2021

DPP v A.C.

Exclusion of evidence – Retrials – Acquittals – Applicant seeking an order quashing the acquittals by direction of the court of trial – Whether the court of trial erred in law in excluding "compelling evidence" within the meaning of s. 23(14) of the Criminal Procedure Act 2010 – [2021] IECA 342 – 21/12/2021

DPP v R.K.

EXTRADITION

European arrest warrant – Surrender – Postponement – Appellant appealing the order postponing the surrender of the appellant to the Republic of Lithuania – Whether the cancellation of certain flights during the course of the Covid-19 pandemic justified the postponement of the surrender of the appellant to Lithuania – [2021] IESC 80 – 13/12/2021

Minister for Justice and Equality v Sciuka

FAMILY LAW

Adoptions – Register of intercountry adoptions – Case stated – Second notice party seeking to have decrees of step-parent adoption entered onto the register of intercountry adoptions maintained by the Adoption Authority – Whether public policy concerns prevented recognition of the adoptions – [2021] IEHC 784 – 17/11/2021

A. v Adoption Authority of Ireland

Passport – Statutory interpretation –

Irish Nationality and Citizenship Act 1956 s. 7(1) – Applicants seeking an order of mandamus directing the respondent to make a decision as to whether to issue an Irish passport in respect of the third applicant – Whether the third applicant had been an Irish citizen from birth by virtue of s. 7(1) of the Irish Nationality and Citizenship Act 1956 – [2021] IEHC 785 – 02/12/2021
A., B. and C. (a minor suing by his next friend A.) v Minister for Foreign Affairs and Trade
Judicial review – Family reunification – Error of law – Applicant seeking an order of certiorari quashing the decision of the respondent refusing the applicant's application for family reunification – Whether the respondent's decision was vitiated by an error of law for failure to have regard to a relevant consideration – [2021] IEHC 774 – 08/12/2021
Axmad v The Minister for Justice
Jurisdiction – Access – Custody – Plaintiff seeking orders pursuant to the Guardianship of Infants Act 1964 – Whether the High Court had jurisdiction to deal with the matters – [2021] IEHC 775 – 28/07/2021
W.D. v M.W.

Library acquisitions

Simon, R.J., Altstein, H. *Adoption Across Borders: Serving the Children in Transracial and Intercountry Adoptions*. Washington: Rowman & Littlefield, 2000 – C100

Articles

O'Sullivan, C. Access to social welfare payments for dependent family members of EU citizens in Ireland. *Irish Journal of European Law* 2021; 23 (1): 145-161

FINANCIAL SERVICES

Articles

Murphy, T. Liability before the Financial Services and Pensions Ombudsman: a fresh look at the Ombudsman's jurisdiction in the modern banking era. *Commercial Law Practitioner* 2021; 28 (11): 226-241

Statutory instruments

Credit Guarantee Act 2012 (extension of guarantee date) order 2021 – SI 751/2021

FISHERIES

Statutory instruments

Sea-fisheries (revocation) regulations 2021 – SI 602/2021
Wild salmon and sea trout tagging scheme (amendment) regulations 2021 – SI 729/2021
Salmon rod ordinary licences (alteration of licence duties) order 2021 – SI 732/2021
Special tidal waters (special local licences) (alteration of duties) order 2021 – SI 733/2021

FREEDOM OF SPEECH

Articles

Anders, T. The conflict between the freedom of speech and intellectual property. *Irish Law Times* 2021; 39 (20): 294-300

GARDA SÍOCHÁNA

Personal injuries – Discovery – Privilege – Plaintiff challenging the claim to privilege made in an affidavit of discovery – Whether the public interest in withholding production of the garda investigation file outweighed the public interest in the due administration of justice in the context of the plaintiff's civil action – [2021] IEHC 808 – 15/12/2021
Kelly v Commissioner of An Garda Síochána, Minister for Justice and Equality and Ireland and The Attorney General

Statutory instruments

Garda Síochána (associations) (amendment) (no. 2) regulations 2021 – SI 603/2021
Garda Síochána (admissions and appointments) (amendment) regulations 2021 – SI 757/2021

GOVERNMENT

Acts

Houses of the Oireachtas Commission (Amendment) Act 2021 – Act 41/2021 – Signed on December 15, 2021

Statutory instruments

Appointment of special adviser (Minister for Finance) (no. 2) order 2021 – SI 577/2021
Justice (delegation of ministerial functions) (no. 3) order 2021 – SI 594/2021
National Archives Act 1986 (section 8(1A)) (transfer of departmental records) order 2021 – SI 678/2021
National Archives Act 1986 (section 8(1A)) (transfer of departmental records) (no. 2) order 2021 – SI 679/2021
National Archives Act 1986 (section 8(1A)) (transfer of departmental records) (no. 3) order 2021 – SI 680/2021
National Archives Act 1986 (section 8(1A)) (transfer of departmental records) (no. 4) order 2021 – SI 722/2021

HEALTH

Acts

Health (Amendment) (No. 3) Act 2021 – Act 37/2021 – Signed on December 9, 2021

Statutory instruments

Nursing homes support scheme (making and discharge of orders on particular family assets) regulations 2021 – SI 581/2021
Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (amendment) (no. 5) regulations 2021 – SI 582/2021
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (restrictions upon travel to the state from certain states) (no. 5) (amendment) (no. 5) regulations 2021 – SI 583/2021
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (extension of various periods of operation) regulations 2021 – SI 585/2021
Health Act 1947 (sections 31AB and 31AD) (Covid-19) (operation of certain indoor premises) (amendment) (no. 8) regulations 2021 – SI 586/2021
Health services (amendment) regulations 2020 – SI 595/2021
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 2) (amendment) (no. 20) regulations 2021 – SI 596/2021
Health Act 1947 (sections 31AB and 31AD) (Covid-19) (operation of certain indoor premises) (amendment) (no. 9) regulations 2021 – SI 597/2021
Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (amendment) (no. 6) regulations 2021 – SI 606/2021
Public Health (Alcohol) Act 2018 (commencement) (no. 2) order 2021 – SI 613/2021
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (restrictions upon travel to the state from certain states) (no. 5) (amendment) (no. 6) regulations 2021 – SI 639/2021
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (restrictions upon travel to the state from certain states) (no. 5) (amendment) (no. 7) regulations 2021 – SI 662/2021
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 2) (amendment) (no. 21) regulations 2021 – SI 664/2021
Health Act 1947 (sections 31AB and 31AD) (Covid-19) (operation of certain indoor premises) (amendment) (no. 10) regulations 2021 – SI 665/2021
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (face coverings in certain premises and businesses) (amendment) (no. 4) regulations 2021 – SI 677/2021
Health and Social Care Professionals Act 2005 (special measures registration having regard to Covid-19) (no. 2) order 2021 – SI 685/2021
Nursing homes support scheme (collection and recovery of repayable amounts) regulations 2021 – SI 695/2021
Health Insurance Act 1994 (section 11E(2)) regulations 2021 – SI 696/2021
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 2) (amendment) (no. 22) regulations 2021 – SI 736/2021
Health Act 1947 (sections 31AB and 31AD) (Covid-19) (operation of certain indoor premises) (amendment) (no. 11) regulations 2021 – SI 737/2021
Health Act 1947 (section 31A (6A)) (Covid-19) (no. 3) regulations 2021 – SI 738/2021
Health Products Regulatory Authority (fees) regulations 2021 – SI 744/2021
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (restrictions upon travel to the state from certain states) (no. 5) (amendment) (no. 9) regulations 2021 – SI 754/2021
Health (residential support services maintenance and accommodation contributions) (amendment) regulations 2022 – SI 1/2022
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (restrictions upon travel to the state from certain states) (no. 5) (amendment) regulations 2022 – SI 4/2022
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 2) (amendment) regulations 2022 – SI 7/2022
Health Act 1947 (sections 31AB and 31AD) (Covid-19) (operation of certain indoor premises) (amendment) regulations 2022 – SI 8/2022

HOUSING

Statutory instruments

Housing loans regulations 2021 – SI 701/2021
Housing (Regulation of Approved Housing Bodies) Act 2019 (commencement) (no. 3) order 2021 – SI 728/2021
Affordable Housing Act 2021 (cost rental letting and eligibility) regulations 2021 – SI 755/2021
Affordable Housing Act 2021 (cost rental rent setting) regulations 2021 – SI 756/2021

HUMAN RIGHTS

Library acquisitions

Smith Rotabi, K., Bromfield, N.F. *From Intercountry Adoption to Global Surrogacy: A Human Rights History and New Fertility Frontiers*. London: Routledge, 2016 – N176.1.008

Articles

McNally, M. Human rights: universal rights? *The Bar Review* 2021; 26 (4): 102-107

IMMIGRATION

Judicial review – Proportionality – Non-EEA family reunification visa – Applicant seeking an order of certiorari of the respondent's refusal to grant a non-EEA family reunification visa – Whether the respondent's decision was unreasonable and/or disproportionate – [2021] IEHC 770 – 03/12/2021
A.Z. v The Minister for Justice
Judicial review – Residence card – Dependence – Applicants seeking residence cards – Whether the trial judge erred in concluding that the respondent had applied the correct legal test for dependence – [2021] IECA 298 – 10/11/2021
Awan and Rehman v Minister for Justice and Equality
Permission to work – Right of residence – Judicial review – Applicant seeking an order of certiorari of the respondent's decision – Whether the respondent erred in law in refusing the applicant's application – [2021] IEHC 692 – 18/10/2021
Dogan v The Minister for Justice
Judicial review – State protection – Country of origin information – Applicants seeking an order of certiorari quashing the decision affirming the recommendation that the applicants be given neither a declaration of refugee status nor a subsidiary protection declaration – Whether the first respondent's treatment of the available country of origin information was irrational and/or inadequately reasoned – [2021] IEHC 817 – 21/12/2021
F.M. and R.M. (a minor suing by her father and next friend, F.M.) v The International Protection Appeals Tribunal and The Minister for Justice
Judicial review – Irrationality – Proportionality – Applicant seeking an order of certiorari quashing the respondent's decision – Whether the respondent's decision was irrational and unreasonable – [2021] IEHC 699 – 04/11/2021
H.M.W. v Minister for Justice
Asylum and immigration – International protection – International Protection Appeals Tribunal – Judicial review – [2021] IEHC 797 – 16/12/2021
K.T. and X. (a minor suing by his mother and next friend K.T.) v The International Protection Appeals Tribunal and The Minister for Justice and Equality
Judicial review – Critical Skills Employment Permit – Remittal – Applicant seeking an order of certiorari of the respondent's decision to refuse the applicant's application for a Critical Skills Employment Permit – Whether the respondent erred in law in unlawfully fettering her discretion – [2021] IEHC 821 – 13/12/2021
M.D .Yeasin v The Minister for Business, Enterprise and Innovation
Judicial review – Variation of visa – Point of law of exceptional public importance –

Respondent seeking to appeal the High Court's principal judgment to the Court of Appeal – Whether the High Court's decision involved a point of law of exceptional public importance – [2021] IEHC 766 – 30/11/2021
Middelkamp v The Minister for Justice and Equality (No. 2)
Judicial review – International protection – Breach of fair procedures – Applicant seeking to challenge the lawfulness of the decision of the first respondent, which affirmed the recommendation that the applicant not be given a refugee declaration or a declaration of subsidiary protection – Whether the first respondent acted in breach of fair procedures and/or natural and constitutional justice – [2021] IEHC 732 – 23/11/2021
Morchiladze v The International Protection Appeals Tribunal, The Minister for Justice and Equality, Ireland and The Attorney General
Judicial review – Study visa – Irrationality – Appellant seeking an order of certiorari by way of an application for judicial review against a decision of the first respondent refusing her application for a study visa – Whether reasons two or three of the contested decision were unreasonable and irrational – [2021] IECA 340 – 21/12/2021
Mukovska v The Minister for Justice
International protection – Judicial review – Irrationality – Applicant seeking an order of certiorari of the first respondent's decision to refuse international protection – Whether the first respondent acted irrationally or unreasonably – [2021] IEHC 693 – 28/10/2021
N.K. v The International Protection Appeals Tribunal and Minister for Justice
Asylum and immigration – International protection – International Protection Appeals Tribunal – Judicial review – [2021] IEHC 781 – 14/12/2021
S.K. v The International Protection Appeals Tribunal and The Minister for Justice and Equality

Statutory instruments

Immigration Act 2004 (visas) (amendment) (no. 4) order 2021 – SI 640/2021
Immigration Act 2004 (visas) (amendment) (no. 5) order 2021 – SI 643/2021
Immigration Act 2004 (visas) (amendment) (no. 6) order 2021 – SI 746//2021

INFORMATION TECHNOLOGY

Articles

O'Doherty, M. Norwich Pharmacal relief and the identification of anonymous online users. *The Bar Review* 2021; 26 (4): 121-126

INJUNCTIONS

Judicial review – International protection – Interlocutory injunction – Applicant seeking an order of certiorari quashing the decision of the respondent refusing the applicant's request for the exercise of her discretion to examine the applicant's application for international protection in Ireland and affirming that she will be transferred to Belgium – Whether the applicant was entitled to an interlocutory injunction pending the outcome of her judicial review challenge – [2021] IEHC 717 – 18/11/2021
Katshibombo v The Minister for Justice
Interlocutory injunction – Eviction – Trespass – Plaintiff seeking interlocutory relief requiring the defendants to vacate property in which the plaintiff alleged they were trespassers – Whether the eviction of the defendants from the property was invalid because the execution order on which it was based had lapsed – [2021] IEHC 691 – 02/11/2021
Start Mortgages DAC v Rogers
Judgment in default of appearance – Interlocutory injunction – Proof of service – Plaintiff seeking judgment in default of appearance and an interlocutory injunction – Whether there was sufficient proof of service – [2021] IEHC 768 – 07/12/2021
Tucker v Curry

INSURANCE

Third-party proceedings – Indemnity – Insurance – Third party seeking to set aside third-party proceedings – Whether the defendant was entitled to enforce the contract of insurance by way of third-party proceedings – [2021] IECA 249 – 05/10/2021
Haughton v Quinns of Baltinglass Ltd

Library acquisitions

Buckley, A.J., Buckley, D. *Buckley on Insurance Law (5th ed.)*. Dublin: Round Hall, 2021 – N290.C5
Glynn, D., Rogers, T. *Riley on Business Interruption Insurance (11th ed.)*. London: Sweet & Maxwell, 2021 – N294.C6

IRISH LANGUAGE

Statutory instruments

Gaeltacht Act 2012 (designation of Irish language networks) order 2021 – SI 579/2021
Gaeltacht Act 2012 (designation of Gaeltacht service towns) order 2021 – SI 580/2021
Gaeltacht Act 2012 (designation of Gaeltacht language planning areas) order 2021 – SI 707/2021
Gaeltacht Act 2012 (designation of Gaeltacht language planning areas) (no. 2) order 2021 – SI 708/2021
Gaeltacht Act 2012 (designation of Gaeltacht language planning areas) (no. 3) order 2021 – SI 709/2021
Gaeltacht Act 2012 (designation of Gaeltacht language planning areas) (no. 4) order 2021 – SI 710/2021

JUDICIAL REVIEW

Judicial review – Burden of proof – Private matter – Applicant seeking to impugn a decision taken by the first respondent – Whether the proceedings were amenable to judicial review – [2021] IEHC 824 – 01/12/2021
B. v Health Service Executive
Mootness – Judicial review – Regulations – Applicant seeking to strike down regulations – Whether the applicant's application was moot – [2021] IEHC 822 – 20/12/2021
Ganley v Minister for Health
Judicial review – Declaratory relief – Orders of certiorari – Applicants seeking judicial review – Whether the Road Traffic (Licencing of Drivers) Regulations 2006 required the applicants to establish further right of residence – [2021] IEHC 748 – 05/11/2021
Landsberg and Breetzke v Road Safety Authority, The Minister for Transport, Tourism and Sport, the Attorney General, Ireland
Judicial review – Order of prohibition – Prosecution – Appellant seeking an order of prohibition in respect of a pending prosecution in the District Court – Whether the matter was suitable for judicial review – [2021] IECA 250 – 05/10/2021
Nugent v The Property Services Regulatory Authority

LAND LAW

Public right of way – Land – Evidence – Appellant appealing against the judgment and order striking out the appellant's claim that there was established a public right of way over certain lands – Whether the trial judge erred in failing to find that there was an established public right of way – [2021] IECA 341 – 21/12/2021
Kildare County Council v Morrin

Library acquisitions

Maddox, N. *The Land and Conveyancing Law Reform Acts: A Commentary (2nd ed.)*. Dublin: Round Hall, 2021 – N60.C5

Acts

Land and Conveyancing Law Reform Act 2021 – Act 35/2021 – Signed on November 26, 2021

Statutory instruments

Land registration rules 2021 – SI 726/2021

LANDLORD AND TENANT

Lease – Frustration – Contract – Plaintiff claiming that there was a partial frustration of the terms of the lease between the parties – Whether partial frustration of contract exists – [2021] IEHC 749 – 30/11/2021
Foot Locker Retail Ireland Ltd v Percy Nominees Ltd

Articles

Canny, M. High Court injunctions for possession of residential properties where the tenancy falls outside the exclusive jurisdiction of the Residential Tenancies Board. *Conveyancing and Property Law Journal* 2021; 26 (4): 80-83
Collins, S. To break the lock or not? *The Bar Review* 2021; 26 (4): 127-130
Geoghegan, D. Leases and encroachments. *Conveyancing and Property Law Journal* 2021; 26 (4): 74-79

Acts

Residential Tenancies (Amendment) Act 2021 – Act 39/2021 – Signed on December 11, 2021

Statutory instruments

Residential Tenancies Act 2004 (prescribed form) (no. 2) regulations 2021 – SI 723/2021

LEGAL HISTORY

Articles

Mac Eochaidh, C. Cearbhall Ó Dálaigh: The Luxembourg Chapter. *Irish Journal of European Law* 2021; 23 (1): 1-26

LEGAL PROFESSION

Articles

Doyle, I. Solicitor presence at police interview: an acute need for legislative intervention. *Irish Criminal Law Journal* 2021; 31 (4): 78-88
Hardiman, A.-M. Leading from the front. *The Bar Review* 2021; 26 (5): 148-150
McDermott, M. North star. *Law Society Gazette* 2021; (December): 28-33
McNickle, A. Working towards equality. *The Bar Review* 2021; 26 (5): 156-157
Phelan, S. Mentoring at the Bar. *The Bar Review* 2021; 26 (5): 154-155

Statutory instruments

Solicitors professional indemnity insurance (amendment) regulations 2021 – SI 587/2021
Solicitors practising certificate (application fee) regulations 2021 – SI 689/2021
Registered European lawyers qualifying certificate (application fee) regulations 2021 – SI 690/2021

MEDICAL LAW

Medical treatment – Wardship – Best interests – Hospital seeking to withhold life-prolonging treatments – Whether it was in the child's best interests and in accordance with what he would wish that he should not be subjected to invasive measures – [2021] IEHC 655 – 18/11/2020
J.J., In re

Articles

Maher, J., McGoldrick, C. Access to justice – the terminally ill plaintiff. *The Bar Review* 2021; 26 (4): 108-111

Statutory instruments

Medicinal products (prescription and control of supply) (amendment) (no. 12) regulations 2021 – SI 578/2021
Medicinal products (prescription and control of supply) (amendment) (no. 13) regulations 2021 – SI 605/2021
Pharmacy Act 2007 (special measures registration having regard to Covid-19) (no. 2) order 2021 – SI 683/2021
Medical Practitioners Act 2007 (special measures registration having regard to Covid-19) (no. 2) order 2021 – SI 684/2021
Medical devices (registration) regulations 2021 – SI 691/2021
Medicinal products (prescription and control of supply) (amendment) (no. 14) regulations 2021 – SI 692/2021
Medicinal products (prescription and control of supply) (amendment) (no. 15) regulations 2021 – SI 718/2021

PENSIONS

Statutory instruments

Public Service Pay and Pensions Act 2017 (section 42) (payments in respect of certain services rendered in response to the risk to public health posed by Covid-19) (no. 2) regulations 2021 – SI 620/2021
Occupational pension schemes (trustee) (amendment) regulations 2021 – SI 626/2021
Occupational pension schemes (registration) (amendment) regulations 2021 – SI 628/2021
Occupational pension schemes (duties of trustees in connection with bulk transfer) (amendment) regulations 2021 – SI 630/2021
Occupational pension schemes (funding standard reserve) (amendment) regulations 2021 – SI 631/2021
Occupational pension schemes (cross-border) (amendment) regulations 2021 – SI 632/2021
Occupational pension schemes (funding standard) (amendment) regulations 2021 – SI 635/2021
Occupational pension schemes (investment) regulations 2021 – SI 636/2021
Occupational pension schemes (disclosure of information) (amendment) regulations 2021 – SI 637/2021
Director of Public Prosecutions Superannuation Scheme 2021 – SI 770/2021

PERSONAL INJURIES ASSESSMENT BOARD

Personal injuries – Liability – Quantum – Appellant appealing against

determinations of liability and quantum – Whether the judge was in error in failing to make a finding of contributory negligence against the respondent – [2021] IECA 329 – 09/12/2021
Griffin v Hoare
Personal injuries – Statute barred – Limitation – Appellant appealing against the judgment and order of the High Court finding that the appellant's claim was statute barred – Whether the trial judge erred in finding that the appellant knew as of the date of the accident that he had sustained a significant injury – [2021] IECA 318 – 29/11/2021
Mullins v The Irish Prison Service, The Minister for Justice and Equality, and Ireland

Articles

Murphy, M.W. The right under EU law to compensation for injuries criminally inflicted: the implications of BV for Irish law. *Irish Journal of European Law* 2021; 23 (1): 219-248

PLANNING AND ENVIRONMENTAL LAW

Judicial review – Planning permission – Scope of appeal – Appellant seeking to quash a decision of the first respondent to grant planning permission – Whether the determination granting leave to appeal was broad enough to include arguments based on the indirect effects of off-site milk production and the Water Framework Directive – [2021] IESC 79 – 07/12/2021
An Taisce – National Trust for Ireland v An Bord Pleanála, The Minister for Communications, Climate Action and The Environment, Ireland and The Attorney General
Development – Liability – Issues to be tried – High Court directing issues to be tried in advance of the trial of the action – Whether the plaintiff was entitled to rely on the Multi-Unit Developments Act 2011 in the proceedings – [2021] IEHC 811 – 21/12/2021
Clarion Quay Management Company Ltd by Guarantee v Dublin City Council, Pierce Contracting Unlimited Company, McCormack, McCormack, McCormack, McCormack and Kelly
Tenancy – Strike out – Bound to fail – Respondent seeking to strike out the proceedings – Whether the appellant's claim to a new tenancy was bound to fail – [2021] IEHC 694 – 20/10/2021
Clydaville Investments Ltd v Setanta Centre
Judicial review – Development plan – Variation – Appellant seeking an order of certiorari of a direction of the first respondent – Whether the recommendation by the notice party to the first respondent for the issue of a draft direction incorrectly proceeded on the basis that an updated joint retail strategy was required by the retail planning guidelines – [2021] IEHC 683 – 05/11/2021
Cork County Council v (by order) the Minister for Housing, Local Government and Heritage, Ireland and The Attorney General
Unauthorised development – Planning permission – Statute barred – Appellant appealing against the decision of the High Court, which refused the appellant's application for various orders pursuant to s. 160 of the Planning and Development Act 2000 – Whether the trial judge erred in fact and in law in finding that the appellant's action was statute barred – [2021] IECA 291 – 05/11/2021
Diamrem Ltd v Cliffs of Moher Visitor Centre Ltd and Clare County Council
Adjournment – Planning and development – Property – Appellant appealing from an order adjourning the appellant's application brought pursuant to s. 160 of the Planning and Development Act 2000 – Whether the trial judge ought to have made an order in respect of a finding she made concerning the existence of an unauthorised shed on the respondents' property – [2021] IECA 345 – 21/12/2021
Ferry v Caulderbanks T/a D&M Services and D&M Environmental Services Ltd T/a DM Waste
Planning permission – Judicial review – Leave to appeal – Applicant seeking leave to appeal – Whether the High Court was correct to conclude that the validity of the planning permission could be upheld, notwithstanding that the Court had referred a question to the Court of Justice of the European Union on an issue that was integral to that permission – [2021] IEHC 636 – 13/10/2021
Hellfire Massy Residents Association v An Bord Pleanála, The Minister for Housing, Planning and Local Government, Ireland and The Attorney General
Housing development – Planning permission – Reference – Applicants seeking an order quashing a decision of the first respondent to grant planning permission for a housing development – Whether s. 28 of the Planning and Development Act 2000 is invalid as contrary to EU law – [2021] IEHC 733 – 30/11/2021
Kerins and Stedman v An Bord Pleanála, Ireland and The Attorney General
Planning and development – Referral – Order of certiorari – Appellant appealing against the judgment of the High Court granting an order of certiorari quashing two decisions of the appellant made pursuant to s. 5 of the Planning and Development Act 2000 – Whether the appellant was precluded from determining a Planning and Development Act 2000 s. 5 referral in the circumstances – [2021] IECA 307 – 17/11/2021
Narconon Trust v An Bord Pleanála
Leave to appeal – Judicial review – Planning and development – Applicant seeking leave to appeal – Whether one could do a full environmental impact assessment of the wider works – [2021] IEHC 700 – 16/11/2021
Save Cork City Community Association CLG v An Bord Pleanála, The Minister for Housing, Local Government and Heritage, Ireland and The Attorney General
Exempt development – Irrelevant considerations – Irrationality – Applicants seeking an order of certiorari quashing the respondent's order – Whether the respondent erred in law, took into account irrelevant considerations and/or failed to take into account relevant considerations and/or acted irrationally and/or unreasonably – [2021] IEHC 745 – 23/11/2021
Spectre (Shelbourne) Ltd v An Bord Pleanála

Articles

Hyde, D. Judicial review of planning permissions for housing developments. *Irish Planning and Environmental Law Journal* 2021; 28 (1): 3-13

Acts

Planning and Development (Amendment) (Large-Scale Residential Development) Act 2021 – Act 40/2021 – Signed on December 14, 2021

Statutory instruments

Planning and development (amendment) (no. 3) regulations 2021 – SI 588/2021
Separate collection (deposit return scheme) regulations 2021 – SI 599/2021
Planning and development (amendment) act 2018 (commencement) order 2021 SI 714/2021
Planning and Development (Amendment) (Large-Scale Residential Development) Act 2021 (commencement) order 2021 – SI 715/2021
Planning and development (large-scale residential development) regulations 2021 – SI 716/2021
Planning and development (large-scale residential development fees) regulations 2021 – SI 720/2021
Water Services (No. 2) Act 2013 (property vesting day) (no. 3) order 2021 – SI 721/2021

PRACTICE AND PROCEDURE

Breach of contract – Rehearing – Adjournment – Plaintiff objecting to the proposal for a complete re-hearing – Whether the re-hearing should be conducted on the basis of the transcript evidence already heard – [2021] IEHC 779 – 21/12/2021
Action Alarms Ltd Trading as Action Security Systems v Emmet O'Rafferty and Top Security Ltd
Extension of time – Leave to renew – Summons – Defendants seeking to set aside the order extending the time for leave to renew a summons – Whether special circumstances had been established in the case – [2021] IEHC 778 – 07/12/2021
Brady v Byrne
Want of prosecution – Inordinate and inexcusable delay – Balance of justice – Defendants seeking to dismiss the plaintiff's claim for want of prosecution – Whether the delay was inordinate and inexcusable – [2021] IEHC 772 – 06/12/2021
Byrne v McGreevy and Conroy (as legal personal representatives of McGreevy deceased) and Monahan
Want of prosecution – Inordinate and inexcusable delay – Balance of justice – Second defendant seeking to have the proceedings dismissed as against him for want of prosecution – Whether the delay on the part of the plaintiff was inordinate and inexcusable – [2021] IEHC 823 – 20/12/2021
Cabot Financial [Ireland] Ltd v Damien Heffernan, Patrick Heffernan and Grant Macrea Stationery Ltd
Legal professional privilege – Crime/fraud exception – Documentation – Applicant seeking determination of preliminary legal issue concerning crime/fraud exception to claim of legal professional privilege – Whether crime/fraud exception applied – [2021] IEHC 651 – 10/08/2021
Director of Corporate Enforcement v Cumann Peile Na hÉireann
Practice and procedure – Supreme Court – Appeal – Jurisdiction to hear appeal from Court of Appeal – Case stated from Circuit Court – [2021] IESC 82 – 20/12/2021
E.L.G. (a minor suing by her mother and next friend S.G.) v Health Service Executive
Practice and procedure – Appeal against summary judgment allowed in earlier hearing – Ruling on costs – [2021] IESC 78 – 01/12/2021
Ennis v Allied Irish Banks Plc
Order of attachment – Contempt – Breach of order – Applicant seeking to issue an order of attachment – Whether there had been a breach of an order of the High Court – [2021] IEHC 666 – 04/11/2021
Friends of the Irish Environment CLG v Roscommon County Council Ireland and The Attorney General
Extension of time – Misconduct – Arguable grounds of appeal – Applicant seeking an order for the extension of time for the filing of a Notice of Appeal – Whether there were arguable grounds of appeal – [2021] IECA 327 – 03/12/2021
James, In re
Isaac Wunder order – Criminal proceedings – Judicial review – Applicant seeking an order lifting an Isaac Wunder order so as to permit him to institute two sets of proceedings – Whether the proposed proceedings were frivolous and vexatious – [2021] IEHC 722 – 18/11/2021
Lavery, In re
Summary judgment – Plenary hearing – Arguable defences – Plaintiff seeking summary judgment – Whether the matter ought to be remitted to plenary hearing – [2021] IEHC 724 – 22/11/2021
Leonard & Woods Developments Ltd v Brian Pagni
Want of prosecution – Frivolous and vexatious proceedings – Bound to fail – Defendant seeking an order dismissing the plaintiff's claim for want of prosecution – Whether the plaintiff's proceedings were frivolous and vexatious or bound to fail – [2021] IEHC 769 – 07/12/2021
McGuinness v Greaney practising under the style and title of Adrian Greaney & Company, Solicitors
Extension of time – Balance of justice – Misconduct – Appellant appealing against the refusal to extend the time for the bringing of an appeal against the determination of the Solicitors Disciplinary Tribunal – Whether the balance of justice lay against the grant of an extension of time – [2021] IECA 332 – 09/12/2021
Murphy v The Law Society of Ireland

PRISONS

Unlawful detention – Order of committal – Order for possession – Applicant challenging the lawfulness of his detention – Whether the detention of the applicant was in accordance with law – [2021] IEHC 723 – 18/11/2021
Hennelly v The Governor of Mountjoy Prison
Unlawful detention – Release – Administration of treatment – Applicant seeking release – Whether the applicant's detention was in accordance with law – [2021] IECA 309 – 19/11/2021
R.G.F. v The Clinical Director, Department of Psychiatry, Midland Regional Hospital, Portlaoise

PROBATE

Articles

Keating, A., Dr. The effect of obliterations appearing in wills. *Irish Law Times* 2021; 39 (20): 301-304

PROPERTY

Possession – Defence – Strike out – Appellant seeking possession of premises – Whether the respondents had made out credible grounds of defence – [2021] IEHC 719 – 18/11/2021
Start Mortgages Designated Activity Company v Ryan

Order for possession – Property – Loan – Respondents seeking order for possession of property – Whether respondents had established jurisdiction in Circuit Court – [2021] IEHC 654 – 26/08/2021
Shoreline Residential DAC and Pepper Finance Corporation (Ireland) DAC v Jacob
Injunctive relief – Trespass – Entitlement to possession – Plaintiff seeking various forms of injunction against trespass by the defendant – Whether the plaintiff owned and was entitled to possession of the property – [2021] IEHC 786 – 15/12/2021
Tarbutus Ltd v Conor Hogan

Articles

Boylan, J. Narrative and the deprivation of property. *Irish Law Times* 2021; 39 (19): 277-282

Statutory instruments

Registration of deeds rules 2021 – SI 727/2021

SOCIAL WELFARE

Social welfare – Benefits – Accrual – Whether person making contributions but without permission to be in State can accrue – Employment Permits Act 2003 – Immigration Act 2004 – Social Welfare Consolidation Act 2005 – [2021] IESC 81 – 16/12/2021
Sobhy v The Chief Appeals Officer, Minster for Employment Affairs and Social Protection, Ireland and The Attorney General

Statutory instruments

Social welfare (consolidated claims, payments and control) (amendment) (no. 15) (carers) regulations 2021 – SI 623/2021
Trust RACs (trustee) (amendment) regulations 2021 – SI 627/2021
Trust RACs (registration) (amendment) regulations 2021 – SI 629/2021
Trust RACs (cross-border) (amendment) regulations 2021 – SI 633/2021
Trust RACs (investment) regulations 2021 – SI 634/2021
Social welfare (temporary provisions) regulations 2021 – SI 660/2021
Social welfare (consolidated claims, payments and control) (amendment) (no. 18) (Covid-19 pandemic unemployment payment) regulations 2021 – SI 699/2021
Social welfare (section 290A) (agreement) order 2021 – SI 700/2021
Trust RACs (disclosure of information) (amendment) regulations 2021 – SI 717/2021
Social welfare (consolidated contributions and insurability) (amendment) (no. 2) (attribution of self- employment contributions) regulations 2021 – SI 730/2021
Social welfare (consolidated occupational injuries) (amendment) (no. 1) regulations 2021 – SI 731/2021
Social Welfare Act 2021 (section 24) (commencement) order 2021 – SI 750/2021

STATISTICS

Statutory instruments

Statistics (waste generation and treatment survey) order 2021 – SI 661/2021
Statistics (income of private hospitals survey) order 2021 – SI 705/2021
Statistics (trading day and product profile survey) order 2021 – SI 706/2021

TAXATION

License agreements – Case stated – Reference – Appellant seeking a reference to the CJEU – Whether the High Court judge erred in law – IECA 334 -15/12/2021
Vieira Ltd v Dermot O'Donagain (Inspector of Taxes)

Library acquisitions

Clarke, G., Lawrance, D. *Clarke's Offshore Tax Planning 2020-21 (27th ed.)*. London: LexisNexis Butterworths, 2020 – M336.76
Fennell, D., Shanahan, D. *Taxation Summary, Finance Act 2020 (45th ed.)*. Dublin: Irish Tax Institute, 2020 – M335.C5

Statutory instruments

Taxes Consolidation Act 1997 (section 835D(3)) order 2021 – SI 686/2021
Value-added tax (refund of tax) (charities compensation scheme) (amendment) order 2021 – SI 713/2021

TELECOMMUNICATIONS

Statutory instruments

Wireless Telegraphy Act 1926 (section 3) satellite earth stations for satellite personal communication services (revocation) order 2021 – SI 642/2021

TORT

Concurrent liability – Indemnity – Contribution – Second and third defendants claiming indemnity and contribution against the first defendant – Whether the first defendant wrongfully failed to take due or proper precautions by way of temporary traffic management control measures to address the risk of a driver falling asleep and crashing into its works area – [2021] IEHC 707 – 28/10/2021
Davey v Sligo County Council, M.D.S. Distribution Ltd and Zachar

TRANSPORT

Statutory instruments

Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012 (section 43) (commencement) order 2021 – SI 575/2021
Railway Safety Act 2005 (section 4(5)) (specified infrastructure, monorail) regulations 2021 – SI 589/2021
Maritime Jurisdiction Act 2021 (commencement) order 2021 – SI 601/2021
Aircraft Noise (Dublin Airport) Regulation Act 2019 levy no. 3 regulations 2021 – SI 604/2021
Road traffic (recognition of foreign driving licences) (New Brunswick) order 2021 – SI 615/2021
Commercial vehicle roadworthiness (vehicle testing) (amendment) regulations 2021 – SI 616/2021
Aviation Regulation Act 2001 (levy no. 22) regulations 2021 – SI 681/2021
Transport (delegation of ministerial functions) order 2021 – SI 682/2021
Road Traffic Act 2010 (part 3) (fixed charge offences) (amendment) regulations 2021 – SI 747/2021
Local Authorities (Traffic Wardens) Act 1975 (fixed charge offences) (amendment) regulations 2021 – SI 748/2021

Bills initiated in Dáil Éireann during the period November 11, 2021, to January 14, 2022

[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.

Appropriation bill 2021 – Bill 157/2021
Birth information and tracing bill 2022 – Bill 3/2022
Dublin Bay bill 2021 – Bill 158/2021 [pmb] – Deputy Ivana Bacik
Education (health, relationships and sex education) bill 2021 – Bill 147/2021 [pmb] – Deputy Gary Gannon
Health (amendment) (no. 3) bill 2021 – Bill 155/2021
Health and criminal justice (Covid-19) (amendment) (no. 2) bill 2021 – Bill 153/2021
Health insurance (amendment) bill 2021 – Bill 154/2021
Higher Education Authority bill 2022 – Bill 1/2022
Houses of the Oireachtas Commission (amendment) bill 2021 – Bill 151/2021
Local government (maternity and family leave for elected members) bill 2021 – Bill 148/2021 [pmb] – Deputy Holly Cairns
Merchant shipping (investigation of marine casualties) (amendment) bill 2021 – Bill 142/2021
Parental bereavement leave (amendment) bill 2021 – Bill 143/2021 [pmb] – Deputy Réada Cronin and Deputy Louise O'Reilly
Protected disclosures (amendment) bill 2021 – Bill 156/2021 [pmb] – Deputy Mairéad Farrell and Deputy Pat Buckley
Protection of children's health (idling of mechanically propelled vehicles in vicinity of schools) bill 2021 – Bill 146/2021 [pmb] – Deputy Jennifer Whitmore
Regulation of providers of building works bill 2022 – Bill 2/2022
Residential tenancies (amendment) (extension of notice periods) bill 2021 – Bill 159/2021 [pmb] – Deputy Eoin Ó Broin, Deputy Cian O'Callaghan, Deputy Ged Nash, Deputy Marian Harkin, Deputy Joan Collins and Deputy Richard Boyd Barrett
Sex offenders (amendment) bill 2021 – Bill 144/2021
Social welfare bill 2021 – Bill 152/2021

Bills initiated in Seanad Éireann during the period November 11, 2021, to January 14, 2022

Planning and development (amendment) (large-scale residential development) bill 2021 – Bill 141/2021
Regulation of air traffic over sporting events bill 2021 – Bill 160/2021 [pmb] – Senator Vincent P. Martin
Residential tenancies (amendment) (no. 2) bill 2021 – Bill 145/2021
Seller's legal pack for property buyers bill 2021 – Bill 150/2021 [pmb] – Deputy Marc MacSharry

Progress of Bill and Bills amended in Dáil Eireann during the period 11th November 2021 to the 14th January 2022

Air navigation and transport bill 2020 – Bill 72/2020 – Committee Stage
Animal health and welfare and forestry (miscellaneous provisions) bill 2021 – Bill 136/2021 – Committee Stage
Criminal justice (smuggling of persons) bill 2021 – Bill 105/2021 – Committee Stage
Finance bill 2021 – Bill 132/2021 – Committee Stage – Report Stage – Passed by Dáil Éireann
Health and criminal justice (Covid-19) (amendment) (no. 2) bill 2021 – Bill 153/2021 – Committee Stage
Health (amendment) (no. 3) bill 2021 – Bill 155/2021 – Committee Stage – Passed by Dáil Éireann
Health insurance (amendment) bill 2021 – Bill 154/2021 – Committee Stage
Houses of the Oireachtas Commission (amendment) bill 2021 – Bill 151/2021 – Committee Stage
Maritime area planning bill 2021 – Bill 104/2021 – Committee Stage – Report Stage – Passed by Dáil Éireann
Planning and development (amendment) (large-scale residential development) bill 2021 – Bill 141/2021 – Committee Stage – Report Stage
Residential tenancies (amendment) (no. 2) bill 2021 – Bill 145/2021 – Committee Stage
Social welfare bill 2021 – Bill 152/2021 – Committee Stage – Passed by Dáil Éireann

Progress of Bill and Bills amended in Seanad Eireann during the period November 11, 2021, to January 14, 2022

Companies (Corporate Enforcement Authority) bill 2021 – Bill 107/2021 – Committee Stage
Criminal justice (amendment) bill 2021 – Bill 25/2021 – Report Stage
Criminal justice (public order) (amendment) bill 2019 – Bill 17/2019 – Committee Stage
Finance bill 2021 – Bill 132/2021 – Committee Stage
Health and criminal justice (Covid-19) (amendment) (no. 2) bill 2021 – Bill 153/2021 – Committee Stage
Health (amendment) (no. 3) bill 2021 – Bill 155/2021 – Committee Stage
Health and criminal justice (Covid-19) (amendment) (no. 2) bill 2021 – Bill 153/2021 – Committee Stage
Land and conveyancing law reform (amendment) bill 2021 – Bill 118/2021 – Committee Stage
Maritime area planning bill 2021 – Bill 104/2021 – Committee Stage – Report Stage
Official languages (amendment) bill 2019 – Bill 104/2019 – Committee Stage – Report Stage
Planning and development (amendment) (large-scale residential development) bill 2021 – Bill 141/2021 – Committee Stage
Residential tenancies (amendment) (no. 2) bill 2021 – Bill 145/2021 – Committee Stage – Report Stage – Passed by Seanad Éireann
Social Welfare Bill 2021 – Bill 152/2021 – Committee Stage

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

Bills and legislation

Supreme Court Determinations – leave to appeal granted
Published on Courts.ie – November 11, 2021, to January 14, 2022

Ahmed v The Fitness to Practice Committee of the Medical Council and ors [2021] IESCDET 121 – Leave to appeal from the Court of Appeal granted on the 03/11/2021 – (Dunne J., O'Malley J., Hogan J.)
Allied Irish Banks Plc v O'Callaghan [2021] IESCDET 137 – Leave to appeal from the Court of Appeal granted on the 20/12/2021 – (O'Donnell C.J., Charleton J., Woulfe J.)
Director of Public Prosecutions v Behan [2021] IESCDET 127 – Leave to appeal from the Court of Appeal granted on the 15/11/2021 – (Dunne J., O'Malley J., Hogan J.)
O'Doherty and Waters v The Minister for Health, Ireland and the Attorney General and ors [2021] IESCDET 129 – Leave to appeal from the Court of Appeal granted on the 23/11/2021 – (O'Donnell C.J. Baker J., Hogan J.)
U.M. v Minister for Foreign Affairs and ors [2021] IESCDET 120 – Leave to appeal from the Court of Appeal granted on the 01/11/2021 – (Dunne J., O'Malley J., Baker J.)

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

Cyberviolence – the law is not enough

While recent legislation seeks to address the increasing problem of image-based sexual abuse, the lack of a civil course of action for victims, and concerns about Garda resources, are among the challenges in achieving justice for victims.

Martin Block BL

One of the consequences of lockdown and subsequent Covid-19 restrictions over the last two years has been a huge increase in online image-based sexual abuse, which is inappropriately and frequently termed as 'revenge porn'. This form of abuse is a criminal offence, which involves revealing private sexual images or videos of an individual without their consent in order to cause them serious harm and trauma.

What is revenge porn?

'Revenge porn' is sexually explicit material that is often comprised of photographs that were at one stage consensually exchanged between the parties, or intimate videos that they jointly made. The consensual exchange of such material is now commonly referred to as 'sexting', whereby intimate images are shared between the parties in a relationship, usually by mobile phone, and frequently among teenagers or young adults.[1]

Sarah Benson, Chief Executive of Women's Aid Ireland, the leading national organisation for the protection of women and children from domestic violence, has emphasised: "The type of language used is extremely important around this issue. It's not revenge, it's not porn. It is image-based sexual abuse". In Ireland, there are no specific statistics that identify online sexual abuse; however, it has been reported that 561 disclosures of digital abuse and stalking were made to Women's Aid in 2018 alone. Ms Benson stated that: "These figures are only reflective of actively disclosed reports based on the previous harassment offences under the 1997 legislation,[2] so the real numbers here are probably underestimated".

Early last year, the Harassment, Harmful Communications and Related Offences Act 2020[3] was introduced to tackle online abuse and the non-consensual sharing of intimate images. The Act, known as 'Coco's law' and named in memory of Nicole Fox, who died by suicide following years of online bullying, creates two new offences, which criminalise the non-consensual distribution of intimate images. Ms Benson concluded that: "While the 2020 Act is a step in the right direction, there is no civil legislation to respond to the needs of victims of this kind of abuse". While the immediate concern of most victims of online sexual abuse is to take back control of the intimate images and to ensure that any online material is taken down from the internet, financial remedies for the damages caused by the publication of sexually explicit material on the internet can only be pursued through the civil courts through traditional torts such as privacy, defamation, data protection laws, and breach of confidence.

The 2020 Act is in addition to existing legislation, which makes it illegal to send, receive or share sexually explicit images, video, or text of someone under 18 years of age.

Latest research conducted in Ireland

Last year, the Department of Justice commissioned 'The Intimate Images Research Report',[4] a nationwide study to establish a better understanding of Irish adults' use of social media and messaging platforms, and their engagement in the sharing of images that are considered intimate in nature. The research clearly shows that the sharing of intimate images is much more common than was previously believed, particularly among adults 18 to 24 years of age, often referred to as Generation Z.

In summary, the research highlighted that 22% of all adults claim to have shared an intimate image with someone else (42% of 18 to 24 year olds are significantly more likely to do so). Of those who have shared an intimate image of themselves with someone else, over one in four shared it within the previous three months. Almost half of those who had shared an intimate image of themselves claimed the reason behind it was "for fun", while one in four said they were "asked to send one" and that "it is a normal part of dating now". Meanwhile, over 50% of all adults who claimed they shared an intimate image of themselves with someone else, shared that image with someone with whom they either were currently or had been in a long-term relationship. The study found that one in five shared an intimate image of themselves with someone they had a sexual interest in, but were not intimate or in a relationship with.

The findings indicated that 21% of all adults claimed to have received an intimate image of someone else from a third party, while these numbers increased for the younger generations (37% among Generation Z and 34% of Millennials). When asked when they last received an intimate image, one in four adults claimed that it was within the previous three months.

Of those who received an intimate image of someone from a third party, three in five said they "did nothing" with the image, while one in six "contacted the person who was in the image". Among those who had received an intimate image from a person and shared it with someone else, most claim they did so due to "peer pressure".

The research went on to show that three in ten adults claim to have received an intimate image of themselves from another person. The study also emphasised the fact that females were much more likely to have received an intimate image than males. Again, the results were significantly higher among the younger generations, with over half of 18 to 24 year olds and Millennials receiving an intimate image from someone else.

Most importantly, the findings revealed that 5% of all adults claimed to have had an intimate image of themselves shared online or on a social media site without their consent (this figure rose to around 13% for the 18 to 24 year age category).[5] Despite these figures, there have been no legal actions taken so far in this jurisdiction regarding sexual image-based abuse.

UK case

In January 2018, the American YouTube singer Chrissy Chambers secured a landmark settlement against her former partner in a civil suit for breach of confidence, misuse of private information and harassment. Her former partner had made intimate recordings and uploaded the content to the internet without her knowledge or consent. Ms Chambers decided to initiate her own proceedings against her former partner when she learned that the Crown Prosecution Service would not prosecute him. Criminal charges could not be brought against her ex-boyfriend since the offences occurred prior to the enactment of Section 33 of the UK's Criminal Justice and Courts Act 2015, which creates an offence of disclosing private sexual photographs or films without the consent of an individual who appears in them and with intent to cause that individual distress.[6]

Irish legislation

It was not until February 2021 that the Harassment, Harmful Communications and Related Offences Act 2020 came into force in Ireland, which amends the law relating to harassment, creates two new offences to deal with the non-consensual distribution of intimate images, both online and offline, and provides anonymity for the victims of those offences. The 2020 Act[7] is in addition to existing legislation, which makes it illegal to send, receive or share sexually explicit images, video, or text of someone under 18 years of age. Below are some of the key provisions:

Definition of an intimate image

Section 1 of the 2020 Act[8] defines an intimate image as any visual representation (including any accompanying sound or document) made by any means including any photographic, film, video or digital representation relating to a person who is naked or engaged in a sexual act as outlined in Section 1 of the Act. It also includes any image claiming to be of an intimate part of a person's body or an image of underwear covering that part of their body.

Sharing intimate images

Section 2 of the 2020 Act goes much further than Section 10 of the 1997 Act,[9] whereby it makes it an offence for a person to distribute, publish, or threaten to distribute or publish an intimate image of another person without consent with the intent to cause harm to another person. Someone who distributes or publishes the intimate image must have intended that or been reckless as to whether these acts would seriously interfere with the peace and privacy of the other person, or cause them harm, alarm, or distress. The Act also makes it clear that the concept of 'harm' includes psychological harm. The offence classifies a person who intends to cause harm as one who intentionally or recklessly seriously interferes with the other person's peace and privacy, or causes alarm or distress to the other person where a reasonable person would realise that their acts would have such an effect, and carries a maximum penalty of seven years' imprisonment.

Section 3 of the Act prohibits a person recording, distributing, or publishing an intimate image without the consent of the person who is the subject of the image if, in so doing, the recording, distribution or publication seriously

interferes with the peace and privacy of the person who is the subject of the image, or causes them alarm, distress or harm. This is a strict liability offence, and the person, or body corporate, does not need to have intended to cause harm. It carries a maximum penalty of 12 months' imprisonment and/or a €5,000 fine.

Threatening and grossly offensive communication

Section 4 of the Act covers the distributing, publishing, or sending of threatening or grossly offensive communications. A person will now commit a criminal offence if, intending to cause harm to another person, they send a threatening or grossly offensive message either to that person or about them. This offence carries a maximum penalty of two years' imprisonment. Unfortunately, the Act does not define what constitutes a 'grossly offensive' communication.

Section 127 of the UK Communications Act 2003 makes it an offence to send a message that is grossly offensive or of an indecent, obscene, or menacing character over a public electronic communications network. The UK's Crown Prosecution Service has defined "grossly offensive" as more than "offensive, shocking or disturbing" or "satirical, iconoclastic or rude comment" or "the expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it".[10]

Anonymity

Section 5 of the Act prevents the identification of the victim under section 2 or 3 of the Act, and provides additional sanctions for anyone distributing or publishing information that leads to identification of the victim. This offence carries a maximum penalty of three years' imprisonment. It is noteworthy that the UK Law Commission is currently considering automatic immunity for victims of sexual image-based abuse. Consequently, the prosecution rate is disproportionately lower than the number of people who report this kind of abuse to the police. In fact, one in three such cases in England and Wales are dropped by victims, 70% of whom are women. So, despite legislation being in place, the law in the UK has not managed to eradicate sexual image-based abuse from online spaces.[11]

Section 8 of the Act is an important safeguard in respect of prosecutions against children under 17 years of age. The consent of the Office of the Director of Public Prosecutions must be given prior to proceedings for an offence under the Act where the alleged offender is under 17 years of age.

Scope of harassment

Section 10 of the 2020 Act extends the scope of harassment under section 10 of the Non-Fatal Offences Against the Person Act 1997 to include indirect communications about someone. This amendment reinforces the offence of harassment under the Act. Previously, to constitute harassment it had to occur as a consequence of persistent communication "with a person". The amendment now includes persistent communication "about a person", sometimes referred to as indirect harassment. This offence carries a maximum penalty of 10 years' imprisonment to reflect the serious nature of harassment and the wide range of behaviours it represents. The amendment is consistent with the recent Supreme Court decision in *DPP v Doherty*,[12] whereby the Supreme Court definitively extended the scope of harassment to include communications that are not directly addressed or sent to the subject of those communications.

Section 11 amends section 40 of the Domestic Violence Act 2018, which now includes section 2 and 3 offences of the Harassment, Harmful Communications and Related Offences Act 2020 so that they become relevant offences in the Domestic Violence Act. The amendment means that it will be an aggravating factor for the purposes of sentencing if the perpetrator of the offence is or was in an intimate relationship with the victim of the offence.

Having a legal framework in place may be insufficient protection to prevent cyberviolence, particularly if the authorities are unable to show that they have made all reasonable efforts to investigate the reported acts and have not implemented the necessary remedies to ensure that there is no recurrence of the alleged abuse in question.

Volodina v Russia (No. 2)

Despite the enactment of the Harassment, Harmful Communications and Related Offences Act 2020, a recent judgment in the European Court of Human Rights in Strasbourg of *Volodina v Russia (No. 2)*[13] may lead to difficulties for States should a victim assert that online sexual harassment has continued because of a failure to effectively investigate reports of serious cyberviolence, and that as a result of such negligence the State has failed to protect the victim from severe abuse under Article 8 of the Convention on Human Rights. Therefore, having a legal framework in place may be insufficient protection to prevent cyberviolence, particularly if the authorities are unable to show that they have made all reasonable efforts to investigate the reported acts and have not implemented the necessary remedies to ensure that there is no recurrence of the alleged abuse in question.

The judgment of *Volodina v Russia (No. 2)*[14] was the second case that referred to the role and responsibility of the Russian authorities in the escalating violence that the victim faced. This included the creation of false online profiles, publishing her nude photos online and sending her death threats. The applicant's complaint that the Russian authorities had failed to protect her from the online violence she experienced was considered well founded. In support of this position, the Court took note of: the fact that Russia had not implemented a restraining order against the perpetrator; the two-year delay

in a criminal investigation; and, the lack of progress, which ultimately resulted in the discontinuation of the case under the domestic statute of limitations. Consequently, the Court ruled that Russia had violated the right to respect for private life as codified under Article 8 of the European Convention on Human Rights.

The Court reiterated that states were obliged to establish and effectively apply a system for punishing all forms of domestic violence, whether occurring offline or online, and to provide sufficient safeguards for victims. There were two fundamental issues in question. The first was, whether the State had put in place an adequate legal framework providing the applicant with protection against the acts of cyberviolence and in doing so had prevented the victim from being continually harassed and threatened from recurrent online violence. The second issue that the Court considered was the manner in which the Russian authorities had conducted the investigation into the applicant's reports. The Court was satisfied that Russian law contained both civil law mechanisms and criminal law provisions for the protection of an individual's private life. The authorities had thus been equipped with the legal tools to investigate the cyberviolence of which the applicant had been a victim. However, Russian law did not provide victims of domestic violence with any measure of protection, such as restraining or protection orders. A newly created order to prohibit certain conduct did not offer adequate protection to victims in the applicant's situation. Such orders only become available after sufficient evidence to charge the perpetrator had been gathered but, in the applicant's case, the investigation against the alleged wrongdoer had not progressed beyond the stage of suspicion. The Court found that the response of the Russian authorities to the known risk of recurrent violence had been manifestly inadequate and that, through their inaction and failure to take measures of deterrence, they had allowed the wrongdoer to continue threatening, harassing, and assaulting the applicant.

However, with regard to the second issue, the manner in which the Russian authorities had handled the investigation, in particular an initial two-year delay in opening a criminal case and the slow pace of the proceedings leading to the prosecution eventually becoming time barred, showed that they had failed to ensure that the perpetrator of acts of cyberviolence be brought to justice. The perpetrator's ensuing impunity had put in doubt the ability of the State machinery to produce a sufficiently deterrent effect to protect women from cyberviolence, and disclosed a failure to discharge their positive obligations under Article 8 of the Convention.[15]

While there is no civil course of action for victims at present, it is a criminal offence for a sexually explicit image to be shared without permission under the recent 2020 Act. It has been reported that the Gardaí were pessimistic about bringing criminal charges of so-called revenge porn.

Conclusions

The recent research carried out by the Department of Justice indicates that a growing number of young adults claim to have their intimate image shared online without their consent. It follows that the courts will see a significant increase in prosecutions in the not-too-distant future. While there is no civil course of action for the victims at present, it is a criminal offence for a sexually explicit image to be shared without permission under the recent 2020 Act.[16] It has been reported that the Gardaí were pessimistic about bringing criminal charges of image-based sexual violence.[17] Nevertheless, the Gardaí need to ensure that cyberviolence reports are acted upon meticulously and without delay, to ensure that under their auspices the State does not fail to fulfil its positive obligations under Article 8 of the European Convention on Human Rights. Whether the Gardaí have sufficient resources is another matter.

References

1. O'Doherty, M. *Internet Law (1st ed.)*. Bloomsbury Professional, 2020, at para 8.178.
2. Section 10 of the Non-Fatal Offences Against the Person Act 1997.
3. Harassment, Harmful Communications and Related Offences Act 2020.
4 Department of Justice. Intimate Images Research Report. Coyne Research, May 2021, C21-108.
5. *Ibid.*, pages 52-54.
6. Kleeman, J. YouTube star in landmark UK 'revenge porn' case. *The Guardian*, January 17, 2018. Available from: https://www.theguardian.com/technology/2018/jan/17/youtube-star-chrissy-chambers-wins-damages-in-landmark-uk-revenge-porn-case.
7. Harassment, Harmful Communications and Related Offences Act 2020.
8. *Ibid*.
9. Section 10 of the Non-Fatal Offences Against the Person Act 1997.
10. UK Crown Prosecution Services. Social Media – Guidelines on prosecuting cases involving communications sent via social media, Legal Guidance, Cyber/Online Crime at paragraph 28. Revised August 21, 2018.
11. Fletcher, O. Legislation alone will not tackle Ireland's 'revenge porn' problem. *The Irish Times*, November 25, 2020. Available from: https://www.irishtimes.com/opinion/legislation-alone-will-not-tackle-ireland-s-revenge-porn-problem-1.4418345.
12. *DPP v Doherty 2020 IESC 45*.
13. *Volodina v Russia (No. 2)*, 40419/19, Judgment of the European Court of Human Rights, September 14, 2021.
14. *Ibid*.
15. Press release issued by the Registrar of the Court, European Court of Human Rights, ECHR 271(2021) 14.09.2021.
16. Harassment, Harmful Communications and Related Offences Act 2020.
17. Gallagher, C. Garda pessimistic about bringing charges over 'revenge porn' leaks. *The Irish Times*, November 21, 2020. Available from: https://www.irishtimes.com/news/crime-and-law/garda-pessimistic-about-bringing-charges-over-revenge-porn-leaks-1.4415105?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fcrime-and-law%2Fgarda-pessimistic-about-bringing-charges-over-revenge-porn-leaks-1.4415105.

Preliminary references – a practical guide

This article offers advice for practitioners considering referral of a case to the Court of Justice of the European Union.[1]

Brian Kennedy SC

In her examination of the first 30 years of preliminary references to the Court of Justice of the European Union (CJEU) following Ireland's accession, Dr Elaine Fahey[2] characterised the number of references as "very disappointing", with 44 references having been made over that 30-year period.

The position has altered radically since then. A comparative analysis of EU law in Scotland and Ireland between 2009 and 2018[3] noted 64 references from Ireland over that ten-year period, in contrast to only five from Scotland, albeit that the different constitutional framework obviously assists in explaining this difference.

That sea-change continues apace. A further 24 cases were received by the CJEU from Ireland between 2019 and 2021. There has also been growth in the areas in which references are being made, with criminal law taking on greater prominence and environmental law in particular raising issues in recent years.

The purpose of this paper is to give practical assistance to practitioners when considering the possibility of a reference in domestic proceedings, up to the point in time at which the reference is sent to the CJEU.[4] The paper focuses on the timing of a reference and the framing of the terms of the request for the preliminary ruling (also known as the order for reference), and the questions, in circumstances where Irish courts typically allow for significant input from the parties in preparing those documents.

Timing of a reference

The CJEU's Recommendations to National Courts and Tribunals in relation to the Initiation of Preliminary Reference Proceedings (the Recommendations) note that a national court or tribunal may submit a request for a preliminary ruling as soon as it finds that a ruling is necessary to enable it to give judgment. The CJEU adopts something of a hands-off approach on this issue, emphasising that it is the national court or tribunal that is in the best position to decide at what stage such a request should be made. In Case C-681/13 *Diageo Brands*, it emphasised that the system of references is based on a dialogue between the two courts, "the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary".[5]

The Recommendations state that in the interests of the proper administration of justice, it may be appropriate for the reference to be made only after both sides have been heard.

The Recommendations also emphasise that the CJEU must have available to it all the information that will enable it both to assess whether it has jurisdiction to reply to the question and, if so, to give a useful response. Consequently, the proceedings must have reached a stage at which the referring court or tribunal is able to define in sufficient detail the legal and factual context of the case in the main proceedings and the legal issues it raises. The Recommendations state that in the interests of the proper administration of justice, it may also be appropriate for the reference to be made only after both sides have been heard.

Broberg and Fenger set out a range of criteria that national courts use in their assessment of whether or not to involve the CJEU.[6] They identify the degree of doubt that the national court entertains in how to interpret the relevant EU law as the most important criterion. They note that some courts have taken the approach of only invoking the Article 267(2) discretionary jurisdiction if a case raises really difficult and important points of EU law, and if the answer of the CJEU moreover can be expected to have a conclusive effect on the outcome of the national proceedings. Others, however, have chosen to refer merely because they are not completely sure and consider it likely that a resolution would be of help.

Broberg and Fenger express the view that it would not be appropriate for national courts to make use of the reference procedure in cases where they have only little doubt as to the correct interpretation of EU law, on the basis that not only would such a liberal approach eliminate the distinction in Article 267 between appealable and non-appealable decisions, but would also ignore the fact that EU law is an integral part of national law and that it is the normal task of national courts to decide on difficult legal questions. They consider that the proper approach is not to apply the relative difficulty in interpreting EU law as a stand-alone condition but instead as one of a number of criteria to be applied. Other relevant criteria include: whether the case can be decided independently of EU law; if the question concerns a legal issue that can be expressed in abstract terms; or, whether it concerns a dispute about how well-established EU law principles should be applied to a particular factual situation. That is really an elaboration of the interpretation/application distinction central to Article 267 – the CJEU interprets EU law while the national court applies this interpretation.

Features specific to a case may also suggest that a reference should be made. For example, if an issue arises as to whether the national law of another member state infringes EU law, that would suggest that a reference would be appropriate in order to give that other member state the opportunity of presenting its point of view. Also of relevance is the delay that results from making a reference, a feature that can cut both ways. On the one hand, a delay of approximately 18 months is an unwelcome feature in any litigation. On the other, if an appeal is considered inevitable and the effect of the reference would be to bring matters to an earlier conclusion, that would lean in favour of a reference.

Recent Irish case law

In *Ryanair v Minister for Finance* [2019] IEHC 469, the plaintiff sought a series of declarations to the effect that Section 127B of the Taxes Consolidation Act, 1997, concerning the income tax treatment of flight crew, was in breach of/incompatible with EU law or, alternatively, unconstitutional. It made an immediate interlocutory application, in which it sought a preliminary reference as well as an order temporarily restraining the operation/application of the provision pending the reference and/or determination of the proceedings.

The High Court (Haughton J.), in refusing the relief sought, referred in some detail to the Recommendations. While the plaintiff had put forward draft agreed facts, the defendants had not agreed the facts and disagreed with much of what was proposed. They contended that it was premature to make a reference. The Court found that the claim made by the plaintiff had evidential deficits such that it had failed to show an arguable case, which one would think would of itself be fatal to a request for a preliminary reference. On that basis, it followed that there was not sufficient detail for the Court to make appropriate findings of fact, or to make or frame a reference. The Court considered that if it were to do so, it would be seeking the opinion based on a hypothetical circumstance. It was also concerned that in exercising its discretion in interlocutory proceedings, it took the risk that matters could be overtaken by events. A further concern was that a premature reference could result in inadmissibility, or loosely framed questions that might not achieve useful answers.

The idea of the parties promoting a reference is not entirely novel. It does, however, require the parties to be in agreement that the case is appropriate for a reference, which is somewhat rare.

In *Eircom Limited v ComReg* [2021] IEHC 328, shortly before the hearing of a statutory appeal, the principal parties informed the High Court that they had come to the view that it should make a reference. The Court gave directions and then made a decision deciding to refer one question to the CJEU. The different approach taken was dictated by the nature of the proceedings. The appellant was appealing five decisions relating to the net cost of delivering a universal service obligation and, in particular, whether that amounted to an "unfair burden" on it. The parties had exchanged affidavit evidence and it was anticipated that there would be significant cross-examination of experts.

The parties accepted that there was a disagreement between them as to the meaning of the conclusions of the CJEU in an earlier judgment.[7] Crucially, they also accepted that questions of EU law arose, which could only definitively be settled by a reference to the CJEU. In deciding to make a reference, O'Moore J. found[8] that if he did not refer the relevant question, a lengthy trial would proceed, which would involve evidence and submissions on substantive matters in the absence of guidance from the CJEU, which he felt was required in order to decide the dispute.

The idea of the parties promoting a reference is not entirely novel. It does, however, require the parties to be in agreement that the case is appropriate for a reference, which is somewhat rare.

There seems to be an increased willingness to make a reference in the course of, or more typically at the end of, the hearing of High Court proceedings on affidavit, in particular in judicial reviews raising environmental law issues. In *Eco Advocacy CLG v An Bord Pleanála* [2021] IEHC 265, Humphreys J. identified a number of questions of interpretation of EU law, to which the answers were not clear. In deciding to make a reference, he noted[9] that a reference may, and frequently does, finally resolve the proceedings concerned, and that it can be far better for the speed of ultimate determination of matters to front load the reference rather than leave it to an appellate court, the

proverbial longest way round sometimes being the shortest way home.

One can see how that is a sensible approach in an environmental law case. The nature of the issues that arise in such cases, and the costs protection that usually applies, have the consequence that parties, in particular disappointed applicants, are more likely to exhaust appeal procedures. There must, however, be some limit to the number of references and it is implicit in Humphreys J.'s judgment in *Eco Advocacy* and other cases that he considered that not only were EU points raised but that they were points of substance, as well as being points of general importance. That might be said to be one of the benefits of a specialist court where the court has a greater familiarity with points that are likely to arise on a recurrent basis.

Another point of interest that arose in *Eco Advocacy* concerned the possible joinder of an *amicus curiae*. Typically, only EU institutions, member states and those who participate in domestic proceedings can participate in a hearing before the CJEU.[10] In *Eco Advocacy*, given the continent-wide nature of any potential ruling, Humphries J. thought it appropriate to give at least some thought to whether a wider set of voices should be included in the discussion. It appears that he may have been influenced at least to some extent by his membership of the official network of European environmental judges, which had identified active European bodies that may have an interest in environmental preliminary references, including ClientEarth and Justice and Environment.

Furthermore, one might observe that if the CJEU is keen to limit the number of intervening parties, a national court might be similarly reluctant to join such a party for that very purpose.

In his first judgment, he indicated that he was neutral as to whether those or any other bodies should be joined. In a second judgment, which was in effect the request for the preliminary ruling,[11] he noted that he had joined An Taisce and ClientEarth as *amici curiae*, and stated[12] that he had found the submissions made by those parties to be particularly helpful in crystallising the issues and clarifying his own thinking, describing the *amicus* process as "a genuinely helpful exercise, as far as I am concerned".

Irish courts are typically slow to allow for the joinder of an *amicus curiae*. Furthermore, one might observe that if the CJEU is keen to limit the number of intervening parties, a national court might be similarly reluctant to join such a party for that very purpose. However, the positive characterisation of the experience of Humphreys J. suggests that this is something that may occur more frequently in the future.

Obligation to refer

Different criteria apply to a court or tribunal against whose decision there is no judicial remedy under national law. Such a body is under an obligation to refer once it considers a decision on an EU law question to be necessary to enable it to give judgment, subject to limited exceptions, principally the *acte eclairé* and *acte clair* principles, which apply, respectively, where the answer has either already been given or is so obvious as to leave no scope for reasonable doubt.[13]

A party bringing an application for leave to appeal, who had raised an issue that would otherwise require a reference, could not be shut out from pursuing an appeal on the basis that no matter of general public importance arose or that the interests of justice so required.

National courts do not always comply with this obligation. It was established in Case C-224/01 *Kobler* that a failure by a court to refer could give rise to a claim for damages for breach of EU law, in an exceptional case. More recently, in Case C-416/17 *Commission v France (Advance Payments)*, the CJEU held for the first time that there had been an infringement of EU law by a court for failing to make a reference, where the French Conseil d'Etat had refused to make a reference in a tax case, notwithstanding the fact that the CJEU, in a subsequent case, reached a different interpretation to that which was considered obvious by the Conseil d'Etat.

A practical question arises as to how Article 267(3) fits in with the establishment of our Court of Appeal. In Case C-99/00 *Lyckeskog*, the Swedish Court of Appeal asked the CJEU whether it was covered by Article 267(3) in circumstances where, at least in certain cases, the Supreme Court had to give leave to appeal before the case could be heard. The CJEU held that the Court of Appeal was not covered by Article 267(3) on the basis that it was possible to bring an appeal to the Supreme Court and that if in this connection, a question arose as to the interpretation or validity of an EU rule, the Supreme Court would be required to make a preliminary reference.

In *Sony Music Entertainment Limited v UPC Communications Ireland Limited* [2018] 2 IR 623, our Court of Appeal held, following *Lyckeskog*, that it was not a court of final appeal on the basis that the Supreme Court may grant leave where it is satisfied that a decision involved a matter of general public importance or if the interests of justice so require. Hogan J. considered that this test plainly satisfied the *Lyckeskog* requirements. He noted[14] that the Supreme Court could make a reference not only at the hearing of the substantive appeal but also on an application for leave to appeal should this be required, referring to *Dowling v Minister for Finance* [2016] IESCDET 40.

While this issue does not appear to have received consideration by the Supreme Court, one can expect it to take the same approach. That does, however, indicate that a party bringing an application for leave to appeal, who had raised an issue that would otherwise require a reference, could not be shut out from pursuing an appeal on the basis that no matter of general public

importance arose or that the interests of justice so required. The logic of *Lyckeskog* is that if a question falling within Article 267 arises, there is an obligation to make a reference at the leave to appeal stage in the event that the Supreme Court were otherwise minded not to grant leave to appeal.

A reference is served on all interested parties, including member states, with a view to obtaining observations.

Form and content of reference

A reference is served on all interested parties, including member states, with a view to obtaining observations. The need for translation means that the document should be drafted simply, clearly and precisely, without superfluous detail. The Recommendations suggest that about ten pages are often sufficient to set out adequately the legal and factual context of the request. Furthermore, a party that is keen to procure the intervention of other member states needs to make the point at issue clear and attractive.

The Recommendations note[15] that in addition to the text of the questions referred, the request must contain:

a) a summary of the subject matter of the dispute in the main proceedings and the relevant findings of fact as determined or, at the very least, an account of the facts from which the questions are based;

b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant case law; and,

c) a statement of the reasons that prompted the referring court/tribunal to enquire about the interpretation or validity of certain provisions of EU law and the relationship between those provisions and the applicable national legislation.

In the absence of one or more of those matters, the CJEU may find it necessary to decline jurisdiction on some or all of the questions referred or dismiss the request for a preliminary ruling.[16] It is important to recall that our legal system differs considerably from those in many other member states and one should not proceed on the assumption that our laws and procedures will be readily understood without clarification.

The Recommendations also require the referring court to provide precise references for the relevant provisions and, where necessary, to briefly set out the main arguments. The referring court may also briefly set out its view on the answer to be given to the questions referred. The Recommendations note that this information may be useful to the Court, in particular in expedited or urgent procedure cases.

The questions themselves need to be viewed to some extent as a self-contained and self-explanatory document, in circumstances where they will be published in isolation in the *Official Journal*. Practitioner guidance again emphasises the need for clarity, given translation requirements – it has been suggested that there should be a maximum of two to five questions, and that internal sub-questions should be as limited as possible.[17]

The questions should be open and not leading. They should be conscious of the interpretation/application distinction. While the CJEU has in the past re-interpreted or revised questions where appropriate, it should not be assumed that it will be willing to do that, in particular in light of its ever-rising case load.

References

1. This is a revised version of a paper delivered to a meeting of the EU Bar Association on November 18, 2021.
2. Fahey, E. *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law in Irish Courts*. Dublin: Firstlaw, 2007, at page 9.
3. Rodger, B., Maher, I., Riordan, R. A decade of EU law in the courts of Scotland and Ireland: national legal systems compared. *Legal Studies* 2021; 41: 311.
4. Of the various texts, Broberg and Fenger's *Preliminary References to the European Court of Justice* (3rd ed., Oxford Scholarship Online, 2021) is particularly helpful. The CJEU's Recommendations to National Courts and Tribunals in relation to the Initiation of Preliminary Reference Proceedings (2019/C 380/01) ('the Recommendations'), which synthesise principles from the relevant case law and rules of procedure, are also very helpful in considering the position up to the making of the reference. For guidance on the subsequent stage, see in particular the CJEU's Practice Directions to Parties Concerning Cases Brought before the Court (2020/L 42 I/1) and its Advice to Counsel Appearing before the Court, available from: https://curia.europa.eu/jcms/jcms/Jo2_12354/conseils-aux-plaideurs.
5. §59.
6. Page 250 et seq.
7. Case C-389/08 Base.
8. §9.
9. §55.
10. Article 23(2) of the CJEU Statute.
11. [2021] IEHC 610.
12. §38.
13. Case 283/81 *CILFIT*, recently reaffirmed in Case C-561/19 *Consorzio Italian Management*.
14. §98.
15. §15.
16. See, in relation to specific questions, the Irish references in Case C-251/16 *Cussens v Brosnan* and Case C-254/19 *Friends of the Irish Environment*.
17. Storey, H., *et al.* Preliminary references to the Court of Justice of the European Union: A note for national judges handling asylum-related cases. Page 33. Available from: https://www.iarmj.org/images/ECJ-CJEU_Preliminary_References_4_14_2.pdf.

Frank Callanan SC

Frank Callanan was the friend who most bedazzled me. I first met him in UCD in the 1970s when he bestrode the Belfield campus with a copious beard that came and went ("my public demanded it" he told me, when I remonstrated at the start of a new academic year about another regrowth), and a voice that had a mellow, almost mesmerising quality. The attraction and the appeal of his arguments, apart from their intrinsic merit, lay in the seductive eloquence of his turn of phrase and his depth of learning, a tribute to Gonzaga's ethos, his parents' liberal aesthetic and the emerging concept of multidisciplinary studies. Frank dominated the Literary & Historical Society (L&H) audience in UCD by his presence, his audacity, his humour and his reading of his audience. His casually elegant command of language, history and literature both engaged and enraptured his listeners, and we knew we had one of the greats in our midst.

His qualities of friendship and convivial company were unsurpassed. Late at night he and I would drink a pint of Smithwicks in the Portakabin that was the old Belfield Bar, with cheese and onion crisps, accompanied by what we magnificently thought were immensely elegant Hamlet cigars, when we discussed and generally resolved the world's problems, at least to our own satisfaction. He invited me frequently to his family home in Park Avenue, where he appeared to simultaneously enrage and amuse his adored and adoring parents, and entertain the flock of students and academics who were attracted to that miniature centre of intellectual curiosity and debate. It was only part of the tragedy of his recent death from a heart attack that his father, Fionnbar, had died just two days earlier. Frank's last piece of writing was the eulogy he was preparing for his father's funeral.

The best of the Bar

Frank manifested all the best traditions of the Bar in his willingness to act in any cause, even if apparently hopeless, and even where the prospect of recovering a fee was remote or non-existent. In the division of his professional time between that of historian (with a particular interest in Parnell, Healy and Joyce) and barrister (specialising in employment law, judicial review and public law), he tended to favour the historian. But it is quite extraordinary that he managed to maintain the wide practice that he did at the Bar simultaneously with his acclaimed achievements as a historian of the intellectual and political history of Ireland in the late 19th and early 20th centuries. While he valued above all else the vindication of a client's rights and employed his powerful gifts as an advocate to that end, he revelled in the intellectual pleasure of research and writing, and recently finished a book on Joyce's politics, which is due to be published shortly by Princeton University Press. Greece was one of his favourite haunts for holidays where he combined his interest in classical antiquity with the pleasures of cigars and good wine (having long ago abandoned the Smithwicks of our youth). One of the photographs in the booklet for his funeral Mass seems to capture the essence of him. Like a still from a Fellini film, Frank is standing on a beach in the warm Greek sunshine, the waves behind him, clad in a yellow linen suit with, incongruously, an umbrella and a briefcase in each hand, looking bemusedly at the sky. It is just as easy to imagine him similarly clad on the streets of Paris, where he was equally at home, with the same quizzical expression on his face and an amused tolerance for the foibles of the world around him.

Pinnacle of life

He seemed for a time to be the perpetual, somewhat eccentric, bachelor, wandering precariously on his bicycle through Georgian Dublin, before slipping on his silk gown for the courtroom where his mildness of manner was shed for a mixture of forensic incisiveness and wholehearted concern for his client. But he was always a romantic at heart. The saga of the Italian model who failed to show at Dublin Airport despite Frank waiting to meet her in a tuxedo en route for some dress dance in his early years at the Bar was just one of the many stories he would tell, with a characteristic mixture of elegance and insouciance, against himself. I recall him telling me dolefully of an occasion in the UCD library when he found himself sitting near a young woman with whom he had to date merely exchanged pleasantries. He silently passed her a note, which read "Faint heart never won fair lady. How about a cup of coffee?" To his regret and undoubtedly her loss, she declined the offer; whether born of shyness or apprehension, history does not record.

So, it was only fitting that he did in fact win the fair lady when the beautiful Bridget Hourican, herself a renowned journalist and historian, enraptured Frank at a time when his friends had thought his romantic heart might never find the gossamer wings of true love. His marriage to Bridget and the wonderful home they made in Fitzwilliam Square were undoubtedly what Frank rightly saw as the pinnacle of his life. And as much as we admired and respected Frank for his professional and personal grace, wit and lucidity, surely the thing that we most cherish is the fact that he finally found such happiness in those gossamer wings, a happiness that will endure in that complex mix of memory and reality that forms the shimmering image of those we love.

MMC

A practical path to addressing inclusion at the Bar

Like many professional organisations, The Bar of Ireland is exploring ways to increase inclusion at the Bar, including in the area of ethnic diversity.

Aoife McNickle BL

The Bar of Ireland recognises the need, in the administration of justice, for the profession to reflect the society it serves. It is imperative that the experience of colleagues at the Bar is heard and respected.

Events globally and nationally have further galvanised organisations – including The Bar of Ireland – to critically reflect on their diversity and inclusion practices, particularly around race and ethnicity, to become 'respectfully curious' and 'comfortable with being uncomfortable'.

The move towards race inclusion at the Bar

In January, The Bar of Ireland was pleased to host its first event tailored to ethnicity, race and cultural background inclusion in the legal profession, and the importance of building an inclusive culture within the industry. The event was an honest and frank discussion between myself and a panel of experts, which included:

- Simon Regis, member of the Bar Council of England and Wales, co-chair of the Bar's Race Working Group, and co-author of 'Race at the Bar: A Snapshot Report';
- Sandra Healy, diversity and inclusion consultant, and founder and CEO of Inclusio, a science-based, data-led diversity and inclusion platform; and,
- Leon Diop, co-founder and CEO of Black and Irish, an organisation dedicated to highlighting and celebrating the identity of black and mixed-race Irish people.

One of the key challenges identified by Sandra Healy was that Ireland faces a lack of language around ethnicity and race. Leon Diop agreed that Ireland has the "scope to shape our own language here and be a leader in that space", describing language as heavily underestimated yet very powerful.

Action steps

Simon Regis made several recommendations on building inclusion – which can be contextualised to fit the Irish legal profession – in a number of key areas, to which the other speakers also gave input:

Access

Entities that wish to be more diverse need to be more intentional in their pupillage, recruitment strategies, communications and adjustments to the application process.

Retention

Also necessary are mechanisms to support the monitoring and equitable allocation of work and tendering by corporate or public bodies. Mention was made of the need to focus on inclusion, not just diversity, to mitigate the "revolving door".

Progression

Promotion and support in respect of taking silk and attaining a career in the judiciary need to be more comprehensively explored to ensure fair opportunities and advancement, irrespective of background.

Culture

Within the legal industry, and any organisation, there needs to be a member-led push for change and a desire to address diversity and inclusion. Engaging stakeholders – the Legal Services Regulatory Authority, circuits, Specialist Bar Associations and similar – and holding an open discourse about the steps being taken to address the issue are essential. Additionally, practices require consistent calibration in response to any changes in organisational context and culture.

Data

Gathering membership data is vital, but so is acting on that data. In moving forward, the steps highlighted by this panel included the need to establish baseline data of membership demographics, to set appropriate targets and goals, and to act on these.

A variation of the political adage might be: Some done! Lots to do!

THE BAR
OF IRELAND
The Law Library

DO YOU NEED A LEGAL OPINION?

DIRECT PROFESSIONAL ACCESS SCHEME

A facility for approved bodies and their members to brief barristers directly.

1. Check if your association or organisation is approved **here**
2. If already approved, you can contact one of our 1,825 barristers directly
3. Find a barrister with the specialism or area of practice that you need **here**
4. For full information on the Direct Professional Access Scheme, including application process, click **here**

Note that legal services under the scheme do not extend to contentious matters (e.g. court appearances)

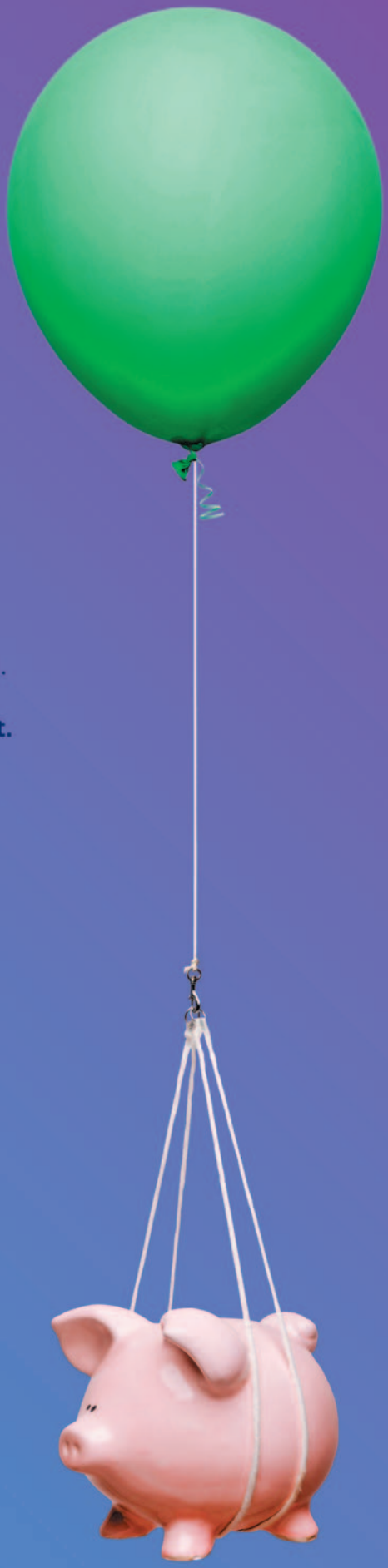
Terms of engagement are a matter between barristers and contracting body.

Mercer

welcome to brighter

what's the simplest way to save up to 40% of income tax?

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.**

www.mercer.ie

A business of Marsh McLennan