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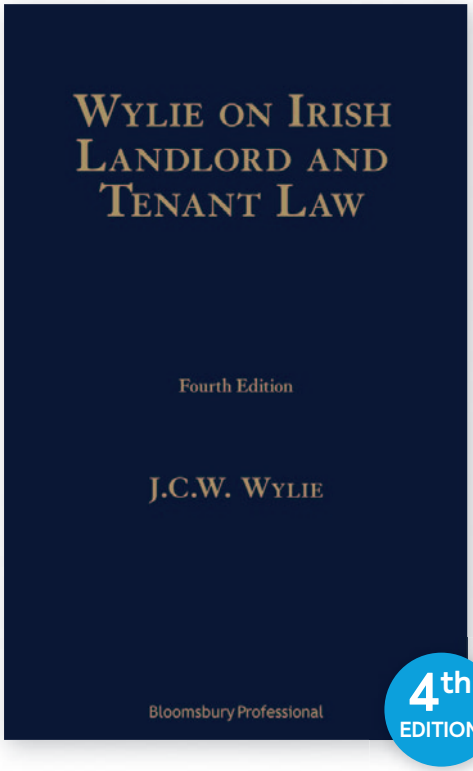


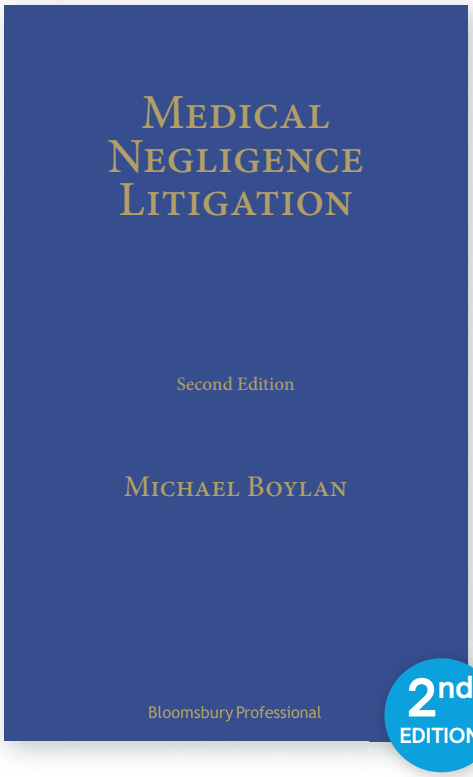
Wylie on Irish Landlord and Tenant Law

By J.C.W. Wylie

Pub date: Jul 2022
Hardback Price: €295 **eBook:** €260.45
ISBN: 9781526522030
Extent: 1248

Long recognised as the definitive work on this area, *Wylie on Irish Landlord and Tenant Law, 4th edition* comprehensively deals with all aspects of this subject relevant to the law in Ireland. The book covers everything from the basics to more complex matters such as when disputes arise, and the controversial subjects of rent reviews and guarantees.

This title will also be available as part of Bloomsbury Professional Ireland's Irish Property Law Online Service



Medical Negligence Litigation

By Michael Boylan

Pub Date: Aug 2022
Paperback Price: €195 **eBook:** €172.16
ISBN: 9781526521743

"I unconditionally welcome the book and recommend it to all practitioners and other interested persons in the complete knowledge that, over time, it will stand as being one of the most authoritative books ever published in this area."

– The Hon. Mr Justice William McKechnie, Judge of the Supreme Court, in the foreword to the first edition of *A Practical Guide to Medical Negligence Litigation*

This title will also be available as part of Bloomsbury Professional Ireland's Irish Medical Law Online Service

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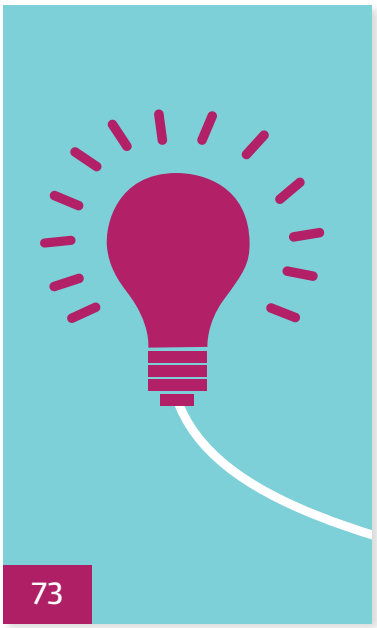

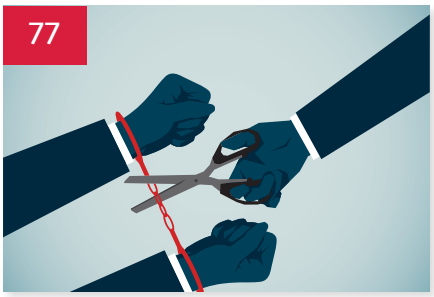

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Kelly Report Implementation Plan published

The Implementation Plan arising from the Review of the Administration of Civil Justice has been published, and barristers should familiarise themselves with its recommendations.

At the end of May, a short number of weeks ago, the Minister for Justice, Helen McEntee TD, published an 'Implementation Plan' setting out the approach and timescales to advance many of the recommendations arising from the Review of the Administration of Civil Justice – also known as the Kelly Report.
The Implementation Plan identifies seven work streams aligned to the main themes from the Kelly Report and sets out the timelines for implementation over the next three years:

1. Civil procedure in the courts: To reform a range of practices and procedures to improve and modernise the civil courts to ensure timelier hearings and reduce delay.
2. Discovery: To reform the system of discovery to reduce the cost of litigation, improve procedures and reduce delay.
3. Judicial review: To consider primary legislation for the non-statutory system of judicial review with the aim of enhancing the timeliness, efficiency and cost-effectiveness of the process, and to amend elements of the Rules of Court.
4. Multi-party litigation: To legislate for a comprehensive multi-party action procedure in Ireland.
5. Litigation costs: To consider and advance measures to reduce the costs of litigation, including costs to the State.
6. Facilitating court users: To achieve more effective outcomes for court users, with particular emphasis on vulnerable court users, including children and young persons, litigants who are ineligible for civil legal aid, and wards of court.
7. Technology and e-litigation: To create a secure digital environment to facilitate e-litigation and to modernise the digital facilities of Irish civil courts.

Some of the key actions for implementation under the Plan include:

- the replacement of multiple court documents with a single document to commence legal proceedings;
- simplification of the language and terminology in the Rules of Court;
- promotion of video conferencing for the taking of expert and other evidence;
- an online information hub to provide dedicated legal and practical information for those considering bringing proceedings without professional representation;
- standardisation of arrangements for naming and vetting of suitability of next friend or guardians *ad litem* to act on behalf of a child in litigation;
- updated Courts Service Customer Charters to provide more specific measurements for performance and service levels; and,
- legislation to provide for the introduction of a more efficient and cost-effective regime for discovery, and to automatically discontinue cases not progressed within 30 months.

One area on which the Kelly Review Group was not able to reach consensus was on how to reduce litigation costs. The majority of the Group members recommended the drawing up of non-binding guidelines for costs levels, while the minority of Group members recommended that a table of maximum costs levels be prescribed by a new Litigation Costs Committee, which could be derogated from in exceptional circumstances. The Department of Justice has recently commissioned economic research in this area – Indecon Economic Consultants were appointed in January 2022. When completed, this research, together with appropriate legal advice on its findings and implications, will inform policy proposals that Minister McEntee intends to bring to Government next year.
The Bar of Ireland, in conjunction with the Law Society of Ireland, made a submission to Indecon in February 2022 highlighting the lack of an evidential basis for claims that Ireland is a high legal cost jurisdiction. A review of reports into legal costs over the last 20 years has demonstrated that there are considerable questions to be raised on the evidential basis of the assertion that Ireland is a high legal cost jurisdiction. On the contrary, there is evidence that legal costs have reduced over the last 10 years.
Our submission also highlighted four areas that would assist in positively impacting on litigation costs:

1. Increased investment in the justice system, in particular the number of judges and support staff, better case management and adoption of technology.
2. Investment in effective civil legal aid to ensure access to justice for all regardless of means.
3. The introduction of non-binding guidelines in respect of legal costs.
4. A reduction in State-imposed revenue on a Bill of Costs.

The Council and its committees will be closely monitoring developments and engaging with the Department of Justice on each of the work streams outlined above. In the meantime, members should take the time to familiarise themselves with the plan, which is available on the Department of Justice website.

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

Insight into vulnerable clients

This edition includes articles on the impact of legal changes relating to crowdfunding and personal injuries cases.

A referendum on the right to housing is one of the topics of discussion during our interview with Fr Peter McVerry. He expresses his concern for the growing number of people on the margins of society and identifies some of the root causes, such as addiction and mental health difficulties. If society can address these problems we can go some way towards reducing homelessness.

Miranda Egan Langley BL examines the recent developments in the law relating to temporary release and explores the differences between community return and custody remission.

The Personal Injuries Guidelines and the introduction of an "insight" clause come under scrutiny by Eugene Deering BL. This is an important development in law and one that colleagues should be aware of. This aspect of the Guidelines can diminish an award for general damages for those plaintiffs with a traumatic brain injury in circumstances where they have low or complete loss of awareness of their own suffering.

Brendan Guildea BL provides a comprehensive guide to the recently introduced European Union Crowdfunding Regulation. Vast sums of money have been raised through websites familiar to most, such as GoFundMe.com and Indiegogo.com. This article examines the new considerations for crowdfunding providers, investors and the companies in search of financial support.

Recent media commentary on the length of trials identified barristers as part of the problem; concision is a lost art and we barristers are guilty of warbling on too much while on our feet. The Chair, Maura McNally SC, defends the Bar in our closing argument. On that note, I'll be brief: see you in October.

Helen Murray BL
Editor
The Bar Review

Afghanistan appeal continues to achieve milestones

James Douglas
Director of Programmes, Irish Rule of Law International

The Taliban takeover of Afghanistan last August resulted in a refugee crisis. At particular risk of persecution were women professionals, including members of the legal professions – women who had served as advocates and judges. To respond to the urgent need for assistance, the International Association of Women Judges (IAWJ), the International Bar Association and others appealed to the Irish State to secure safe passage for ten Afghan women judges and their families from Afghanistan to Ireland.

A coalition was formed between the Law Society of Ireland, Irish Rule of Law International, The Bar of Ireland, the Association of Judges of Ireland, and the IAWJ, to assist in supporting their safe transition to and resettlement in Ireland. In doing so, the coalition put out a call to members of the broader legal professions to help in one of three ways: pledges of accommodation; financial assistance; and, social and professional support.

As a result of the enormous generosity of members of Ireland's legal community – and despite numerous challenges and roadblocks – the coalition has achieved a number of key milestones. It has secured accommodation for five judges and their families, and is currently in the process of securing an additional five houses. In addition, support circles have been established for

each judge, which are being led by members of the judiciary, the Bar and the Law Society. Trainee solicitors have been working hard with the judges in assisting them to avail of scholarships for future professional and educational development. All of the judges are currently enrolled in intensive English language courses, availing of scholarships and laptops that have been generously donated to them. Social events have also taken place, with future outings planned.

The coalition would like to continue to support the judges and their families as they resettle in Ireland. It will not be possible to do so without the continuing generosity of members of Ireland's legal profession.

To see how you can assist, please visit:
https://www.irishruleoflaw.ie/afghanistan_appeal.

Specialist Bar Association news

EU Bar Association (EUBA)

Brian Kennelly QC SC presented an EUBA seminar on March 29 entitled 'An Update on EU Restrictive Measures (Sanctions) Arising from the Invasion of Ukraine'. The seminar was chaired by Noel Travers SC.

Planning, Environmental and Local Government Bar Association (PELGBA)

James Devlin SC examined 'Pleadings and European Law' at the PELGBA webinar on March 31. On April 6, Deirdre Conroy MA MUBC BL, protected structure specialist, gave a very detailed presentation on 'Architectural Heritage – Legislation and Planning Matters'. PELGBA also enjoyed a presentation from Niall Handy BL on May 19, who discussed the Maritime Area Planning Act 2021. On May 30, Sonja O'Connor BL discussed 'The New Large Scale Residential Development Act' at a PELGBA webinar. All of these webinars were chaired by current Association Chair Stephen Dodd SC.

Employment Bar Association (EBA)

The EBA held its first hybrid breakfast briefing on March 23. Attendees could watch online and from the Gaffney Room as Mairead McKenna BL gave her presentation on *Baranya v Irish Meats Group Ltd* [2021], and discussed the Supreme Court appeal case on a communication made by an employee in a meat plant to his supervisors on September 15, 2015, constituting a "protected disclosure" for the purposes of s.5 of the 2014 Act. On April 7, Cathy Smith SC provided an update on *Power v HSE* at an EBA breakfast briefing. This event encompassed a brief consideration of the Supreme Court judgment in an appeal of a decision of the Labour Court under the Protection of Employees (Fixed Term Work) Act, 2003. Both breakfast briefings were chaired by Alex White SC, Chair, EBA.

Probate Bar Association (PBA)

Vinog Faughnan SC chaired the PBA breakfast briefing on April 26, where Andrea McNamara, Senior Associate Solicitor, TEP, O'Connell Brennan, provided an overview of Capital Acquisitions Tax (CAT) and common reliefs and exemptions. This webinar covered CAT, tax-free thresholds, the scope of CAT, common reliefs and exemptions, and tips on addressing CAT. The PBA also held a breakfast briefing on May 24, which was chaired by Vinog Faughnan SC, where John Glennon, probate officer, considered 'Court Applications – The Underlying Cause'.

Sports Law Bar Association (SLBA)

The SLBA and the Arbitration and ADR (AADR) Committee of The Bar of Ireland held a joint event on April 28, chaired by Cathrina Keville BL, Chair, AADR, and Susan Ahern BL, Chair, SLBA. Christine Bowyer-Jones and Roderick Maguire BL discussed mediation in sport. On May 3, the SLBA held a webinar on horse racing. Cliodhna Guy, Interim CEO, Head of Licensing, Legal & Compliance at The Irish Horseracing Regulatory Board, and Mr Justice Tony Hunt gave very interesting insights into the structure of racing regulation in Ireland, inquiries, appeals, and the legal principles that apply.

At the CBA Conference (from left): Mr Justice Garett Simons; James Burke BL; Jonathan FitzGerald BL; and, Mrs Justice Finola O'Farrell DBE.

Construction Bar Association (CBA)

The CBA held its seventh major open conference event in the Atrium, Distillery Building, on May 6, 2022. The event was split into three panels. Panel 1 on adjudication was chaired by Jonathan FitzGerald BL. Speakers and topics included:

CBA Conference speakers (from left): John Kennedy SC; Robert Fitzpatrick SC; Mrs Justice Mary Finlay Geoghegan; and, Lydia Bunni BL.

- Mr Justice Garrett Simons on 'Adjudication and the Courts – the Irish Experience';
- Mrs Justice Finola O'Farrell DBE on 'Adjudication and the Courts in England and Wales' and,
- James Burke BL on 'Judicial Review and Adjudication'.

Panel 2 on insurance and construction was chaired by Mrs Justice Mary Finlay Geoghegan, former judge of the Irish Supreme Court. Speakers and topics included:

- Peggy O'Rourke SC on 'Bonds in Construction';
- John Kennedy SC on 'Civil Liability Acts and Concurrent Wrongdoers'; and,
- Lydia Bunni BL on 'Insurance Clauses in Standard form Construction Contracts'.

Panel 3 on recent developments in construction law was chaired by Mr Justice Mark Sanfey. Speakers and topics included:

- Patrick Leonard SC on 'Retrospectivity and the MUD Act; clarification by the High Court *Clarion Quay v Dublin City Council*';
- Robert Fitzpatrick SC on 'Implied terms in Construction Contracts'; and,
- Anita Finucane BL on 'Suspension and Termination Provisions in Construction Contracts'.

Immigration, Asylum and Citizenship Bar Association (IACBA)

On May 26, the IACBA held an event on the topic of International Protection Appeals Tribunal (IPAT) hearings, which was aimed at junior members of the Law Library and explained the practicalities of running IPAT hearings. The event was chaired by William Quill BL with Cindy Carroll, Deputy Chair, IPAT, and Lisa McKeogh BL providing a comprehensive synopsis.

Law and Women Mentoring Programme

Applications are open for the 2022/23 Law & Women Mentoring Programme. The Programme is open to all female barristers at any stage of their career who would like to benefit from a mentoring partnership over the next year. As well as being paired with a senior mentor for the year, you will receive training to help you get the most from the experience, as well as invitations to workshops and events. Check *In Brief* for details or contact Lindsay.bond@lawlibrary.ie for more information.

Prof. Conor O'Mahony

"We need to be angry"

Fr Peter McVerry spoke to *The Bar Review* about his work among the most marginalised in society, and what needs to change to end inequality and solve the housing "catastrophe".

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Fr Peter McVerry is probably one of the best known people in Ireland, and the Trust that bears his name is equally famous for its work with the most marginalised in society. It comes as something of a surprise therefore to learn that Peter completed a degree in chemistry and maths at UCD, taught part-time in institutes of technology, and once considered a career in academia. He also looked to the Jesuit order's mission in Zambia as a possible path, but all of that changed when he went to live and work in Summerhill in Dublin's north inner city in 1974: "That totally changed my life. Two things shocked me. The first was the conditions in which people lived. Much of the housing was old tenement buildings from the 1800s divided into flats. Some of the houses had one outside toilet for eight families. Parents would tell you of waking up in the morning and finding a rat on their child's cot. Unemployment was at about 80%. The second thing that shocked me was that I had been living in Dublin for the previous 15 years and I had no idea that people lived in such conditions. That affected me a lot – my ignorance. I think that runs through the whole of society".

A growing need

The evolution of the work that Peter began in 1974 reflects in many ways the social change that has taken place in inner city Dublin, and elsewhere in Ireland. The first issue was young people leaving school early and drifting into criminal behaviour. The Jesuits responded by setting up a youth club and employment scheme: "Then I came across a nine-year-old kid sleeping on the street, so we opened a hostel for boys up to the age of 16. Then the young people were leaving at 16 and going back onto the streets, so Dublin City Council gave us a flat in Ballymun as a hostel for over 16s. Then the drug problem hit Dublin, and we had 14 and 15 year olds coming to us, injecting heroin, so we opened a detox centre. Then we had to open a drug-free hostel for the young people who had finished detox. Then the Child Care Act came in and we had to separate the under 18s from the over 18s, so we had to open another hostel. There was no big plan. We just went from year to year saying 'what do we have to do next?'"

The Arrupe Society, later renamed as the Peter McVerry Trust, is now one of the leading providers of services to homeless people in Ireland, with 25 hostels in Dublin and Kildare providing emergency accommodation to almost 1,000 people every night. The Trust also now provides around 500 permanent homes, and operates six drug and alcohol treatment centres, a drop-in centre, and two small schools.

This expansion also came with increasing financial and regulatory responsibility, which was taking Peter away from the work he wanted to do – working directly with homeless people – so the Trust appointed CEO Pat Doyle in 2005: "He's very competent, very efficient, very compassionate, and he has expanded this organisation to where it is today in a way that I could never have done".

Prevention and intervention

Working so closely with people who have become homeless gives Peter a unique insight into the underlying causes, and the measures that would make

a difference: "Money spent in early childhood intervention is money very well spent. Many of the homeless people who come to us have had horrific childhoods. Barnardos have a slogan that Ireland should be the best place in the world for every child to grow up in, and that would be my hope".

Investment in addiction and mental health services is also badly needed. Peter points out the irony of a system that will spend tens of thousands of Euro keeping someone in prison, but not on preventing them ending up there in the first place: "If you're poor, and if you have a mental health problem and an addiction problem, you may forget about it. I think investment would pay dividends for society because about 70% of those who go to prison have an addiction, and many of them are on long waiting lists for treatment, while we're spending €80,000 a year keeping them in prison. The only public service that's available to the poor today, for which there is no waiting list, is the prison service".

The issue of what exactly the State's role in service provision should be can be a thorny one. One view might be that the State has a responsibility to provide these services directly, rather than relying on voluntary bodies and charities to do the heavy lifting. Peter has concerns that the lack of understanding of the issues by those in power would be a significant barrier to effective services: "I don't want Government running homeless services because they wouldn't have a clue. Voluntary bodies like ourselves and the Simon Community and Focus Ireland have the experience, and I think we add an element that Government might not. The Government might see it as providing accommodation for homeless people, full stop. We see it as providing care for homeless people, which includes accommodation".

He does of course accept that the State has a vital role, as funder and regulator, and a balance needs to be struck: "I have no problem with Government delegating services to voluntary bodies, provided the Government assumes responsibility for the services, for the funding, for their adequacy. What tends to happen is the Government dumps the service onto a voluntary body and then forgets about it. The Government sees voluntary bodies as wanting more and more money, and the voluntary bodies see the Government as trying to get them to do as much as possible with as little as possible. That can be very disruptive".

Right to housing

One piece of State intervention that Peter is very much in favour of is the proposal for a referendum on the right to housing: "The right to education is in the Constitution, and that means that every child in this country is entitled to an education. If they're not getting it, they can go to the courts. If we could get the right to housing into the Constitution, it obviously doesn't mean that the day after the referendum, every homeless person can demand the keys of a house, but it does impose on Government the obligation to make housing a priority. They have to produce policies and a timeline, perhaps by 2030, at the end of which everybody is entitled to have a place they can call home".

He's not terribly hopeful though: "It's in the Programme for Government, and the Government has recently set up a committee to examine it, but I'm afraid it's going to go on the back burner, especially after December when Fine Gael take over the Taoiseach's office. Fine Gael have always been adamantly opposed to a right to housing in the Constitution, so I'm afraid nothing's going to happen".

Fr Peter McVerry still lives in Ballymun in north Dublin, where his door is always open to those who need him.

The new homeless

Meanwhile Ireland's housing crisis has produced a new and growing group of homeless people: those who cannot find or afford suitable rented accommodation. Figures released shortly after our interview reveal that the number of people now in emergency accommodation has once again passed the 10,000 mark, including almost 3,000 children: "Seven, eight years ago there was no such thing as a homeless family in this country. A few families became homeless but they were very quickly rehoused. Now it is probably the most serious issue, and a much more intractable problem because with a homeless single person you can get them off the streets into a hostel: you can't do that with a homeless family".

Peter speaks of what he feels is a "total inertia" on the part of those in power, and wishes for "a decision-maker with a passion for this" to take the problem on. He says he respects the current Minister for Housing, Darragh O'Brien TD, who he feels is stymied by the policies of a previous administration, but Peter's model for a housing visionary is, perhaps unsurprisingly, Donagh O'Malley, who introduced free secondary education in the late 1960s despite opposition from many sectors of society, and indeed his own Government.

In the absence of such a visionary, what can be done? For Peter, the obvious answer is to build more social housing: "In 1975, this country built 8,500 council houses. In 1985, we built 6,900. In 2015, this country built 75 council houses. We're paying the price for years of appalling housing decisions".

For Peter, the roots of these decisions lie in the ideology of those in power: "They come from the neoliberal ideology that says the private sector can do all these things better than the public sector. That has now proved to be a disaster".

Solutions

Building social housing takes time; meanwhile, the crisis in the rental sector must be addressed, and that means addressing the tax regime, and taking on the institutional landlords: "The Government keeps saying supply is the issue, but supply isn't the issue. Affordable supply is the issue. There's no problem if you can spend €3,000 a month on renting a flat. Many of the big institutional investors are leaving their apartments empty rather than reducing the rent because it pays them to keep the rents high. One of my solutions is to reduce rents by 25% across the board and reduce the tax that landlords pay on rental income by 50%. That's a win for the tenant and the landlord. The problem is that the big institutional investors, who don't pay any tax on their income, would go screaming all the way to the Supreme Court".

He would also like to see the regulations around short-term rentals properly enforced, mentioning recent figures showing only 850 properties available for rent in the whole country, but many thousand short-term lets: "We're putting homeless people into hotels and tourists into private flats, which is absurd. There are regulations around letting these properties out, but the local authorities say they don't have the capacity to regulate that. My proposal would be to make it illegal to advertise on Airbnb, and illegal for Airbnb to accept an advertisement, unless the property is fully regulated and, if necessary, has planning permission. You don't have to monitor it. You just make it illegal".

Peter points out that the Government is capable of taking emergency action when it wants to: during Covid-19 restrictions the numbers of homeless people dropped significantly because of a ban on evictions, but now that this ban has been lifted, the numbers are rising again: "There are measures we could take, but we seem very reluctant to take them, and one of the arguments against taking them is the right to private property in the Constitution. If you have a proposal and people say it's against the right to private property, go to the Supreme Court and let them decide. I don't think we need to take that right out of the Constitution. Indeed, many legal experts would say that the Supreme Court has on a number of occasions indicated that the right to private property is secondary to the common good. Now, however, the right to private property in the Constitution is making Irish people homeless".

This brings us back to ideology: "Who benefits from rising house prices? The banks do. Who benefits from rising rents? Landlords. So which side is the Government on? The Government is on the side of the banks and the big international investments funds. They're on the side of the owners of capital. They're not on the side of tenants or mortgage payers who are struggling. And that has to change".

It also brings us back to the gap between those who make decisions and those who are affected by them: "How do you see Irish society? There's a view from the top and a view from the bottom. The problem is that all the decision-makers have the view from the top. They live in their own houses in nice areas of town. They have permanent, pensionable jobs, their children are almost certainly going to third-level education, and that's the perspective that they're making decisions from".

Channelling the anger

Peter's work has made him one of the most recognisable figures in the country. It's not something he's comfortable with, but he accepts it as part of the job: "I live with it. I wish it wasn't the case, but if it's going to help homelessness, I will tolerate it".

With political inertia and rising national and international crises to contend with, he admits that he is pessimistic about the future: "We've had a housing crisis. Now we have a housing catastrophe. And we have the Ukrainians thrown in the mix. I think our response to the Ukrainian refugees is a really bright light in Irish society, and I'm all in favour of it, but it has intensified the catastrophe that we have been building up over the past 20 years by failing to provide social housing".

He says that he is driven to continue by anger: "I'm angry at what's happening, at what has happened over the last 40 years. We need to be angry. You think of anger as something very negative, something that explodes destructively, but anger and love go together. You cannot love somebody who's suffering unnecessarily without being angry at what's causing the suffering. So I think we need to be angry and we need more politicians who are angry and we need more of the public who are angry, and who are demanding that something changes".

A sense of service

Fr Peter McVerry was born in 1944 and grew up in Newry. He credits his father, who was the local doctor, with passing on a sense of service: "He was a doctor in those days before doctors had practices with assistants and partners, so he was alone. Frequently I would hear the phone going at night and he would be called out to his patients, and he'd get up and go out – he never complained". His sense of religion, he says, came from his mother: "My mother was a Welsh Protestant who converted to Catholicism in order to marry my father and, like many converts, became more Catholic than the Catholics themselves". The combination of these attributes led him to choose a life of service in a religious context, and he joined the Jesuit order in the 1960s. While attitudes to the priesthood have changed hugely in the decades since, and are often much less positive than they once were, Peter has no regrets: "I've never looked back. If I was starting again, I'd do exactly the same".

Quiet life

Despite a pretty punishing schedule, with a phone that never stops ringing and a door that is open to everyone, Peter says he's learned to relax: "I have a dog. The dog has probably kept me alive because you have to walk the dog so you get a little bit of exercise. Like myself she's getting old and she likes short walks, which suits me fine. I do sudoku. I usually do the super tough level, but they've now introduced another level called insane, so I'm doing that one now".

Access to funds?

The regulations are in. But what do practitioners need to know about the 2020 EU Crowdfunding Regulation and Statutory Instrument 702/2021?

Brendan Guildea BL

Introduction

The regulations are in.[1] They took a while.[2] And, as usual, the EU has attempted to strike a balance between stakeholders with competing interests. In this case there are three: small investors; SMEs attempting to raise funds; and, the ever-growing panoply of business-to-consumer intermediary platforms (crowdfunding service providers or CSPs).[3] Framing the parameters of this growing area in a deliberately general and technology-neutral way, it seems that EU legislators do not yet know where the real issues will arise.[4] Let's dive in.

What is crowdfunding?

In the Crowdfunding Regulation (EU) 2020/1503 (the Regulation), crowdfunding is defined as "the matching of business funding interests of investors and project owners through the use of a crowdfunding platform and which consists of … the facilitation of granting of loans … [and/or the sale of] transferable securities and admitted instruments for crowdfunding purposes issued by project owners or a special purpose vehicle".[5] In other words, a crowdfunding website contains a list of projects for which funding[6] is sought. Examples include GoFundMe.com and Indiegogo.com. Companies can use these websites to advertise the goods/services for which they are seeking financial assistance to develop or bring to market. Anybody wishing to invest simply clicks on a link and makes payment, either directly to the company through the crowdfunding website or through yet another intermediary.

As of December 2021, this mechanism has raised US$34 billion worldwide – of which US$17.2 billion and US$6.48 billion have been raised in the US and EU, respectively.[7] A prominent example of a successful company that originally used crowdfunding to get off the mark is virtual reality headset company Oculus, which was bought by Facebook for US$2 billion in 2014.[8] In 2012, Oculus raised US$250,000 in four hours via Kickstarter.com. Closer to home, Irish work safety company HaloSOS raised €160,000 in less than a month in spring 2020.[9]

In a similar, possibly more altruistic, vein, crowdfunding has been leveraged to support charitable and not-for-profit projects. Medical crowdfunding is where finance is raised to cover often life-saving procedures via GoFundMe.com. Recently, €100,000 was raised in less than a day by Irish doctors and the proceeds used to send medical supplies to Ukraine.[10] However, where money changes hands on this scale, layers of oversight and regulation emerge.

The Crowdfunding Regulation (EU) 2020/1503

Goals and context

As with all EU legislation, the recitals to the Regulation provide some useful background. The recitals take up 25% of the body of the Regulation.[11] Our light speed commentary on these is as follows:

- Recital 1 sets an aspiration that CSPs take on no risk for the funds committed as a result of an investment made via their website;

- Recital 3 says that the primary goal of crowdfunding is to provide access to finance for SMEs who otherwise lack access to bank finance, with Recital 4 noting that secondary benefits of this practice include: a successful crowdfunding campaign can validate a business idea; it gives entrepreneurs access to a large number of people who may provide valuable insights; and, it is a marketing tool;
- Recitals 5-9 and 74 discuss the issues arising from fragmented and divergent regulation across the EU, which runs counter to the free movement of goods and services, effectively forcing companies to only seek finance within their national market;[12]
- Recital 10 sets out the revolutionary aspect of crowdfunding: "crowdfunding services aims to facilitate the funding of a project by raising funds from a large number of people who each contribute relatively small investment amounts through a publicly accessible internet-based information system. Crowdfunding services are thus open to an unrestricted pool of investors who receive investment propositions at the same time and involve the raising of funds predominantly from natural persons, including those that are not high-net-worth individuals";
- Recitals 11-15 discuss various related means of raising funds such as initial coin offerings (ICOs) and investment-based funding – further regulation is likely to follow as these practices develop further;
- Recitals 16 and 17 introduce the cap of €5m per offering or project;[13]
- Recitals 18-21, 25-27 and 50-57 contain a discussion of the obligations imposed on CSPs (such as what information should be presented on their websites);[14]
- Recitals 24 and 42-47 emphasise the importance of investor protection – the Regulation differentiates between sophisticated and unsophisticated investors, as crowdfunding is usually the purview of the latter;
- Recitals 22, 23, 28-35, 37-41, 49 and 58-70 discuss issues for national regulators;
- Recital 36 mentions the establishment of an EU-wide up-to-date register of all CSPs, under the auspices of the European Supervisory Authority;[15]
- Recitals 48 and 71-72 address the ongoing review of this area by EU institutions, including the Commission; and,
- Recital 73 sets out the overlap with the General Data Protection Regulation (GDPR).

Substantive requirements

Following a consultation period in late 2013,[16] and a 2015 opinion from the European Securities and Marketing Authority,[17] in 2018 the EU Commission proposed a regulation "European Crowdfunding Service Providers (ECSP) for Business".[18] The key substantive provisions, which found their way into the final (October 2020) version, can be broken into three categories:

I. Obligations on CSPs

- Articles 3 to 11: Legal obligations of CSPs, including: the requirement to obtain authorisation (Art 3(1)); a duty to act honestly, fairly and professionally (Art 3(2)); prohibition on routing investors' orders to a particular crowdfunding offer (Art 3(3)); duty to protect the integrity of the market and the interests of clients (Art 4); mandatory minimum due diligence checks (Art 5); additional duties where CSPs offer portfolio management services (Art 6); avoiding internal conflict of interests (Art 8); and, outsourcing does not negate CSP responsibility for compliance (Art 9(3));
- Article 23: Requirement to provide prospective investors with a "key investment information sheet";[19] and,
- Articles 27 and 28: Marketing limitations on CSPs – for example, Article 27(2) states: "Prior to the closure of raising funds for a project, no marketing communication shall disproportionately target planned, pending or current individual crowdfunding projects or offers".

II. Regulatory matters

- Articles 1 and 2: Scope and definitions, respectively;
- Articles 29-38: Obligation on member states to establish regulators;
- Article 18: Cross-border regulation;[20]
- Articles 39-43: Enforcement of regulations by national regulators; and,
- Articles 12-17: Regulatory matters around authorisation of CSPs – Article 12(8) states:

"The competent authority shall, within three months from the date of receipt of a complete application, assess whether the prospective crowdfunding service provider complies with the requirements set out in this Regulation and shall adopt a fully reasoned decision granting or refusing to grant authorisation as a crowdfunding service provider. That assessment shall take into account the nature, scale and complexity of the crowdfunding services that the prospective crowdfunding service provider intends to provide. The competent authority may refuse authorisation if there are objective and demonstrable grounds for believing that the management body of the prospective crowdfunding service provider could pose a threat to its effective, sound and prudent management and business continuity, and to the adequate consideration of the interest of its clients and the integrity of the market".

III. Investor rights/project owner obligations

- Articles 19-26: Creation of obligations owed by project owners and CSPs to investors, in terms of information to be made available about offerings;
- Annex 1: Key investment information sheet requirements; and,
- Annex 2: Definition of sophisticated investors.

Irish implementing legislation

On December 13, 2021, the Irish Minister for Finance signed Statutory Instrument 702/2021, giving "full effect to" the European Union (Crowdfunding) Regulations 2021. The Central Bank of Ireland is designated as the competent authority, with a right of appeal to the Irish Financial Services Appeals Tribunal.[21] The penalties that can be imposed on those who breach the Regulation are set out in section 33AQ of the Central Bank Act 1942, as amended. These include:

- a penalty up to €10m or 10% of turnover (whichever is greater), in the case of companies, or €1m in the case of a natural person; and,
- revocation or suspension of CSP authorisation.

The balance of the Statutory Instrument deals with the responsibility for investment information sheets. Investors have two potential avenues for recouping compensation when information sheets are misleading or inaccurate, or they omit key information needed to aid investors when considering whether to finance the crowdfunding project. They can either:

A. sue the project owner or, where the project owner is a body corporate, each person who is a director of that body corporate, when the key investment information sheet is published[22] – the identification of the directors should be clear from the information sheet; or,

B. sue the CSP.

Considerations for CSPs

If CSPs are to make as big an impact as the social media platforms of the '00s and '10s, they will need to keep their regulators, project owners and investors happy. On the regulation side, ambitious CSPs will need authorisation to provide crowdfunding, payments and credit services. Doing so will cut out the need for several layers of intermediaries between investors and project owners. However, the more legwork they take on, the greater their liability, which defeats a fundamental goal of the Crowdfunding Regulation: to allow CSPs to provide their service without taking on risk.

Where CSPs accept payment in cryptocurrencies, third-party oracle protocols or other decentralised financial instruments, they run the risk of breaching anti-money laundering or 'KYC' (know your customer) requirements. So, for the moment, cash is likely to remain king in the area of crowdfunding.

Article 8 of the Regulation attempts to harmonise the position regarding CSPs and conflicts of interest. On the one hand, employees of CSPs are permitted to hold interests in projects displayed on their sites so long as these are disclosed. On the other hand, CSPs are not permitted to "have any participation in any crowdfunding offer on their crowdfunding platforms". It will be interesting to see how this apparently contradictory approach will develop.

Considerations for investors

As has been clear from the earliest days of e-commerce, the influence of the 'long tail' – the sum of all participants outside the top 100 in size or popularity – of small and medium-sized companies and investors should not be underestimated.[23] For those not familiar with the 'long tail' principle, consider a regular corner shop from the pre-internet age. The limited space available meant that only relatively popular products could be kept in stock. Niche items were found in specialised shops to which the customer needed to travel. With the internet, companies like Amazon quickly learned that the cumulative sales across 'niche' areas vastly outstripped the more popular or mainstream products. In the present crowdfunding context, investors might do well to exploit the recently empowered long tail, by seeking niche projects offering a generous return on investment. However, the long tail of investors has a doubling effect on the potential scope for businesses that would previously have been considered dubious prospects at best.

The Regulation does not quite endow small investors with the same protection as consumers.[24] This position will likely need tweaking as the CSPs grow more powerful, and disingenuous or 'matchstick' project owners become more cunning.

For the time being, investors should conduct their own investigation on whether the information in the key investment sheet is accurate and complete. This will lead to a secondary market of websites containing a checklist of which projects have been reviewed, which in turn will raise the issue of whether such a checklist amounts to financial advice.

The key question one might ask when considering whether to invest via a CSP is whether the underlining product will succeed given the time/money needed to bring it to market and the personnel involved. Returns on investments should be compared to those offered in State Savings Bonds.

Considerations for companies raising funds

Project owners must ensure that they accurately and fully disclose the nature of their business and the terms of return on investment. This requirement may exclude certain companies with unregistered or vulnerable intellectual property, for example when their unique selling point is an innovative business model. It will be interesting to see which changes in circumstances need to be disclosed to investors post investment. Article 23 refers to "any change of information" and "any material change" triggering a notification obligation. Will the change of senior company personnel, for example, need to be notified?

The word 'equity' appears only three times in the Regulation, despite an increase in equity crowdfunding. It seems that, under the current law, the only immediate point of difference between equity and non-equity raises pertains to disclosure obligations. Annex 1 of the Regulation sets out different requirements for loan-based as opposed to investment-based offerings, as follows:

Part D (h): For non-equity instruments, the nominal interest rate, the date from which interest becomes payable, the due dates for interest payments, the maturity date and the applicable yield.

Part E (e): For equity instruments, distribution of capital and voting rights before and after the capital increase resulting from the offer (assuming that all the transferable securities or admitted instruments for crowdfunding purposes will be subscribed).

In addition to the civil obligations set out in the Regulation, project owners may face criminal charges if they engage in fraudulent or deceitful tactics in the course of raising funds, under Part 2 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

Conclusion

In a similar vein to the 1995 Directive on data processing, the Crowdfunding Regulation presents an early attempt at drawing battle lines between investors, CSPs and companies seeking funding. National regulators are encouraged to enforce certain minimum standards while the finer details are being worked out.

Reliability of information provided to potential investors will likely result in the most litigation in the next five to ten years. If CSPs find themselves more exposed than anticipated, and increased regulation presents a barrier to entry to new CSPs, the utopian aspiration in Recital 10 might meet an early end. Funds raised through a CSP will only be available for the purpose stated in the key investment sheet, almost to the same degree as money raised under the Charities Act 2009. This inflexibility is likely to come into conflict with the right of self-determination vested in the majority of shareholders under the Companies Acts – particularly where the majority perceives a better opportunity elsewhere in a related market.

Developments in the UK are worth watching, as the Financial Conduct Authority's Conduct of Business Sourcebook (COBS) contains a whole section, 18.12, on "Operating an electronic system in relation to lending".[25]

The fascinating mystery of how social media trends emerge through a mix of perceptive algorithms and zeitgeist elements has yet to give rise to litigation in Europe. However, if a fraudulent project listed on a CSP reaches a wider audience via social media platforms, shouldn't these latter platforms take on an element of liability when things go south?

Let the games begin!

References

1. Regulation (EU) 2020/1503 of the European Parliament and of the Council of October 7, 2020, OJ No. L. 347, 20.10.2020. p.1. Effective across the EU from November 10, 2021.
2. Brady, N. Late arrival of crowdfunding rules hits peer-to-peer lending. *The Sunday Times*, January 16, 2021. Available from (paywalled): https://www.thetimes.co.uk/article/late-arrival-of-crowdfunding-rules-hits-peer-to-peer-lending-pntw3b5s8.
3. Law firms have published highly search engine optimised (SEO) articles on the Regulation in the hope that it will attract potential or impress current clients. For example, see https://www.lkshields.ie/news-insights/news/eu-crowdfunding-regulation.
4. This article presents and elaborates on the author's February 2022 interview with UK-based crypto company Trastra.com, which is available at: https://www.youtube.com/watch?v=I0haqq7T4oI.
5. Article 2(1)(a).
6. An investor merely provides an unsecured loan to the company, on specified terms. The investor acquires no shareholding or equity stake in the company, so we will avoid using the term 'capital' for monies raised by this process.
7. Kearl, M. Raise the money you need fast. Investopedia, December 21, 2021. Available from: https://www.investopedia.com/best-crowdfunding-platforms-5079933. See also: Regional crowdfunding statistics – Available from: https://blog.fundly.com/crowdfunding-statistics/#regional
8. Original listing: https://www.kickstarter.com/projects/1523379957/oculus-rift-step-into-the-game.
9. Per TechIreland's Funding Review, 2022 Edition. Available from: https://www.techireland.org/content/snapshots/Funding%20Review%202022%20Edition.pdf. See also: https://www.halosos.com.
10. Wilson, J. Ukrainian doctors in Ireland 'overwhelmed' after over €100,000 is raised in a day for aid. *The Irish Times*, March 2, 2022. Available from: https://www.irishtimes.com/news/ireland/irish-news/ukrainian-doctors-in-ireland-overwhelmed-after-over-100-000-is-raised-in-a-day-for-aid-1.4816849
11. The recitals take 11 of the 44 pages of the body of the Regulation. The entire document is 49 pages long, with five pages given to Annexes regarding key investment sheets and sophisticated investors.
12. Recital 9 begins: "To avoid regulatory arbitrage and to ensure their effective supervision, crowdfunding service providers should be prohibited from taking deposits or other repayable funds from the public, unless they are also authorised as a credit institution…". It is perhaps ironic that, in the banking sector, 'arbitrage' means the practice of selling the same thing more than once. See speech by Danièle Nouy, Chair of the Supervisory Board of the ECB, at the 33rd SUERF Colloquium, Helsinki, September 15, 2017: 'Gaming the rules or ruling the game? – How to deal with regulatory arbitrage' Available from: https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170915.en.html.
13. Possibly in response to the Theranos saga whereby US$700m was raised before a whistleblower exposed the lack of peer-reviewed research behind the company's claims. See: https://www.cnbc.com/2019/03/20/hbos-the-inventor-how-elizabeth-holmes-fooled-people-about-theranos.html.
14. For example, under Recital 21: "The existence of filtering tools on a crowdfunding platform under this Regulation should not be regarded as investment advice under Directive 2014/65/EU as long as those tools provide information to clients in a neutral manner that does not constitute a recommendation".
15. See: https://www.esma.europa.eu/sections/crowdfunding.
16. See https://ec.europa.eu/finance/consultations/2013/crowdfunding/index_en.htm.
17. See: https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1378_opinion_on_investment-based_crowdfunding.pdf.
18. COM/2018/113/FINAL. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A0113%3AFIN.
19. It is not clear when such information needs to be provided to a prospective investor. Some platforms only provide investment summaries, and then disclose further information once money is paid into escrow. This practice appears to be arguably in breach of the Regulation.
20. One national regulator can be the 'single point of contact' where CSPs operate in more than one jurisdiction.
21. See generally: https://www.centralbank.ie/regulation/industry-market-sectors/crowdfunding-service-providers/legislation.
22. Information sheets must include a declaration that the information contained therein is in accordance with the facts, and makes no omission likely to affect its import.
23. Anderson, C. *The Long Tail: Why the Future of Business Is Selling Less of More*. Hyperion, 2006.
24. GDPR may, indirectly, provide an interim solution if investment data is abused by CSPs.
25. Available from: https://www.handbook.fca.org.uk/handbook/COBS.pdf.

LEGAL UPDATE

THE BAR OF IRELAND
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ADMINISTRATIVE LAW

Library acquisitions

McQuitty, J. *A Guide to Conducting Internal Investigations*. London: Bloomsbury Professional, 2021 – M303

AGRICULTURE

Articles

Little, C. Down on the farm. *Law Society Gazette* 2022; April: 54-57

Acts

Animal Health and Welfare and Forestry (Miscellaneous Provisions) Act 2022 – Act No. 4 of 2022 – Signed on April 4, 2022

Statutory instruments

Avian influenza (precautionary confinement of birds) regulations 2021 (revocation) regulations 2022 – SI 203/2022

ASYLUM

International protection – Irrationality – Extension of time – Applicant seeking to set aside the decision of the first respondent to affirm the recommendation of the International Protection Office that the applicant be given neither a refugee declaration nor a subsidiary protection declaration – Whether extension of time should be granted – 01/04/2022 – [2022] IEHC 204

G.K. v The International Protection Appeals Tribunal, The Minister for Justice and Equality, Ireland and The Attorney General

AVIATION

Statutory instruments

Irish Aviation Authority (regulation of Irish Coast Guard aviation operations) order 2022 – SI 212/2022

BANKING

Objective bias – Actual bias – Strike out – Second defendant seeking orders setting aside all previous orders made in the proceedings – Whether the orders were vitiated by bias – 08/04/2022 – [2022] IEHC 224

Allied Irish Banks, Plc and Everyday Finance DAC v McQuaid

Summary judgment – Loans – Default in repayment – Plaintiff seeking summary judgment against the defendants – Whether the plaintiff had proved the defendants' indebtedness – 07/02/2022 – [2022] IEHC 62

Allied Irish Banks Plc v Wasim

Order for possession – Entitlement – Credible defence – Appellant seeking order for possession – Whether the appellant had established its entitlement to possession of the premises – 01/03/2022 – [2022] IEHC 190

Start Mortgages Designated Activity Company v Galibert

Summary judgment – Appointment of receivers – Loan agreement – First respondent seeking summary judgment – Whether the second and third respondents were validly appointed as joint receivers – 06/04/2022 – [2022] IECA 87

Ulster Bank Ireland Ltd, McCann and Dillon v McDonagh

Statutory instruments

Central Bank (Supervision and Enforcement) Act 2013 (section 48(1)) (insurance requirement) regulations 2022 – SI 126/2022

Central Bank Act 1942 (section 32E) prospectus and related documents fee regulations 2022 – SI 135/2022

Central Bank Reform Act 2010 (sections 20 and 22) (amendment) regulations 2022 – SI 169/2022

BUILDING CONTRACTS

Statutory instruments

Building control (prescribed qualifications) regulations 2022 – SI 114/2022

CHILDREN

Judicial review – Statutory interpretation – Children Act 2001 s. 23 – Applicants seeking judicial review – Whether the proper interpretation of s. 23 (1) (a) of the Children Act 2001 is to entitle the applicants and their legal advisors to be provided with all material contained in the Garda investigation file – 01/02/2022 – [2022] IEHC 149

J.M. (a minor) v Commissioner of An Garda Síochána

Statutory instruments

Child Care Act 1991 (early years services) (amendment) regulations 2022 – SI 195/2022

COMMERCIAL LAW

Commercial proceedings – Service – Bias – Plaintiff appealing against two High Court orders – Whether the proceedings were properly regarded as "commercial proceedings" – 10/03/2022 – [2022] IECA 55

Harrington v Greenway Properties Ltd and or

Library acquisitions

Keijser, T. *Transnational Securities Law (2nd ed.)*. Oxford: Oxford University Press 2022 – N304.1

Munday, R. *Agency Law and Principles (4th ed.)*. Oxford: Oxford University Press, 2022 – N25

Murphy, D. *Derivatives Regulation: Rules and Reasoning from Lehman to Covid*. Oxford: Oxford University Press, 2022 – N300

Ortolani, P., Louisse, M. *The EU Crowdfunding Regulation*. Oxford: Oxford University Press, 2021 – N308.3

COMPANY LAW

Right of subrogation – Net loss – Investor Compensation Act 1998 – Applicant seeking directions as regards the scope and operation of its right of subrogation pursuant to s. 35 of the Investor Compensation Act 1998 – Whether the applicant's right of subrogation was restricted to the assets of the company – 10/03/2022 – [2022] IEHC 179

Custom House Capital Ltd ((in liquidation))

Winding up – Shares – Companies Act 2014 s. 212 – Respondent seeking relief under s. 212 of the Companies Act 2014 – Whether the trial judge erred in the application of the jurisdiction of s. 212 of the Companies Act 2014 – 02/03/2022 – [2022] IECA 48

Mascarenhas v Karim and Sultana

Statutory instruments

Industrial and Provident Societies Act 1893 (section 14A(1)) (Covid-19) order 2022 – SI 219/2022

Companies Act 2014 (section 12A(1)) (Covid-19) order 2022 – SI 220/2022

COMPULSORY PURCHASE

Library acquisitions

Honey, R., Pereira, J., Daly, C., Clutten, R. *The Law of Compulsory Purchase (4th ed.)*. United Kingdom: Bloomsbury Professional, 2022 – N96.3

CONSUMER LAW

Acts

Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 – Act No. 5 of 2022 – Signed on April 11, 2022

Statutory instruments

Consumer Protection Act 2007 (grocery goods undertakings) (revocation) regulations 2022 – SI 150/2022

COPYRIGHT

Library acquisitions

Arnold, R. *Performers' rights (6th ed.)*. London: Sweet & Maxwell, 2021 – N112.4

COSTS

Costs – Interlocutory application – Injunction – Plaintiff seeking costs – Whether the proceedings were rendered

moot by the unilateral act of the defendants in agreeing to participate in the arbitral process – 06/04/2022 – [2022] IEHC 212

Bronxville Investments Limited v Cayenne Holdings Limited, Carberry and Kane

Estoppel – Form of orders – Costs – Appellant seeking costs – Whether the appellant was the entirely successful party in the proceedings – 23/03/2022 – [2022] IECA 69

Healy v Ulster Bank Ireland Ltd and Promontoria (Aran) Ltd

Security for costs – Professional negligence – Special circumstances – Defendant seeking security for costs – Whether granting security would wholly stifle the plaintiff's claim – 25/01/2022 – [2022] IEHC 35

Marlan Homes Ltd v Egan, Administrator ad litem to the estate of the late O'Brien, deceased

Substitution – Fair and reasonable publication – Costs – Appellant appealing from High Court orders – Whether costs should be solicitor and own client costs – 11/03/2022 – [2022] IEHC 56

McCool v Honeywell Control Systems Ltd

Costs – Matter of systemic importance – Employment contract – Appellants seeking an order setting aside the order of the High Court granting costs to the respondent – Whether the award of costs made to the respondent ought to be reversed – 04/03/2022 – [2022] IESC 16

Sobhy v The Chief Appeals Officer, Minister for Employment Affairs and Social Protection, Ireland and the Attorney General

Costs – Eligibility – Request for tenders – Respondent seeking costs – Whether the case was conducted in the most cost-effective manner possible – 07/4/2022 – [2022] IEHC 219

Word Perfect Translation Services Ltd v The Minister for Public Expenditure and Reform

COURTS

Statutory instruments

Rules of the Superior Courts (Criminal Procedure Act 2021) 2022 – SI 122/2022

CRIMINAL LAW

Convictions – Murder – Unsatisfactory trials – Appellants seeking to appeal against convictions – Whether the appellants' trials were satisfactory – 10/03/2022 – [2022] IECA 63

DPP v Bradley

Sentencing – Making a false statement – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – 08/03/2022 – [2022] IECA 52

DPP v Cribbin

Sentencing – Making a threat to kill or cause serious harm – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – 08/04/2022 – [2022] IECA 94

DPP v Gavigan

Conviction – Sexual assault – Corroboration warning – Appellant seeking to appeal against conviction – Whether the trial judge was within his discretion in deciding not to give a corroboration warning – 07/04/2022 – [2022] IECA 96

DPP v M.C.

Sentencing – Robbery – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – 04/04/2022 – [2022] IECA 93

DPP v Mahon

Criminal prosecution – Right to a fair trial – Criminal Procedure Act 1967 s. 4E – Plaintiff seeking declarations to the effect that s. 4E of the Criminal Procedure Act 1967, or particular parts thereof, are contrary to the provisions of the Constitution – Whether the provisions of s. 4E of the Criminal Procedure Act 1967 were in breach of the plaintiff's right to a fair trial and his right to equality of arms in the conduct of the criminal prosecution against him – 08/04/2022 – [2022] IEHC 222

Perucki v Ireland and The Attorney General and DP

Library acquisitions

Geiran, V., McCarthy, S. *Probation and Parole in Ireland: Law and Practice*. Dublin: Clarus Press 2022 – M589.1.C5

Law Reform Commission. *Law Reform Commission Issues Paper No. 67 – Compensating Victims of Crime*. Dublin: Law Reform Commission, 2022 – L160.C5

Office of the Director of Public Prosecutions. *Guidelines for Prosecutors 2019: Director of Public Prosecutions (5th ed.)*. Dublin: Office of the Director of Public Prosecutions, 2019 – M500.C5

Articles

Fitzgerald O'Reilly, M., Dr. Sex offender management in Ireland: are we heading in the right direction? *Irish Criminal Law Journal* 2022; 32 (1): 2-10

O'Driscoll, L. Oberstown and single separation: litigation as a means of bringing about accountability and reform in youth detention in Ireland. *Irish Criminal Law Journal* 2022; 32 (1): 11-20

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.5) regulations 2022 – SI 172/2022

Misuse of Drugs Act 1977 (controlled drugs) (declaration) order 2022 – SI 176/2022

Misuse of drugs (amendment) regulations 2022 – SI 210/2022

Misuse of Drugs Act 1977 (controlled drugs) (designation) order 2022 – SI 211/2022

Misuse of Drugs Act 1977 (controlled drugs) (designation) order 2022 – SI 212/2022

Misuse of drugs (amendment) regulations 2022 – SI 210/2022

DAMAGES

Personal injury – Negligence – Damages – Plaintiff seeking damages – Whether the plaintiff suffered serious personal injury, mental distress, loss and damage as a consequence of the negligence, breach of duty and breach of contract of the defendant in the provision of medical and surgical services – 24/02/2022 – [2022] IEHC 128

A.Z. (substituted by order) v Robert Hannon

Breach of contract – Damages – Courts Act 1981 interest – Plaintiff seeking damages for breach of contract – Whether there was a case for Courts Act 1981 interest – 04/02/2022 – [2022] IEHC 33

Action Alarms Ltd Trading as Action Security Systems v O'Rafferty and Top Security Ltd

Damages – Injury – Referable – Plaintiff seeking damages – Whether the plaintiff's complaints of pain and resultant disability were referable to the accident – 23/03/2022 – [2022] IEHC 195

Coughlan v Kerry Ingredients (Ireland) Ltd

DATA PROTECTION

Statutory instruments

Data Protection Act 2018 (access modification) (health) regulations 2022 – SI 121/2022

Data Sharing and Governance Act 2019 (commencement of certain provisions) order 2022 – SI 137/2022

DEFAMATION

Articles

Shirran, K. Clarity on defamation. *The Bar Review* 2022; 27 (1): 14-17

DEFENCE FORCES

Statutory Instruments

Defence (Amendment) Act 2021 (commencement) order 2022 – SI 179/2022

DISCOVERY

Disclosure – Warrant – Journalists – Applicants appealing against an order directing that certain data on the first applicant's phone be made available to An Garda Síochána – Whether the warrant that issued ought to be quashed – 22/04/2022 – [2022] IECA 98

Corcoran and Oncor Ventures Ltd T/A The Democrat v The Commissioner of An Garda Síochána and DPP

Discovery – Revocation – Patent infringement – Parties seeking discovery – Whether categories of discovery were relevant and necessary – 26/04/2022 – [2022] IEHC 234

Novartis Pharma AG v Eli Lilly and Company Ltd

EDUCATION

Statutory instruments

Student grant scheme 2022 – SI 118/2022

Student support regulations 2022 – SI 119/2022

Technological Universities Act 2018 (section 36) (appointed day) (no.2) order 2022 – SI 175/2022

Education Act 1998 (composition of National Council for Curriculum and Assessment) order 2022 – SI 206/2022

EMPLOYMENT LAW

Interlocutory relief – Protected disclosures – Disciplinary procedures – Plaintiff seeking interlocutory relief – Whether disciplinary procedures invoked against the plaintiff were connected with statements made by the plaintiff on earlier occasions, which the plaintiff claimed were protected disclosures – 14/02/2022 – [2022] IHEC 86

Barrett v Commissioner of An Garda Síochána

Contract of employment – Fixed-term employee – Workplace Relations Act 2015 s. 46 – Respondent appealing on a point of law against a determination of the Labour Court – Whether the Labour Court had erred in law in its interpretation of the definitions of "fixed-term employee" and "contract of employment" – 31/03/2022 – [2022] IESC 17

Power v Health Service Executive

Library acquisitions

Donovan, D. *Employment Law (3rd ed.)*. Dublin: Round Hall, 2022 – N192.C5

Kerr, A. *Trade Union and Industrial Relations Law (6th ed.)*. Dublin: Round Hall, 2022 – N195.C5

Articles

Kierans, L. The protected disclosures (amendment) bill 2022: Is whistleblowing law in Ireland on the right track? *Irish Employment Law Journal* 2022; 19 (1): 13-22

Murphy, T. "That's it, I quit!": A review of significant Irish case law on disputed resignations. *Irish Employment Law Journal* 2022; 19 (1): 4-12

Acts

Redundancy Payments (Amendment) Act 2022 – Act No. 3 of 2022 – Signed on March 31, 2022

Statutory instruments

Irish Human Rights and Equality Commission Act 2014 (code of practice on sexual harassment and harassment at work) order 2022 – SI 106/2022

Irish Human Rights and Equality Commission Act 2014 (code of practice on equal pay) order 2022 – SI 107/2022

Employment regulation order (contract cleaning industry joint labour committee) 2022 – SI 110/2021

Redundancy Payments (Amendment) Act 2022 (commencement) order 2022 – SI 174/202

ENERGY

Statutory instruments

Electricity Costs (Domestic Electricity Accounts) Emergency Measures Act 2022 (commencement) order 2022 – SI 104/2022

Electricity costs emergency benefit scheme regulations 2022 – SI 120/2022

EQUALITY

Racial discrimination – Harassment – Equal Status Acts 2000-2015 – Appellant advancing an appeal pursuant to s. 28(3) of the Equal Status Acts 2000-2015 – Whether the appellant was discriminated against by the first respondent – 27/04/2022 – [2022] IECA 99

Smith v The Office of the Ombudsman and Kearney and Traynor and Tyndall

EUROPEAN UNION

Library acquisitions

Blanco, L. EU *Competition Procedure (4th ed.)*. Oxford: Oxford University Press 2022 – W110

Articles

Kennedy, B. Preliminary references – a practical guide. *The Bar Review* 2022; 27 (1): 22-25

Statutory instruments

European Union (restrictive measures concerning Ukraine) (no. 7) regulations 2022 – SI 105/2022

European Union (market surveillance) (compliance with certain products) regulations 2022 – SI 108/2022

European Union (food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control) regulations 2022 – SI 111/2022

European Union (good agricultural practice for protection of waters) regulations 2022 – SI 113/2022

European Union (restrictive measures concerning Belarus) (no. 3) regulations 2022 – SI 116/2022

European Union (restrictive measures concerning Ukraine) (no. 8) regulations 2022 – SI 117/2022

European Union (restrictive measures concerning Central African Republic) regulations 2022 – SI 128/2022

European Union (restrictive measures concerning the Democratic Republic of the Congo) regulations 2022 – SI 129/2022

European Union (restrictive measures concerning Venezuela) regulations 2022 – SI 130/2022

European Union (restrictive measures concerning Syria) regulations 2022 – SI 131/2022

European Union (restrictive measures against serious human rights violations and abuses) regulations 2022 – SI 132/2022

European Union (single use plastics) (amendment) regulations 2022 – SI 136/2022

European Union habitats (Boleybrack Mountain special area of conservation 002032) regulations 2022 – SI 157/2022

European Union habitats (Cloonmoylan Bog special area of conservation 000248) regulations 2022 – SI 158/2022

European Union habitats (Croaghaun/Slievemore special area of conservation 001955) regulations 2022 – SI 159/2022

European Union habitats (Akeragh, Banna and Barrow Harbour special area of conservation 000332) regulations 2022 – SI 160/2022

European Union habitats (Slieve Bloom Mountains special area of conservation 000412) regulations 2022 – SI 161/2022

European Union habitats (Clonaslee Eskers and Derry Bog special area of conservation 000859) regulations 2022 – SI 162/2022

European Union habitats (Carlingford Mountain special area of conservation 000453) regulations 2022 – SI 163/2022

European Union (water policy) (amendment) regulations 2022 – SI 166/2022

European Union (restrictive measures concerning Ukraine) (no. 9) regulations 2022 – SI 168/2022

European Union (restrictive measures concerning Iraq) regulations 2022 – SI 170/2022

European Union (restrictive measures concerning Yemen) (no.2) regulations 2022 – SI 171/2022

European Union (restrictive measures concerning Ukraine) (no. 10) regulations 2022 – SI 177/2022

European Union (restrictive measures concerning Belarus) (no. 4) regulations 2022 – SI 178/2022

European Communities (alarm and signal weapons) (technical specifications) regulations 2022 – SI 180/2022

European Union (EU digital Covid certificates) (amendment) regulations 2022 – SI 182/2022

European Union (restrictive measures concerning Ukraine) (no.11) regulations 2022 – SI 197/2022

Childcare Support Act 2018 (calculation of amount of financial support) (amendment) regulations 2022 – SI 198/2022

European Union (protection of animals used for scientific purposes) (amendment) regulations 2022 – SI 205/2022

European Union (restrictive measures concerning Iraq) (no.2) regulations 2022 – SI 208/2022

European Union (acquisition and possession of weapons and ammunition) regulations 2022 – SI 209/2022

EVIDENCE

Library acquisitions

Keane, A., McKeown, P. *The Modern Law of Evidence (14th ed.)*. Oxford: Oxford University Press 2022 – M600

EXTRADITION LAW

Trade and Cooperation Agreement warrant – Surrender – Correspondence – Applicant seeking an order for the surrender of the respondent to Northern Ireland pursuant to a Trade and Cooperation Agreement warrant – Whether surrender was prohibited by s. 38 of the European Arrest Warrant Act 2003 – 25/01/2022 – [2022] IEHC 144

Minister for Justice v Casey

Surrender – Judicial authority – European Arrest Warrant Act 2003 s. 22(7) – Applicant seeking the consent of the High Court to proceedings being brought against the respondent in the United Kingdom – Whether the issuing judicial authority was aware of and authorised the European Arrest Warrant Act 2003 s. 22(7) request – 11/01/2022 – [2022] IEHC 199

Minister for Justice v Connors

European arrest warrant – Surrender – Error – Applicant seeking an order for the surrender of the respondent to the Kingdom of Spain pursuant to a European arrest warrant – Whether the European arrest warrant had been executed against the respondent in error – 04/04/2022 – [2022] IEHC 200

Minister for Justice and Equality v Huida

European arrest warrant – Surrender – European Arrest Warrant Act 2003 s. 21A – Applicant seeking an order for the surrender of the respondent to Hungary pursuant to a European arrest warrant – Whether surrender was prohibited by s. 21A of the European Arrest Warrant Act 2003 – 24/02/2022 – [2022] IEHC 191

Minister for Justice and Equality v Juhász

Surrender – Lack of clarity – Abuse of process – Applicant seeking an order pursuant to s. 22(7) of the European Arrest Warrant Act 2003 – Whether the European Arrest Warrant Act 2003 s. 22(7) letter of request amounted to an abuse of process – 17/01/2022 – [2022] IEHC 145

Minister for Justice and Equality v Kaleja

Trade and Cooperation Agreement warrant – Surrender – Correspondence – Applicant seeking an order for the surrender of the respondent to the United Kingdom of Great Britain and Northern Ireland pursuant to a Trade and Cooperation Agreement warrant – Whether surrender of the respondent in respect of the offences and each or other of them contained in the Trade and Cooperation Agreement warrant was prohibited by s. 5 and/or s. 38 of the European Arrest Warrant Act 2003 – 17/02/2022 – [2022] IEHC 162

Minister for Justice and Equality v Porter

European arrest warrant – Surrender – Judicial authority – Applicant seeking the surrender of the respondent pursuant to a European arrest warrant – Whether the Prosecutor General of Lithuania who issued the warrant could be considered a judicial authority within the meaning of the European Arrest Warrant Act 2003 – 30/03/2022 – [2022] IEHC 214

Minister for Justice and Equality v Veresovas

Statutory instruments

Extradition (Australia) order 2022 – SI 134/2022

FAMILY LAW

Wrongful removal – Rights of custody – Hague Convention – Appellant seeking the return of a child to Moldova – Whether the child's removal from Moldova was wrongful – [2022] IECA 75 – 28/03/2022
G.(E.) v P.(T.)

Articles

Corbett, M., Dr. Child care is crying out for a specialist, separate, supported and unified family court. *Irish Journal of Family Law* 2022; 25 (1): 3-8
Hand, D. Opposition to vaccination in family law proceedings. *Irish Journal of Family Law* 2022; 25 (1): 9-14

FINANCE

Statutory instruments

Finance Act 2021 (section 62) (commencement) order 2022 – SI 133/2022
Finance Act 2020 (section 16(1)) (commencement) order 2022 – SI 142/2022

FISHERIES

Statutory instruments

Control of fishing for salmon (amendment) order 2022 – SI 109/2022
Fisheries (commercial fishing licences) (alteration of duties and fees) order 2022 – SI 173/2022
Sea-fisheries (Miscellaneous Provisions) Act 2022 (commencement) order 2022 – SI 202/2022

GARDA SÍOCHÁNA

Acts

Garda Síochána (Functions and Operational Areas) Act 2022 – Act No. 7 of 2022 – Signed on May 4, 2022

GOVERNMENT

Statutory instruments

Appointment of special advisers (Minister of State at the Department of Agriculture, Food and the Marine) order 2022 – SI 199/2022
Appointment of special adviser (Taoiseach) order 2022 – SI 216/2022
Appointment of special adviser (Tánaiste and Minister for Enterprise, Trade and Employment) order 2022 – SI 217/2022

HEALTH

Acts

Health (Miscellaneous Provisions) Act 2022 – Act No. 6 of 2022 – Signed on April 12, 2022

Statutory instruments

Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (revocation) regulations 2022 – SI 103/2022
Regulated Professions (Health and Social Care) (Amendment) Act 2020 (commencement of certain provisions) order 2022 – SI 115/2022
Infectious diseases (EU digital Covid certificates) regulations 2022 – SI 139/2022
Health Act 1947 (section 31A – EU digital Covid certificates) regulations 2022 – SI 140/2022
Health Insurance (Amendment) Act 2021 (commencement) order 2022 – SI 145/2022
Health Insurance Act 1994 (preparation of financial statements) regulations 2022 – SI 146/2022
Health Insurance Act 1994 (risk equalisation scheme) (amendment) regulations 2022 – SI 147/2022
Health Insurance Act 1994 (information returns) (amendment) regulations 2022 – SI 148/2022
Health Act 1947 (affected areas) (revocation) order 2022 – SI 153/2022
Health Identifiers Act 2014 (commencement) order 2022 – SI 154/2022
Health Identifiers Act 2014 (other identifying particulars) regulations 2022 – SI 155/2022
Health Identifiers Act 2014 (health service providers) regulations 2022 – SI 156/2022
Infectious diseases (EU digital Covid certificates) (amendment) regulations 2022 – SI 181/2022

HOUSING

Statutory instruments

Housing and Sustainable Communities Agency (amendment) order 2022 – SI 123/2022
Residential Tenancies Act 2004 (prescribed form) regulations 2022 – SI 152/2022
Local Government Rates and Other Matters Act 2019 (commencement) order 2022 – SI 164/2022
Residential Tenancies (Amendment) Act 2021 (section 7) (commencement) order 2022 – SI 165/2022
Affordable housing regulations 2022 – SI 183/2022
Affordable housing (no. 2) regulations 2022 – SI 184/2022

HUMAN RIGHTS

Articles

Malervy, R. Protection of socio-economic rights under the ECHR and ECHR Act 2003. *Irish Law Times* 2022; 40 (6): 88-94

IMMIGRATION

Removal order – European Union citizen – Article 27 of the 2004 Citizens' Rights Directive – Appellant challenging review decision affirming removal order – Whether the way the decision maker approached the question of removal of the appellant from the State was adequate and proportionate – 07/04/2022 – [2022] IECA 89
J.B. v The Minister for Justice and Equality, The Attorney General and Ireland

INFORMATION TECHNOLOGY

Articles

Block, M. Cyberviolence – the law is not enough. *The Bar Review* 2022; 27 (1): 18-21
Daly, C. Wipe out: are web-surfers in Ireland – particularly children – sufficiently protected by law from harassment and online harm? *Law Society Gazette* 2022; April: 36-39

INJUNCTIONS

Injunctive relief – Properties – Possession – Plaintiffs seeking interlocutory injunctions – Whether the plaintiffs had raised a fair issue to be tried – 07/04/2022 – [2022] IEHC 218
O'Reilly v Promontoria (Finn) Ltd, McCleary, Murphy and Harper

INSOLVENCY

Personal insolvency arrangement – Excludable debt – Personal Insolvency Acts 2012-2015 s. 115A(9) – Personal insolvency practitioner seeking to approve the coming into effect of the personal insolvency arrangement – Whether an excludable debt, which is not a permitted debt, can be included in a personal insolvency arrangement at all – 23/03/2022 – [2022] IEHC 180
Chambers, In re

Library acquisitions

Bork, R., Van Zwieten, K. *Commentary on the European Insolvency Regulation (2nd ed.)*. Oxford: Oxford University Press 2022 – N312

Statutory instruments

Personal Insolvency Act 2012 (prescribed protective certificate personal insolvency arrangement application form) regulations 2022 – SI 213/2022
Personal Insolvency Act 2012 (prescribed protective certificate debt settlement arrangement application form) regulations 2022 – SI 214/2022
Personal Insolvency Act 2012 (prescribed debt relief notice application form) regulations 2022 – SI 215/2022

INSURANCE

Insurance policy – Interpretation – Causation – High Court asked to address issues of interpretation of a particular provision in a policy of insurance – Whether the requirements were satisfied – 30/03/2022 – [2022] IEHC 178
Premier Dale Ltd (Trading as the Devlin Hotel) v Arachas Corporate Brokers Ltd

Library acquisitions

Birds, J., Lynch, B., Paul, S. *MacGillivray on Insurance Law (15th ed.)*. London: Sweet & Maxwell 2022 – N290

INTERNATIONAL LAW

Articles

Murphy, R. Jus in bello. *Law Society Gazette* 2022; April: 46-49

JUDICIAL REVIEW

Judicial review – International protection – Injunction – Applicant seeking discretionary leave to have his international protection claim determined in the State – Whether the applicant had an arguable case – 31/03/2022 – [2022] IEHC 198
A.H.Y. v The Minister for Justice
Judicial review – Permission to remain in the State – Extension of time – Applicant seeking judicial review – Whether the interests of justice merited granting an extension of time – 29/03/2022 – [2022] IEHC 182
L.O. v The Minister for Justice and Equality
Judicial review – International protection – Credibility – Applicant seeking judicial review – Whether the respondent erred in law in rejecting the applicant's general credibility and his entire claim for international protection on the basis of disbelief of the applicant's account of his travel from Nigeria and his entry into Ireland – 15/03/2022 – [2022] IEHC 155
O.O. v The International Protection Appeals Tribunal and anor
Judicial review – Backdated promotion – Right to equality of treatment – Applicant seeking to backdate his promotion – Whether the failure to backdate the applicant's promotion was contrary to the principles of natural and constitutional justice – 11/04/2022 – [2022] IEHC 230
Quinn v The Commissioner of An Garda Síochána

LAND LAW

Reinstatement – Charge – Discharge – Applicant seeking to reinstate a charge

discharged in error – Whether there was a causative mistake of sufficient gravity – 04/04/2022 – [2022] IEHC 232
Allied Irish Banks PLC v The Property Registration Authority, Tully and Conroy

Statutory instruments

Land Development Agency Act 2021 (commencement) order 2022 – SI 143/2022
Land Development Agency Act 2021 (dissolution day) order 2022 – SI 144/2022
Residential Tenancies (Amendment) Act 2019 (commencement) order 2022 – SI 167/2022

LEGAL HISTORY

Articles

Murray, F. The Treaty. *Law Society Gazette* 2022; April: 20-27

LEGAL PROFESSION

Articles

Hardiman, A.-M. Law in turbulent times. *The Bar Review* 2022; 27 (1): 11-13
Hallissey, M. First we take Manhattan. *Law Society Gazette* 2022; April: 28-31

MARITIME LAW

Statutory instruments

Maritime Area Planning Act 2021 (commencement of certain provisions) order 2022 – SI 112/2022

Articles

Mulcahy, S. The big blue: challenging future military exercises within Ireland's Exclusive Economic Zone. *Law Society Gazette* 2022; April: 41-45

MEDICAL LAW

Judicial review – Misconduct – Prejudice – Appellant challenging a number of decisions of the CEO of the respondent – Whether the court should quash the decisions – 25/03/2022 – [2022] IECA 74
O'Sullivan v Health Service Executive

PENSIONS

Statutory instruments

Occupational pension schemes (revaluation) regulations 2022 – SI 127/2022

PERSONAL INJURIES

Bound to fail – Statute barred – Want of prosecution – Defendant seeking to dismiss proceedings – Whether the proceedings were bound to fail as being statute barred – 03/02/2022 – [2022] IEHC 60
Hennessy v Ladbrooks Payments (Ireland) Ltd and Ladbrooks (Ireland)
Personal injuries – Road traffic accident – General damages – Plaintiff seeking general damages – Whether damages fell to be assessed on the basis that the plaintiff suffered significant psychological injury as a result of the road traffic accident – 27/04/2022 – [2022] IEHC 226
Hynes v Kilkenny County Council
Personal injuries – Road traffic accident – Special damages – Plaintiff seeking special damages – Whether the plaintiff was entitled to recover by way of damages against the defendants a sum equivalent to that received by the plaintiff from his employer in respect of sick pay – 27/04/2022 – [2022] IEHC 227
Hynes v Kilkenny County Council
Personal injuries – Negligence – Balance of probabilities – Plaintiff seeking damages – Whether the negligence alleged against the defendant had been established – 08/04/2022 – [2022] IEHC 134
Kolton v Parmont Ltd Trading as Esplanade Hotel
Personal injury – Inordinate and inexcusable delay – Balance of justice – Defendant seeking to dismiss the proceedings for delay – Whether the balance of justice lay in favour of dismissing the proceedings – 08/04/2022 – [2022] IEHC 223
Mansfield v Roadstone Provinces Ltd

Articles

Lakes, M. Counting the costs. *Law Society Gazette* 2022; April: 32-35

Statutory instruments

Personal Injuries Assessment Board (fees) (amendment) regulations 2022 – SI 124/2022

PLANNING AND ENVIRONMENTAL LAW

Protective costs – Judicial review – Planning permission – Applicant seeking costs protection – Whether the applicant was entitled to costs protection under s. 50B of the Planning and Development Act 2000 or under the Environment (Miscellaneous Provisions) Act 2011 – 08/04/2022 – [2022] IEHC 201
Abbey Park and District Residents Association Baldoyle v An Bord Pleanála, Ireland, The Attorney General and Fingal County Council
Planning permission – Extension – Error of law – Applicant challenging a decision of the respondent not to extend the duration of planning permission register reference F14/0109 – Whether the decision was flawed by reason of error of law – 26/04/2022 – [2022] IEHC 233
Barford Holdings Ltd v Fingal County Council
Leave to appeal – Remittal – Planning – Applicant seeking leave to appeal from a decision made in a remittal judgment – Whether it was desirable in the public interest that an appeal should be brought from the remittal judgment – 26/04/2022 – [2022] IEHC 231
Cork Harbour Alliance for a Safe Environment v An Bord Pleanála
Planning and development – Unauthorised development – Planning and Development Act 2000 s. 160 – Applicants seeking relief pursuant to s. 160 of the Planning and Development Act 2000 – Whether the respondent was carrying out unauthorised development – 07/04/2022 – [2022] IEHC 220
Coyne v Enginenode Ltd
Judicial review – Development – Administrative law – Applicants challenging a development on recreational open space lands – Whether there was material contravention of, or misinterpretation of, the development plan in its various aspects – 25//02/2022 – [2022] IEHC 83
Flannery and ors v An Bord Pleanála
Judicial review – Statutory injunction – Integrated pollution control license – Applicant seeking judicial review – Whether the respondent's decision was properly reasoned – 16/03/2022 – [2022] IEHC 148
Harte Peat Ltd v The Environmental Protection Agency, Ireland and The Attorney General
Planning permission – Stay – Extension – Applicants seeking extension of stay – Whether there would be both serious and irreparable harm to the environment if the stay sought was refused – 27/04/2022 – [2022] IECA 100
Jennings and O'Connor v An Bord Pleanála, Ireland and The Attorney General
Protective costs – Judicial review – Strategic housing development – Applicant seeking costs protection – Whether the applicant was entitled to a costs protection under s. 50B of the Planning and Development Act 2000 or under the Environment (Miscellaneous Provisions) Act 2011 – 08/04/2022 – [2022] IEHC 202
Save Roscam Peninsula CLG and ors v An Bord Pleanála and ors

Statutory instruments

Planning and Development Act 2000 (exempted development) (no. 2) regulations 2022 – SI 151/2022

POWER OF ATTORNEY

Library acquisitions

Shindler, G.A., Wass, P. *Aldridge: Powers of Attorney (12th ed.)*. London: Sweet & Maxwell, 2022 – N25.2

PRACTICE AND PROCEDURE

Want of prosecution – Inordinate and inexcusable delay – Balance of justice – Defendant seeking an order dismissing the plaintiff's action for want of prosecution – Whether the balance of justice lay against granting the order sought – 21/12/2021 – [2021] IHEC 853
Dunning v Murphy
Statement of grounds – Amendment – O. 84A, r. 8 of the Rules of the Superior Courts – Applicant seeking to amend its statement of grounds – Whether the proposed amendments were a wide-ranging enlargement of the case – 08/04/2022 – [2022] IEHC 221
Energoinvest Reach Active Ltd v Electricity Supply Board
Misconduct – Abuse of process – Recusal – Appellant seeking to set aside the orders of the trial judge in their entirety – Whether there was lawful basis for the orders made by the trial judge – 07/04/2022 – [2022] IECA 90
Kavanagh and Tanager Designated Activity Company v Larkin (sole appellant) and (otherwise Quinn) Larkin
Summary judgment – Agreement – Shareholdings – Plaintiffs seeking summary judgment – Whether consideration was paid in accordance with terms of agreement – 22/03/2022 – [2022] IEHC 158
Kennedy and O'Riordan v Ward
Interlocutory relief – Protected disclosures – Registration – Suspension – Poor professional performance – Appellant seeking the cancellation of the respondent's decision to suspend his registration as a pharmacist for a two-month period – Whether the respondent mischaracterised the seriousness of the conduct at issue – 11/02/2022 – [2022] IEHC 80
Lannon v Council of the Pharmaceutical Society of Ireland
Abuse of process – Delay – Balance of justice – Defendant seeking to strike out the proceedings on the grounds of abuse of process and delay – Whether the balance of justice remained in favour of the case proceeding – 10/02/2022 – [2022] IEHC 75
O'Connor v Health Service Executive
Statement of claim – Extension of time – O. 27, r. 1 of the Rules of the Superior Courts – Defendants seeking orders dismissing two actions – Whether the plaintiff ought not to be required to deliver a statement of claim – 15/03/2022 – [2022] IEHC 140

Pepper Finance Corporation (Ireland) DAC v Persons unknown in occupation of the property known as 31 Richmond Avenue, Dublin 3
Prosecutorial delay – Inordinate and inexcusable delay – Balance of justice – Defendants seeking to dismiss proceedings – Whether the plaintiff's delay in prosecuting the proceedings was inordinate and inexcusable – 16/03/2022 – [2022] IEHC 169
Scannell v Beecher

Library acquisitions
Coulson, P. *Civil Procedure 2022 (2022 ed.). Supplement: Costs & funding following the civil justice reforms: questions & answers (8th ed.)*. London: Sweet & Maxwell, 2022 – N361

Articles
Murray, E., Pentony, E. To execute or not to execute? That is the question. A review of Order 42 Rule 24 of the Rules of the Superior Courts. *Commercial Law Practitioner* 2022; 29 (3): 43-47

REAL PROPERTY

Appointment of receiver – Property – O. 45, r. 9 of the Rules of the Superior Courts – Plaintiff seeking an order for the appointment of a receiver by way of equitable execution – Whether the funds for the purchase of the property came from entities owned or controlled by the defendant – 16/03/2022 – [2022] IEHC 156
Harrahill v Kane

SOCIAL WELFARE

Statutory instruments
Social welfare (consolidated claims, payments and control) (amendment) (no. 3) (income disregard) regulations 2022 – SI 125/2022
Social Welfare Act 2021 (section 14) (commencement) order 2022 – SI 149/2022
Social welfare (consolidated claims, payments and control) (amendment) (no.1) (domiciliary care allowance – temporary residence in an institution) regulations 2022 – SI 200/2022
Social welfare (consolidated claims, payment and control) (amendment) (no. 6) (carers allowance) regulations 2022 – SI 201/2022

STATISTICS

Statutory instruments
Statistics (quarterly survey of construction) order 2022 – SI 141/2022

SUCCESSION

Library acquisitions
Lehane, C. *Succession Law*. Dublin: Bloomsbury Professional, 2022 – N120.C5

TAXATION

Library acquisitions
Buckley, M. *Capital Tax Acts 2022*. Dublin: Bloomsbury Professional 2022 – M335.C5.Z14
Maguire, T. *The Taxation of Companies 2022*. Dublin: Bloomsbury Professional, 2022 – M337.2.C5

Statutory instruments
Capital Acquisitions Tax (electronic probate) (amendment) regulations 2022 – SI 204/2022

TELECOMMUNICATIONS

Statutory instruments
Wireless telegraphy (further temporary electronic communications services licences) (no. 4) regulations 2022 – SI 138/2022

TRUSTS

Library acquisitions
Matthews, P., Mitchell, C., Harris, J. *Underhill and Hayton Law of Trusts and Trustees (20th ed.)*. United Kingdom: LexisNexis Butterworths, 2022 – eBook edition available on Lexis Library under the commentary tab – N210

Bills initiated in Dáil Éireann during the period March 11, 2022, to May 5, 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.

Bretton Woods agreements (amendment) bill 2022 – Bill 32/2022
Circular economy, waste management (amendment) and minerals development (amendment) bill 2022 – Bill 35/2022
Commission of Investigation (nursing homes) bill 2022 – Bill 47/2022 [pmb] – Deputy Peadar Tóibín, Deputy Catherine Connolly and Deputy Seán Canney
Consumer rights bill 2022 – Bill 44/2022
Electoral reform bill 2022 – Bill 37/2022
Impaired farm credit bill 2022 – Bill 46/2022 [pmb] – Deputy Mattie McGrath, Deputy Michael Collins, Deputy Danny Healy-Rae, Deputy Richard O'Donoghue, Deputy Carol Nolan and Deputy Michael Healy-Rae
Insurance (miscellaneous provisions) bill 2022 – Bill 40/2022
Judicial appointments commission bill 2022 – Bill 42/2022
Living wage bill 2022 – Bill 51/2022 [pmb] – Deputy Ivana Bacik
Local government and residential tenancies (amendment) (Carrigaline rent pressure zone) bill 2022 – Bill 48/2022 [pmb] – Deputy Donnchadh Ó Laoghaire
Personal protective equipment (Covid-19) bill 2022 – Bill 45/2022 [pmb] – Deputy Paul Murphy
Responsibility of social media platforms (defamation amendment) bill 2022 – Bill 36/2022 [pmb] – Deputy Martin Kenny, Deputy Pauline Tully, Deputy Pa Daly and Deputy Imelda Munster
Safe deposit boxes and related deposits bill 2022 – Bill 49/2022 [pmb] – Deputy Éamon Ó Cuív
Thirty-ninth amendment of the constitution (neutrality) bill 2022 – Bill 34/2022 [pmb] – Deputy Paul Murphy, Deputy Bríd Smith, Deputy Gino Kenny and Deputy Richard Boyd Barrett
Water services (amendment) bill 2022 – Bill 33/2022 [pmb] – Deputy Éamon Ó Cuív and Deputy Jennifer Murnane O'Connor

Bills initiated in Seanad Éireann during the period March 11, 2022, to May 5, 2022
Planning and development (amendment) (no. 2) bill 2022 – Bill 39/2022
Right to flexible work bill 2022 – Bill 50/2022 [pmb] – Senator Marie Sherlock, Senator Mark Wall, Senator Rebecca Moynihan and Senator Annie Hoey

Progress of Bill and Bills amended in Dáil Éireann during the period March 11, 2022, to May 5, 2022
Birth information and tracing bill 2022 – Bill 3/2022 – Report Stage – Passed by Dáil Éireann
Circular economy, waste management (amendment) and minerals development (amendment) bill 2022 – Bill 35/2022 – Committee Stage
Competition (amendment) bill 2022 – Bill 12/2022 – Committee Stage – Report Stage
Defence forces (evidence) bill 2019 – Bill 65/2019 – Committee Stage
Finance (Covid-19 and miscellaneous provisions) bill 2022 – Bill 26/2022 – Committee Stage – Report Stage
Garda Síochána (functions and operational areas) bill 2021 – Bill 109/2021 – Report Stage
Higher Education Authority bill 2022 – Bill 23/2022 – Committee Stage
Institutional burials bill 2022 – Bill 23/2022 – Committee Stage
Patient safety (notifiable patient safety incidents) bill 2019 – Bill 100/2019 – Committee Stage
Protected disclosures (amendment) bill 2022 – Bill 17/2022 – Committee Stage – Report Stage
Regulation of providers of building works and building control (amendment) bill 2022 – Bill 2/2022 – Report Stage – Passed by Dáil Éireann
Sex offenders (amendment) bill 2021 – Bill 144/2021 – Committee Stage
Sick leave bill 2022 – Bill 38/2022 – Committee Stage

Progress of Bill and Bills amended in Seanad Éireann during the period March 11, 2022, to May 5, 2022
Animal health and welfare and forestry (miscellaneous provisions) bill 2021 – Bill 136/2021 – Report Stage
Health (miscellaneous provisions) bill 2022 – Bill 16/2022 – Committee Stage
Merchant shipping (investigation of marine casualties) (amendment) bill 2021 – Bill 142/2021 – Committee Stage
Online safety and media regulation bill 2022 – Bill 6/2022 – Committee Stag
Safe access to termination of pregnancy services bill 2021 – Bill 130/2021 – Report Stage

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Bills and legislation
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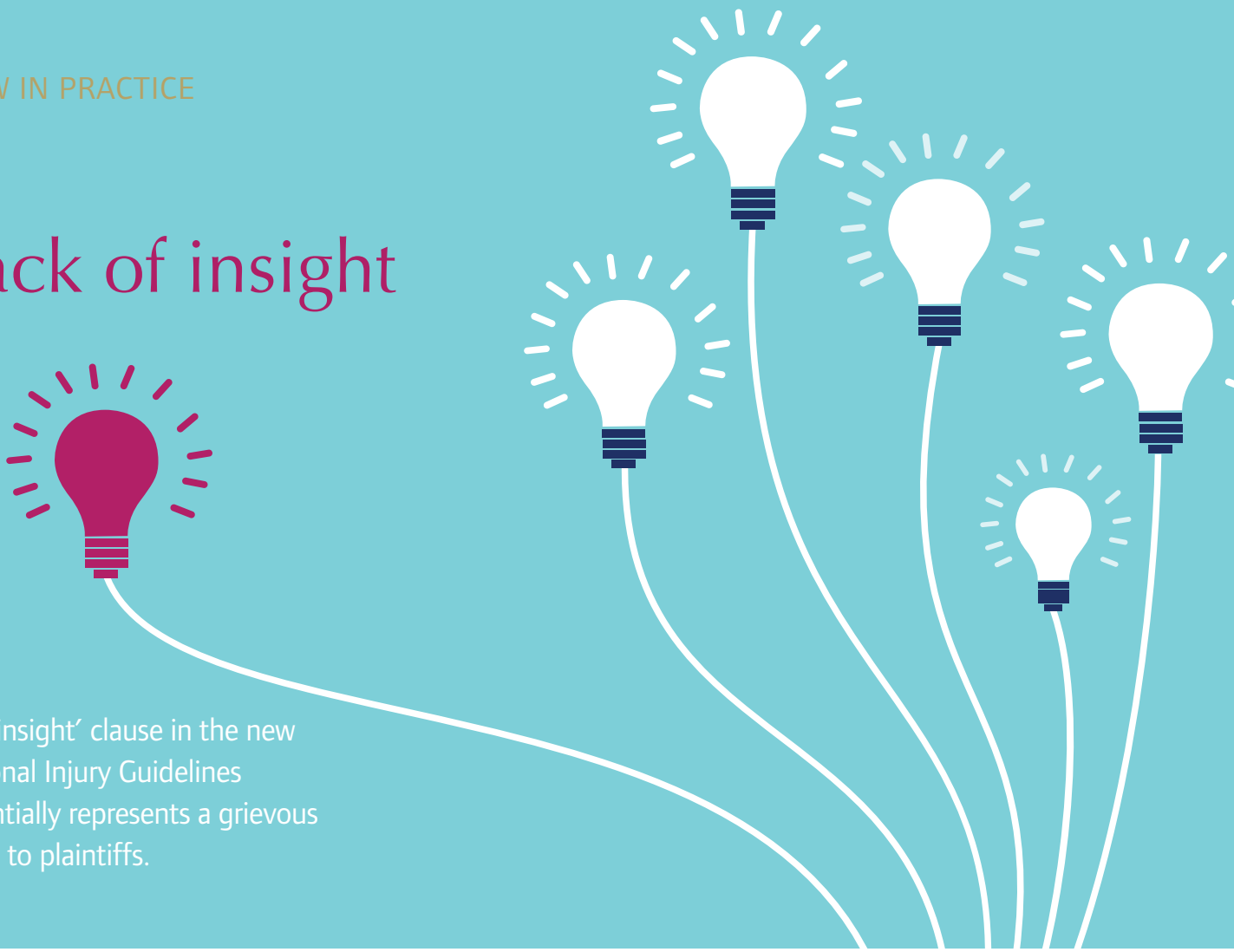
Lack of insight



The 'insight' clause in the new Personal Injury Guidelines potentially represents a grievous insult to plaintiffs.

Eugene Deering BL

The new Personal Injuries Guidelines (the Guidelines), which came into effect on April 24, 2021, set out the level of damages that may be awarded or assessed in respect of personal injuries. The Guidelines reduce award levels for most categories of personal injury and will be used by both the Personal Injuries Assessment Board (PIAB) and the courts to assess compensation in such claims. The Guidelines also introduce what is termed an 'insight' clause, which diminishes an award for general damages for those plaintiffs with a 'most severe' or 'severe' brain injury, commonly known as a traumatic brain injury (TBI), in circumstances where they have low or complete loss of insight or awareness of their pain or suffering.[1] Such an insight clause may well fall foul of our stated domestic and international obligations governing the human rights of disabled people and their right to be treated equally before the law. And to compound matters, in the face of such commitments, disabled plaintiffs will struggle to find a remedy to challenge their deepening legal predicament.

A significant step

Speaking at the introduction of the Guidelines, the Minister for Justice, Helen McEntee TD, remarked that the Guidelines represented a "very significant step in meeting our commitment to make insurance more affordable for consumers, businesses and community groups. The commencement of the Personal Injuries Guidelines should reduce costs and, in time, boost competition in the Irish insurance market." (Department of Justice press release, April 13, 2021).

The Guidelines apply to applications already made to the PIAB, except where an assessment has been made. The Book of Quantum will continue to apply where PIAB assessments have been made or where a hearing is already before the courts.

The Minister emphasised at the time that the Government's overriding concern was to "urgently address the economic impacts of high insurance costs, while ensuring fair compensation when someone is injured through no fault of their own".

The path to the creation of the Guidelines is a well-worn one and there is no requirement here to go over old ground on their merits and demerits. Suffice to say that the Guidelines, since coming into effect, are essentially doing what they intended: significantly reducing the value of general damages, with only the most serious type of personal injuries now being heard before the High Court. According to reports, the PIAB's average award last year dropped by 42% in the wake of their introduction.[2] Headlines that there has been an "immediate and colossal" impact on insurance pay-outs will no doubt vindicate those who have been campaigning for reform in the area for some time. The PIAB reports that the overall average general damages award across motor, employer and public liability claims was €11,583, a drop of 47% on the €21,850 average

in 2020. The PIAB report concerns 4,731 claims assessed by it between April 24, 2021 – when the Guidelines came into effect after being approved by a majority of the Judicial Council – and December 31, 2021. It must also be stated that not all PIAB claims are settled and the figures must be taken with a degree of caution.

The 'insight' clause

However, those who have the grave misfortune to suffer a significant traumatic brain injury (TBI) and, through no fault of their own, are unable to articulate the potential devastating effect it may have upon them, can expect to receive less prospective damages under the new Guidelines than if they were to retain the ability to express their trauma adequately.

Under head injuries in the category of 'Most severe brain damage' (Section 3(a) of the Guidelines), judges are now expected to consider the plaintiff's level of 'insight' as to their injuries among the following factors before making an award under general damages:

(i) age;
(ii) life expectancy;
(iii) insight – low or complete loss of insight or awareness will diminish general damages; and,
(iv) extent of physical limitations.[3]

The Guidelines define 'most severe brain damage' as: "In the most severe cases the claimant will be in a vegetative state; there may be recovery of eye opening and some return of sleep and waking rhythm and postural reflex movements; no evidence of meaningful response to environment. Unable to obey commands; no language functions and need for 24-hour nursing care". A similar insight clause exists for those plaintiffs deemed to fall under the category of 'severe brain damage', which is defined as: "Severe disability. Conscious, but total dependency and requiring constant care. Disabilities in most cases will be cognitive and involve marked impairment of intellect and personality, but may also include physical disabilities, e.g., limb paralysis".

No insight clause exists for those plaintiffs who suffer serious and moderate brain damage, minor brain damage or head injury. So, where a plaintiff may have suffered most severe or severe brain trauma, their award for general damages will be reduced where the plaintiff has a low or complete loss of insight or awareness of their injury, including their pain and suffering. In short, and somewhat bizarrely, the potential exists where the less disabled a plaintiff becomes following a traumatic brain injury, the more compensation they are likely to obtain under general damages. The unfortunate plaintiff who may suffer a catastrophic brain injury and, through no fault of their own, has failed to retain the ability to adequately articulate an awareness of their injuries, has effectively been silenced by the blunt instrument of this 'insight' clause.

Issues for practitioners

It remains to be seen how a future court will be able to assess whether or not an injured plaintiff retains an insight into their condition; unfortunately, there have been instances where plaintiffs, because of their particular brain injury, have been left without a physical voice, but the inner torment is present nonetheless and very real. Having to put a plaintiff on proof of such awareness of their own suffering will surely place the courts and practitioners in a somewhat unedifying position.

According to Headway, the UK brain injury association, brain injury can result in a range of physical, emotional, behavioural, psychological and cognitive changes. However, sometimes a brain injury survivor may be unaware that these changes have taken place, and they may deny them even if they are pointed out – this is referred to as 'lack of insight'.[4]

An added difficulty from both the practitioner and court point of view is the potential for some element of recovery of insight for some plaintiffs with TBI. In such a scenario, where does this leave an award of diminished general damages? Dealing with future uncertainties is a difficult enough matter for judges when grappling with an assessment of general damages, but trying to square the round peg of diminished damages due to a lack of insight, and calculating future probabilities into present day sums, is likely to test even the most exacting judge, as is whether it is possible under the new Guidelines to factor in the likelihood of a partial or full recovery of insight, particularly after a successful period of rehabilitation. There is also a volume of scholarly work, which recognises that where there is a lack of insight, recovery and rehabilitation can take much longer than for patients who retain insight to their injuries. This raises the further issue of whether this extended rehabilitation period can be factored into the award of general or special damages by way of pecuniary losses.

So, where does this leave the affected 'lack of insight' plaintiff who, through no fault of their own, is unable to articulate the necessary pain and suffering to obtain a satisfactory award of general damages? And, even in circumstances where it can be established that the plaintiff has low or complete loss of insight or awareness, why is their pain and suffering diminished as a result of their acquired disabilities?

National and international law

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) is a human rights treaty adopted by the United Nations in 2006, which exists to protect and reaffirm the human rights of disabled people. The Irish Government signed the Convention in 2007 and in March 2018 the Convention was finally ratified. In particular, Article 33 of the CRPD requires that an independent mechanism be established to monitor the progress of Government in improving its laws, policies and essential services to ensure that people with disabilities enjoy the same human rights as everyone else.

Furthermore, Article 5 of the Convention states that those with a disability have the right to enjoy equal protection and benefit from the law. Article 12 also recognises for those with a disability, "the right to recognition as persons before the law, to enjoy legal capacity on an equal basis with others, to own property and to control their financial affairs, with safeguards to prevent abuse".

The 'insight clause' in the new Guidelines clearly flies in the face of our obligations under the CRPD. In ratifying the Convention, the then Minister

of State for Disability Issues, Finian McGrath TD, stated that the purpose of the Convention is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'" (Department of Justice Press Release, March 23, 2018).

The commencement of the Assisted Decision-Making (Capacity) Act 2015 (June 2022 for the substantive provisions) is also worth referencing here, and in particular, whether there is a role for its provisions in the context of the present discussion, particularly Section 8, which states that there shall be due regard to the person's right to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property. The capacity of a person is to be presumed and, unless all practical steps have been taken to show otherwise, a person shall not be considered unable to make decisions.

Potential remedies

Optional Protocol of the UNCRPD

While Ireland's ratification of the CRPD is an important milestone, it has been described as somewhat superficial in that the Optional Protocol (OP) of the CRPD, an important associated measure of oversight, was not ratified by Ireland at the same time. The OP provides a mechanism for individuals with disabilities to make a complaint to the UN. As Ireland is a dualist State, Article 29.6 of the Constitution provides that those international agreements have the force of law to the extent determined by the Oireachtas.

The Disability (Miscellaneous Provisions) Bill 2016, which the then Minister for Disabilities had said was crucial to the enforcement of the UNCRPD, lapsed at third stage with the dissolution of the Dáil and Seanad on January 14, 2020. The primary purpose of the Bill was to address the remaining legislative barriers to Ireland's ratification of the CRPD. The Bill sought to address a range of legislative barriers to ratification, which are not addressed separately in other legislation (mainly in the Assisted Decision-Making (Capacity) Act 2015), and it seeks to progress a number of other miscellaneous amendments to equality and disability legislation. Ireland's Initial State Report to the UN Committee on the Rights of Persons with Disabilities states, at page 22, paragraph 151, that:

"Article 40.1 of the Irish Constitution sets out the Right to Equality Before the Law for all persons, including those living with a disability. The Government fully supports the right of persons with a disability to equal recognition before the law and their right to exercise legal capacity. Ireland is putting in place the required legislation that will give full effect to its obligations under Article 12".[5]

Ireland's commitments are at distinct odds with the new Personal Injury Guidelines and the Irish Human Rights and Equality Commission (IHREC), which is the independent monitoring mechanism for the CRPD in Ireland, working with the National Disability Authority to carry out this task, may well have something to say on the matter in due course.

Ireland's failure to ratify the OP has been the subject of criticism at the Oireachtas Committee on Disability Matters. Markus Schefer, a member of the UN Committee on the Convention on the Rights of Persons with Disabilities, said that it suggests Ireland is not confident or comfortable enough to open itself up to international scrutiny.[6]

The current Minister for State for disability issues, Deputy Anne Rabbitte TD, told the Joint Committee on Disability Matters (Thursday, November 25, 2021) that the Government was unable to give an exact timeframe of when it was ready to ratify the OP, noting that various disability steering groups continue to meet with Department representatives. The Minister noted: "I am repeatedly asked about the UNCRPD and the Optional Protocol. It is a Programme for Government commitment. However, when we did the Programme for Government we were in a space where we had sight of a timeline for going before the UN, which was mid-2022. That does not seem to be the timeline at the moment".[7]

Article 40.1

An alternative remedy to challenge the Guidelines could arise in circumstances where a disabled person takes an Article 40.1 challenge following an award of general damages for most severe or severe brain damage on the grounds that the award may not reflect an equal treatment before the law.

Indeed, the issue of treating plaintiffs unequally in personal injury claims has already been flagged by McMahon and Binchy, authors of *Law of Torts*. The writers opine that where a cap is placed on general damages, this approach is potentially in conflict with Article 40.1 of the Constitution, as it implies that two plaintiffs can suffer similar or identical catastrophic injuries, but receive different amounts of damages for pain and suffering because the amount of economic loss suffered by each will differ.[8]

The Law Reform Commission, in its issue paper on Capping Damages in Personal Injuries Actions,[9] as part of the Fifth Programme of Law Reform, argues that "[it] therefore seems likely, though not certain, that a plaintiff would be able to state a reasonable case that the guarantee of equality in Article 40.1 would apply to him or her under at least some variations of cap on damages". Reference is made to *Brennan v Attorney General*[10] as the current favoured test when reviewing the extent to which the right to equality may be curtailed. This test maintains that "the [statutory] classification must be for a legitimate legislative purpose ... it must be relevant to that purpose, and ... each class must be treated fairly".[11]

The fairness of the new Guidelines for disabled persons is certainly open to challenge. It is useful to be reminded of the comments of Denham J., as she then was, who stated in *M.N. v S.M.*, that "the three elements, fairness to the plaintiff, fairness to the defendant and proportionality to the general scheme of damages awarded by a court, fall to be balanced, weighed and determined".[12]

It remains to be seen if there will be any departure in the superior courts from the Guidelines. They are, after all, as the then Mr Justice Kevin Cross observed, just that, a guide. Observing that the Guidelines "do not change the law", judges are still required to assess damages that are "fair and reasonable" in individual cases, and if a judge believes it is necessary to depart from the guidelines, then they may do so, giving their reasons for doing so.[13]

A reference to the non-binding nature of the Guidelines was made in the pre-April 24, 2021, case of *O'Mahoney v Tipperary County Council and ors and Kennedy v Tipperary County Council and ors*,[14] where Mr Justice Twomey stated:

"… it remains to be observed that there is no reason why, in appropriate cases, an Irish court cannot, if it so wishes, refer to the Personal Injury Guidelines to assist it in reaching its assessment of damages, even though the Personal Injury Guidelines are not 'binding' on the court (in relation to litigation commenced prior to 24th April, 2021). (In this regard, s. 22(2) of the Civil Liability and Courts Act 2004 states that subsection (1) (cited above) 'shall not operate to prohibit a court from having regard to matters other than the Book of Quantum when assessing damages in a personal injuries action')".

He also stressed:

"It is difficult to see therefore why an Irish court could not, if it so wished, rely on other non-binding guidelines (in this case the Personal Injury Guidelines issued by the Judicial Council in Ireland), even if those Guidelines are not binding on the court (if the litigation was commenced prior to 24th April, 2021), in order to assist the court, if it felt it needed assistance, in reaching its conclusion as to the reasonableness of a certain figure for damages".

And while the Law Reform Commission concluded that caps imposed by the (then proposed) Guidelines will likely withstand any constitutional challenge, and that the Guidelines will meet constitutional tests of proportionality due to the fact that the judiciary has the freedom to depart from them in any given case, subject to the setting out of reasons, this nevertheless has not prevented the taking of several judicial review proceedings in the High Court against the PIAB and/or the Judicial Council.

Of relevance for this discussion is that many of the current challenges regarding the application of the laws underpinning the Guidelines concern the breaching of constitutional rights relating to bodily integrity, property and equality. It is also being claimed that there has been a breach of the fair trial provisions of the European Convention on Human Rights (ECHR). The outcome of the various challenges is eagerly awaited and ultimately will likely rest with the Supreme Court to determine.

Conclusion

The new Judicial Guidelines, in the absence of a complaints mechanism under the UNCRPD, may well be open to an Article 40.1 challenge on the grounds that those affected plaintiffs with most severe or severe brain injuries are not being treated equally before the law as a result of the rather cumbersome catch-all concept of an 'insight clause'.

The failure to ratify the OP is a clear denial to those citizens with disabilities of the mechanism to hold the Irish State accountable. Current judicial review proceedings attacking the constitutionality of the laws underpinning the Guidelines may well bring clarity to the issues in due course.

References

1. Similar guidelines, 'Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland ('The Green Book')', exist in Northern Ireland with insight clauses for plaintiffs with 'very severe brain damage' and 'moderately severe brain damage'.
2. Carolan, M. 'Colossal' drop in personal injury awards which fall by 42% after new guidelines. *The Irish Times*, April 12, 2022. Available from: https://www.irishtimes.com/news/consumer/colossal-drop-in-personal-injury-awards-which-fall-by-42-after-new-guidelines-1.4850301.
3. Section 3 (a), page 10.
4. Headway factsheet. Lack of Insight after Brain Injury. 2016. Available from: https://www.headway.org.uk/media/4091/lack-of-insight-after-brain-injury-factsheet.pdf.
5. Published November 10, 2021. Available from: https://www.gov.ie/en/publication/75e45-irelands-first-report-to-the-united-nations-committee-on-the-rights-of-persons-with-disabilities/#:~:text=On%2010%20November%202021%2C%20Minister,rights%20of%20people%20with%20disabilities.
6. Fagan, M. UN criticises Ireland for failings on disabilities legislation. *Irish Examiner*, May 30, 2021. Available from: https://www.irishexaminer.com/news/arid-40301564.html?.
7. Aligning Disability Services with the UN Convention on the Rights of Persons with Disabilities: Discussion (Resumed), Joint Committee on Disability Matters debate, Thursday, November 25, 2021. Available from: https://www.oireachtas.ie/en/debates/debate/joint_committee_on_disability_matters/2021-11-25/2/?highlight%5B0%5D=anne&highlight%5B1%5D=rabbitte.
8. McMahon and Binchy. *Law of Torts (4th ed)*. Bloomsbury Professional, 2013, at para 44.239.
9. LRC 126-2020.
10. [1983] ILRM 449, at page 480.
11. LRC 126-2020, para 3.79, page 81.
12. [2005] 4 I.R. 461 at para 38.
13. Carolan, M. New guidelines on personal injury awards do not change the law, says judge. *The Irish Times*, April 22, 2021. Available from: https://www.irishtimes.com/news/crime-and-law/courts/high-court/new-guidelines-on-personal-injury-awards-do-not-change-the-law-says-judge-1.4544708?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fcrime-and-law%2Fcourts%2Fhigh-court%2Fnew-guidelines-on-personal-injury-awards-do-not-change-the-law-says-judge-1.4544708.
14. [2021] IEHC 643.

To release or not to release

Case law throws light on recent developments in the law relating to temporary release.

Miranda Egan Langley BL

This article will examine the recent developments in the law relating to temporary release (TR), and look at the difference between TR, the Community Return Scheme (CRS), and custody remission. In examining the law relating to TR, circumstances as to when it might be appropriate to mount a judicial review on the decision to refuse and/or revoke TR will be considered by setting out the legislative framework and the relevant case law. The article will also briefly consider the potential impact on the decision of parole in light of the establishment of the Parole Board under the Parole Act 2019.

What is the difference between temporary release, the Community Return Scheme, and custody remission?

Temporary release

There are three kinds of TR:

- TR on compassionate grounds for a specified period – this is limited to urgent family or domestic circumstances;
- day-to-day TR – this is normally to go to a job outside the prison during the day and return to the prison at night, usually granted at the end of a sentence; and,
- full TR until the end of the sentence.[1]

The Parole Act 2019, which commenced in July 2021, deals with the procedures for granting parole for life sentence prisoners only. The Act sets out that the following persons are eligible for parole:

(a) a person serving a sentence of imprisonment for life who has served at least 12 years of that sentence; and,
(b) a person serving a sentence of imprisonment of a term equivalent to or longer than such term as is prescribed in regulations made by the Minister under subsection (3), who has served at least such portion of the sentence as may be prescribed by the Minister in accordance with that subsection.[2]

Exceptions

Those guilty of capital murder convicted under section 3 of the Criminal Justice Act 1990 cannot be considered for TR unless there are grave reasons of a humanitarian nature.
It has also been the position that those convicted under section 15A of the Misuse of Drugs Act 1977 (as amended) cannot be considered for TR under that legislation, although there has been some doubt cast upon that by case law (see *David Kavanagh v The Minister for Justice and Equality*).[3]

Eligibility criteria

The eligibility criteria for TR are governed by section 2 of the Criminal

Justice (Temporary Release of Prisoners) Act 2003 and the Minister must have due regard to the Act in considering an application.

Among the criteria to be considered are: the nature and gravity of the offence to which the sentence of imprisonment relates; the potential threat to and security of the public (including the victim of the offence to which the sentence relates) should the person be released from prison; and, any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment relates.

The factors to be considered by the Minister in granting and/or refusing an application for TR are far reaching.

The Community Return Scheme

The CRS is a form of TR that is granted subject to certain conditions. It is an incentivised scheme for the supervised release of qualifying prisoners who complete unpaid community work as a condition of their early release. It enables prisoners to avail of the opportunity of early and renewable TR with resettlement support. It is only available for those who have been assessed to meet the following criteria:

- they pose no threat to the community;
- they are serving more than one year and fewer than eight years; and,
- they have served at least 50% of their sentence.

An applicant can make an application to the Governor for CRS if he or she meets the criteria.

Custody remission

The Prisons Act 2007 (s.35) permits the Minister to make rules "for the regulation and good government of prisons" and sentence remission is among the matters that may be governed by such rules.[4]

Under Rule 59 of the Prison Rules 2007 as amended, the vast majority of prisoners serving sentences are entitled to remission at a rate of one-quarter. In practice, this means that a person sentenced to four years' imprisonment will be expected to serve three years in custody. However, part of this remission may be cancelled as disciplinary punishment.

On application by a prisoner, the Minister for Justice and Equality can grant enhanced remission of up to one-third of the sentence. For this to be granted:

- the prisoner must have shown further good conduct by engaging in authorised structured activities; and,
- the Minister must be satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community.

Prisoners who cannot benefit from remission include those serving life sentences or those committed to prison for contempt of court.[5]

When is it appropriate to challenge a decision to refuse TR?

In considering whether there are grounds to mount a challenge to a decision by the governor to refuse an applicant TR, one has to first consider a prisoner's rights in bringing a legal challenge in respect of his or her incarceration after sentence. The following summary of the relevant considerations was given by Edwards J. in the case of *Devoy v Governor of Portlaoise Prison*:[6]

1. Convicted prisoners, as human beings and citizens, have rights under the Constitution, including a right of access to the courts.
2. Many of these rights are abrogated, suspended or limited by reason of the prisoner's conviction and sentence.
3. A prisoner lawfully convicted and sentenced has lost his right to personal liberty for the period of his sentence. Therefore, habeas corpus is not an appropriate procedure in which to investigate his complaints.
4. Exceptionally, however, the conditions under which a prisoner is detained may be such as to make his detention unlawful, notwithstanding the existence of a valid warrant. In such case, habeas corpus will lie.
5. Lesser legitimate complaints of prisoners fall to be investigated in other forms of legal proceedings.
6. The prisoners' subsisting rights can often be ascertained from the Prison Rules themselves, read in the light of the Constitution".[7]

In challenging a decision to refuse an application for TR, it should be noted that under rule 70(2) of the European Prison Rules, a prisoner should receive reasons if a request is denied or a complaint is rejected, and the prisoner shall have a right of appeal to an independent authority. It should, however, be noted that the Irish courts have regularly cited the wide discretion afforded to a prison governor in performing his or her duties, and the case law is suggestive of a general reluctance to micromanage decisions in the prisons themselves. In *Caolan Smyth v The Governor of the Midlands Prison and The Irish Prison Service and The Minister for Justice & Equality* [2020] IEHC 302, Gearty J. considered the rights of prisoners in reviewing the decisions of prison governors and outlined as follows:

"3.1 The rationale informing much of the case law in respect of prisoner applications for judicial review was addressed in the Canadian case of *R v Institutional Head of Beaver Creek Correctional Camp* (1968) 2 D.L.R. 3d 545, and can be summarised as follows: if the governor is making an administrative decision, the courts have no function. If she is making a judicial or quasi-judicial decision, this can be reviewed by the Court. On a pragmatic note, the Canadian court suggested that if the decision affects the prisoner as an inmate, it is likely to be an administrative decision but if it affects her as a person, it is more likely to be a judicial decision. Hence the numerous cases in which the dignity of the prisoner as a human being has been upheld by reviewing decisions which are said to create onerous regimes of confinement or unsanitary conditions. This line of authorities also grew in tandem with the European Court of Justice jurisprudence on the rights of prisoners".

The decision of the High Court in *Foy v Governor of Cloverhill Prison*[8] indicates the difficulties faced by prisoners seeking to challenge decisions of the prison authorities. Charleton J. held as follows:

"It is only possible to mount a challenge to the decision of a governor where it is shown to both infringe a right and, as to the balance of the exercise of that right with the duty of the governor to ensure proper order within the prison, to fly in the face of fundamental reason and common sense. Such cases are, of their nature, difficult to prove. A prison governor is entitled to some measure of latitude in judgment as to the decision which he or she makes".[9] The question of the duty to give reasons and the generally applicable principles of fair procedures to administrative actions has not been examined extensively in the prison context by the Irish courts. The argument could be made that the prison service, as a public body, should give reasons for its decisions, especially when matters of fundamental rights are involved.[10]

Examining the relevant case law

David Kavanagh v The Minister for Justice and Equality

In *David Kavanagh v The Minister for Justice and Equality*,[11] the applicant had applied for remission of a sentence arising from a conviction under Section 15A of the Misuse of Drugs Act, 1977 (as amended). Section 27(3I) of the Misuse of Drugs Act 1977 (as inserted by s. 33 of the Criminal Justice Act 2007) prohibits the granting of TR to those convicted of s. 15A offences. The legislation provides explicitly for the purpose of the sentencing regime. In s. 27(3D): "The purpose of this subsection is to provide that in view of the harm caused to society by drug trafficking", those convicted of s. 15A offences be sentenced to ten years' imprisonment.

In *Kavanagh, the* applicant was sentenced to ten years' imprisonment with three suspended for a s. 15A offence. He sought to quash the refusal to grant him TR. White J. held that where ambiguity arose in relation to a sentence received under Section 27 of the 1977 Act, any such ambiguity should be judged in favour of the prisoner. In this instance, the trial judge had sentenced the applicant but had not specified as to whether the sentence was under Section 27 (3B) or (3C) of the 1977 Act, the latter allowing for remission for a sentence for a conviction under Section 15 (a) of the 1977.

However, this judgment would appear to be *per incuriam*. The penalty provisions set out in the 1999 Act (which introduced s. 15A) provided that the ban on TR only appeared to apply when the ten-year minimum was imposed. The amendments introduced by the 2007 Act make it clear that it applies to all people sentenced under subsection (3A), which is anyone sentenced for an offence contrary to s. 15A (or s. 15B). The amendment in the 2007 Act was commenced in May 2007, before the sentence was imposed in *Kavanagh* (February 2008).[12]

Callan v Ireland

Another exception to the grant of TR is in relation to those guilty of capital murder convicted under section 3 of the Criminal Justice Act 1990. Interestingly, however, in *Callan v Ireland*,[13] the court held that the applicant was entitled to apply for enhanced remission despite the fact that he was serving a sentence for capital murder.

In that case, the applicant was charged with the murder of a Garda in 1985. While he had been involved in the incident, he had not fired the killing shot but was convicted arising out of his joint enterprise and, together with his co-accused, was sentenced to death. This was subsequently commuted to a 40-year sentence. He sought an order that he should be treated as having a fixed sentence of 40 years and would thereby be entitled to one-quarter standard remission under the Prison Rules. The State argued that he was not serving a sentence but rather a commutation. Hardiman J. held in Callan's favour based on the nature of the legal instrument to commute the sentence. He went on to state that, given Callan's engagement with treatment in prison, he should also be eligible to apply for enhanced remission.

The argument could be made that the prison service, as a public body, should give reasons for its decisions, especially when matters of fundamental rights are involved.

Shaun Kelly v Minister for Justice and Equality

More recent case law suggests that the courts are reluctant to interfere with the discretion of the governor in granting TR and/or enhanced remission.

In *Shaun Kelly v Minister for Justice and Equality*,[14] the applicant was sentenced by Donegal Circuit Criminal Court on December 18, 2014, to a sentence of four years' imprisonment with the final two years suspended in respect of a charge of dangerous driving causing death. The offence was committed in July 2010 when the applicant was 21 years of age. It involved the death of eight people, including seven friends of the applicant who were passengers in the car driven by him.

The applicant sought an order of *certiorari*, by way of judicial review, of two decisions of the respondent refusing him TR and enhanced remission, respectively. The applicant contended that it was an unfair decision to cancel the applicant's TR based on adverse media reports. The respondent argued that the basis of its decision was the identification of a potential threat to the safety of the applicant as a member of the public while he was on TR.

Faherty J. refused to grant the desired relief to the applicant as she was satisfied that the requirements of r.59 (2) (d) of the Prison Rules 2007 had not been met. The Court also noted that the respondent's decision was reasonable and cogent in terms of ensuring the safety and security of the prisoners, including the applicant.[15]

B v the Director of Oberstown and ors

It is noteworthy to mention that the 2020 decision in *B v the Director of Oberstown and ors*[16] clarifies that the penal regime in relation to TR does not apply to children.

In *B*, the appellant, who was a child, pleaded guilty to one count of robbery and was sentenced by the Dublin Circuit Criminal Court to three years' detention in 2017.

The applicant was entitled, under the rules applied to children after the judgment in *Byrne (a minor) v Director of Oberstown*,[17] to ordinary remission amounting to one-quarter of his total sentence. He then applied to be considered for enhanced remission; however, no substantive answer was received and judicial review proceedings were issued.

Reynolds J. dismissed as "unfounded and based on mere assertion" the

appellant's contention that he was detained pursuant to s. 151 of the Children's Act 2001, as opposed to s. 142. The court also rejected his claim that a failure to consider an application for enhanced remission from a juvenile offender constituted a breach of the guarantee of equality before the law enshrined within Article 40.1 of the Constitution.

On appeal to the Supreme Court, O'Malley J. held that the appellant appeared to have maintained the argument that he was dealt with under s. 151 because of the belief that it was the only provision that allows for suspension or part-suspension, and that this was clearly incorrect, having due regard to s. 144 in its entirety. The Court had been asked to accept that the penal regime that applies to all children should be compared with that established for adults and O'Malley J. held that the presumption of the legislature, that the differences between children and adults call for different regimes, had not been shown to be factually incorrect:

"It may well be, therefore, that a particular 17-year-old is more mature than a particular 19-year-old, or even a 30-year-old. However, the Oireachtas has determined that the 17-year-old should be treated differently because of his age … Since the Constitution leaves it to the Oireachtas to decide when the status of childhood ends, this differential treatment can only be challenged on the basis that it is, in principle, unconstitutionally invidious. That argument has not been made in this case".[18]

Edward O'Reilly v The Governor of the Midlands Prison

In this case, the applicant sought to challenge the decision to revoke the direction that the applicant was granted TR, which had been cut short following a complaint by An Garda Síochána to the prison authorities to the effect that the applicant had been found trespassing on private property. The applicant said that he was on the lands for the purpose of hunting rabbits and it was submitted on his behalf that this did not constitute a criminal trespass. The two principal issues for determination were as follows: (i) whether the informal inquiry conducted by the prison authorities into the alleged incident was adequate; and, (ii) whether the fact that the one-month period of the TR had expired by effluxion of time had rendered the judicial review proceedings moot.

Simons J. held that the governor was entitled to rely on information provided to him by An Garda Síochána, and that there was no obligation on him to conduct an inquiry to the standard of a criminal prosecution.[19]

The aforementioned case law is indicative of the courts' reluctance to intervene in the role of the governor in granting temporary release.

Impact of the Parole Act 2019

It will be interesting to see what, if any, impact arises from the commencement of the Parole Act 2019, which has recognised a statutory basis for the establishment of the Parole Board together with a legal aid panel. This new statutory framework centres on a human rights-based approach, which endeavours to be consistent with other European countries.[20]

The function of the Board is to provide information to persons serving life sentences of imprisonment, victims and members of the public.[21] The Board is also required to make recommendations to the Minister, upon his or her request, to assist him or her in co-ordinating and making policy related to the release of persons from prison on parole.[22]

The Act also confers considerable powers upon the Board where it is considering an application for parole or the revocation of a parole order, chief among them the assigning of legal representatives to the relevant person and the relevant victim where he or she wishes to make submissions to the Board.[23]

It is clear that the objective of the Parole Board is to enhance parole application procedures by ensuring that the duty to give reasons and the generally applicable principles of fair procedures to administrative actions are adhered to.

References

1 Criminal Justice (Temporary Release of Prisoners) Act 2003.
2. Parole Act 2019, Section 24.
3. [2013] IEHC 626.
4. It was a similar situation under the Prisons (Ireland) Act 1907; Rules for the Government of Prisons 1947 (S.I. No. 320 of 1947). See *O'Brien v Governor of Limerick Prison* [1997] 2 I.L.R.M. 349.
5. Article 59 of the Prison Rules 2007.
6. [2009] IEHC 288.
7. [2009] IEHC 288, at para. 55.
8. [2010] IEHC 529.
9. [2010] IEHC 529, at para. 22.
10. See *Mallak v Minister for Justice* [2012] IESC 59, where it was held that the Minister is under a duty to provide reasons and the failure to do so deprives the affected person of a meaningful opportunity to make a new application or challenge the decision on substantive grounds.
11. [2013] IEHC 626.
12. See also *David Hui v The Governor of the Midlands Prison, the Irish Prison Service and the Minister for Justice and Equality* 2013/325JR, July 31, 2013.
13. [2013] IESC 35.
14. [2017] IEHC 805.
15. [2017] IEHC 805 at para. 43.
16. *B. (a minor suing through his mother and next friend J.G.) v The Director of Oberstown Children Detention Centre and The Minister for Children and Youth Affairs and the Attorney General* [2020] IESC 18.
17. [2013] IEHC 562.
18. [2020] IESC 18 at para. 69.
19. [2020] IEHC 201 at para. 52 and 53.
20. Griffin, Dr D. Life imprisonment and the Parole Act 2019: assessing the potential impact on the parole decision making. *Irish Judicial Studies Journal* 2020.
21. Section 9(1) (a) Parole Act 2019.
22. Section 9 (1) (b)Parole Act 2019.
23. Section 13 Parole Act 2019.

Unjust criticism of barristers must be addressed

Recent commentary accusing barristers of unnecessarily prolonging trials is unfounded and harmful to the profession.

Maura McNally SC
Chair, Council of The Bar of Ireland

The thorny issue of legal costs has been the subject of media comment and analysis in recent weeks and some prominent voices have charged barristers with being responsible for the increased duration of both non-jury and jury trials. The use of prolonged cross-examination of witnesses and an unwillingness to be concise are just some of the criticism that has been levelled at the Bar.

Such remarks are groundless and unfair. In particular, the suggestion that members of the Bar would deliberately prolong the cross-examination of a witness in circumstances where they have been the victim of a sexual assault is outrageous and an insult to the profession.

The premise of these comments – that the duration of trials has greatly increased over time – does not appear to be linked to any empirical evidence. The article does not include figures to justify this assertion, nor to my knowledge have any been collated. We do know that the total length of proceedings, from the issuance of a claim to the final disposal of the issue, has increased significantly in recent years. The 'Review of the Administration of Civil Justice', chaired by Mr Justice Kelly, found that in the five-year period up to 2019, the average length of proceedings, from issue to disposal, increased by 157 days in the Circuit Court and by over 500 days in the Supreme Court.[1] Simply put, in circumstances where only a small number of proceedings occupy anything greater than a few days at trial, there is no amount of bloviation by counsel to which so large an increase in so short a timeframe could be attributable. Indeed, procedural changes in the last decade have ensured that there is little room for the modern barrister to engage in unfocused advocacy or sprawling cross-examinations.

Bar has embraced procedural reform

The direction of travel in recent procedural reform has been one designed to encourage the efficiency of counsel at trial, in line with the goals of judicial economy and reduction of costs for litigants. Further, it is one to which members of the Bar have adjusted admirably. A wide range of cases, including chancery and non-jury actions in the High Court, and equity and construction disputes in the Circuit Court, now benefit from an efficient case management procedure, a procedural change that was welcomed by the Council of The Bar of Ireland.[2] In judicial review proceedings, the court may 'telescope' the hearing or exercise its discretion to dispense with the requirement for oral submissions at the substantive hearing.[3] Witness examination has been streamlined by the introduction of a power that the court may direct a conference between experts, dispensing with separate examinations of expert witnesses.[4] Further, members of the Bar are acutely aware of new costs measures designed to discourage the ventilation of any unnecessary arguments. Section 169 of the Legal Service Regulation Act 2015 permits the court, when awarding costs, to consider whether it was reasonable for a party to raise, pursue or contest certain issues in the proceedings.

No room for stereotypes

I note with particular concern the suggestion that barristers in criminal cases contribute to the prolongation of trials to the detriment of witnesses and "risk… the florid growth of cross-examinations that serve not to test, or put, a case but only to upset victims". Any suggestion that barristers would intentionally or otherwise engage in conduct at trial that served not to represent the best interests of a litigant but to upset a witness is entirely rejected. Barristers make every effort to consider the welfare of victims, as was commented upon by Ms Justice Tara Burns following senencing in the recent Midlands rape trial. It must be noted that the Council has positively engaged with the recommendations in the O'Malley Report with respect to protections for vulnerable witnesses and that intensive training is delivered on the subject for practitioners.

The criticism is disingenuous and its generalised nature – barristers enjoy the sound of their own voice – reinforces a stereotype that belongs to bygone era.

The Bar of Ireland is just beginning to recover from a difficult two years. Many members' practices have been devastated by pandemic-related disruption and new entrants have been afforded fewer opportunities to develop professionally. Against this backdrop, it is disappointing to have to address such harmful and unsubstantiated criticism of our profession.

References

1. Review of the Administration of Civil Justice. October 2020, Annex 2.
2. Bar Council. Comments in Relation to the Proposed New Rules of the Superior Courts – Order 63C. 2012.
3. Order 84, rule 22(8) RSC.
4. Order 39, r. 60; 61 RSC.

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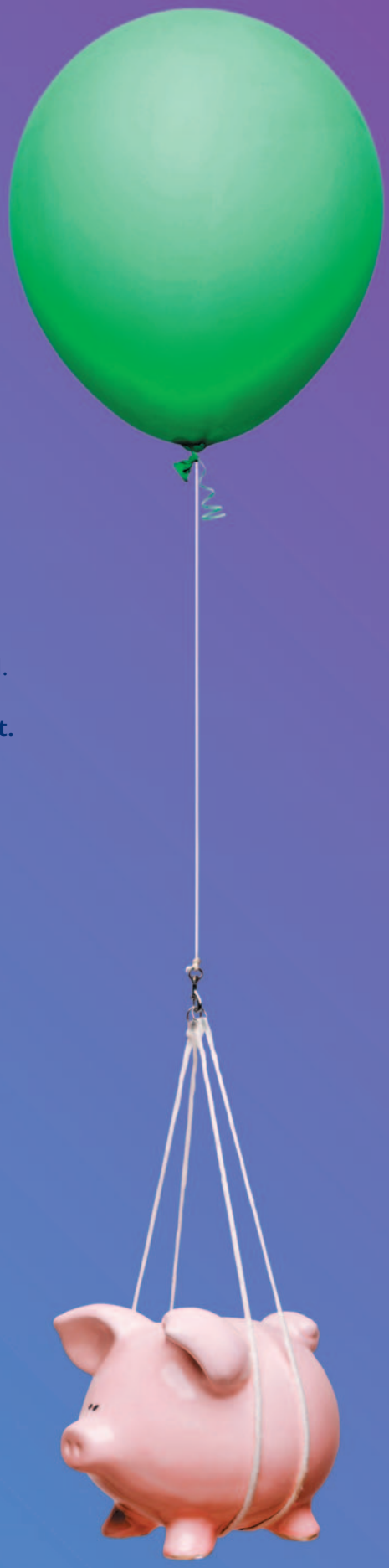

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