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THE BAR REVIEW

Journal of The Bar of Ireland

Volume 27 Number 5
December 2022

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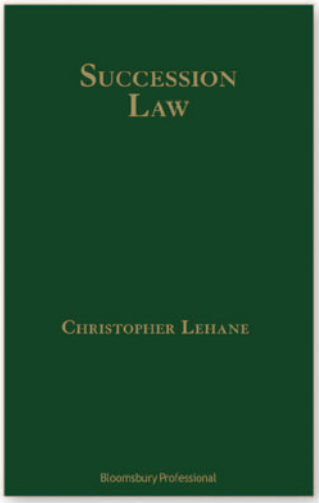

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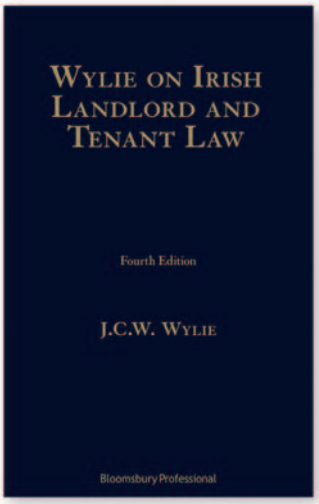

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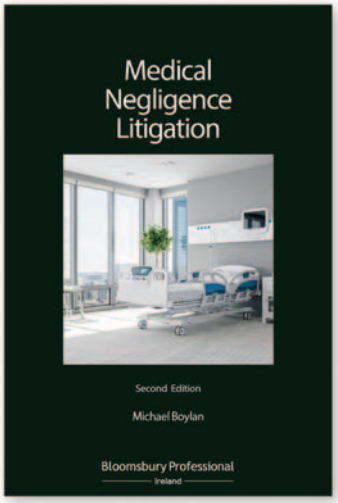

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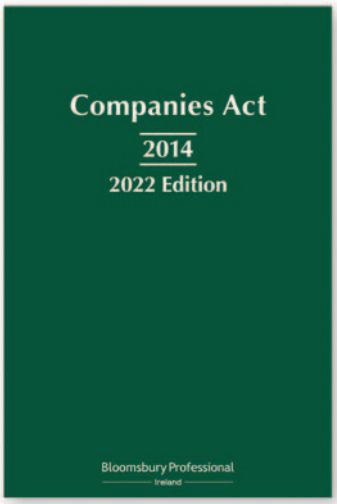

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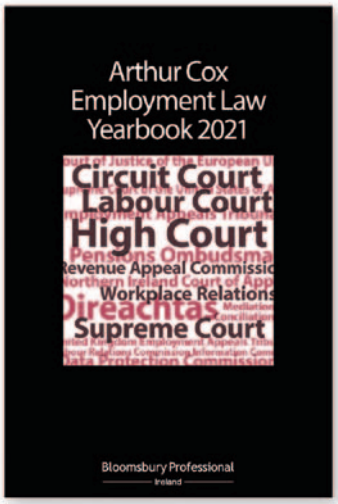

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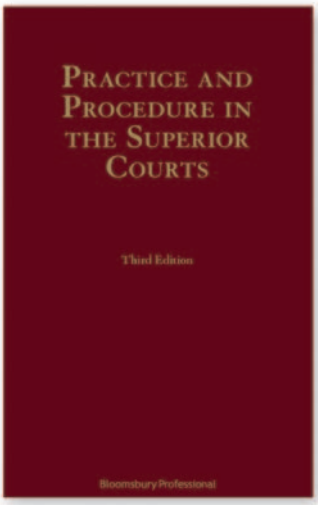

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Published on behalf of The Bar of Ireland by Think Media Ltd

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Design: Rebecca Bohan, Tony Byrne, Meliosa Fitzgibbon
Advertising: Paul O'Grady, Calum Petit

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Coming back to court

The welcome return to in-person court hearings must be encouraged for the benefit of all Law Library members.

The mental health and well-being of barristers is very much to the forefront of our minds as we emerge from the pandemic and return to life, not quite as we knew it prior to March 2020.

Our first week of term saw a presentation by Prof. Brendan Kelly of TCD and wellness coach Caroline Kelly entitled 'A Mindfulness Practice: A Companion to Your Practice at The Bar'. Caroline's mindfulness group also continues apace on Mondays at 4.30pm. More recently, Pieta House and suicide prevention were the focus of The Bar of Ireland's celebration of International Men's Day, and no doubt the Equality & Resilience Committee will have more mental health and well-being events planned as the legal year progresses.

However, one of the fundamental (and easy to implement) contributors to a sense of positive well-being is the ability to meet up, and chat, with our friends and colleagues. We are, after all, a social species, and isolation is not good for our psyche. This is where the collegiality of the Bar comes into its own; by meeting on the floor of the Law Library, in the CCJ, on Circuit, or for a tea or coffee or something stronger, we not alone have an opportunity to discuss matters legal, but also to discuss issues that may be troubling us, or to debrief after a difficult and trying day in court. It may be a truism to say that 'a problem shared is a problem halved' but it is in the sharing of our problems that we gain a sense of perspective, and a problem is rarely, if ever, made worse for the sharing.

Collegiality

Collegiality at the Bar depends upon us being not only able, but available, to chat with our colleagues, and we have always prided ourselves on the most senior members of the Law Library being accessible to more junior members to provide advice and assistance on matters legal and non-legal. But it can be daunting for a junior to pick up the phone to a senior, to introduce themselves, to make sure they are not disturbing the senior, and then go on to seek advice, all the time wondering if they have the senior's full attention. This engagement is far easier if a junior can simply approach the senior outside court or around the Law Library when it is much more obvious if the senior has time and availability to discuss whatever the issue may be.

It would be such a shame to see this aspect of our collegiality fall into abeyance by reason of our physical absence.

Now that most court sessions have returned to in-person sittings, we should all fully embrace the opportunity to appear in court in person. While the online options can be convenient, our impact as a profession is greatly enhanced by our physical presence. The opportunity to meet and interact is lost when we appear online, and this meeting and interacting has many less tangible or obvious benefits, some practice related and some personal.

Professional and personal benefits

On a practice level, by meeting our 'opposite numbers' in court or the environs of the Law Library, we inevitably end up talking about cases in which we are involved (other than the particular case in court on any given day) and issues may be resolved or narrowed organically and far more easily than if we had to make time to pick up the phone to that colleague. And for more junior members, the fact of being in court in person and observing senior colleagues (and peers) in action is an invaluable experience and a learning tool that simply cannot be replicated online. Further, senior members and solicitors are far more likely to 'notice' a more junior member's performance in a physical court setting, and such recognition can often result in work coming that junior's way.

On a personal level, we are far more likely to notice if a colleague is upset or out of sorts if we meet them in person and, conversely, that colleague is far more likely to approach us to discuss whatever it is that ails them if they 'bump into' us rather than having to pick up the phone. The very act of picking up the phone is to sometimes make more of an issue than needs to be made, and if we are available in person, we avoid this risk.

Looking to the future and the sustainability of our profession, let us not, with the benefit of hindsight, wish we had been more proactive in encouraging members to attend court in person and return to the floor of the Law Library.

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

Celebrating an esteemed colleague

A Father of the Bar is interviewed, and new creative writing is celebrated.

Can you imagine practising as a barrister without a phone? For some it might be heaven, for others it could mean the end, but for our esteemed colleague, Ronnie Robins SC, it was just part of everyday life. *The Bar Review* had the honour of interviewing the former Father of the Bar for our December edition and he has given a fascinating insight into his experiences, which extend to seven decades at the Bar.

Eithne R. O'Doherty BL and Sean Gillane SC explore the new stand-alone offence of stalking in the Criminal Justice (Miscellaneous Provisions) Bill 2022, and provide comprehensive comparison with the law in Northern Ireland, England and Scotland.

Michael Judge BL examines how we might increase the number of judges and investigates how retired judges in the United States have become an integral aspect of the judiciary. The ramifications of an Isaac Wunder order are given thoughtful consideration by Ali Bracken Ziad BL, and his article is a thorough guide to its history and impact.

Finally, *The Bar Review* is delighted to publish the winning submission in our first ever Creative Writing Competition. The winner has chosen to keep their light under a bushel, but the piece shall speak for itself. I have no doubt you will enjoy it.

Helen Murray BL
Editor
The Bar Review

Equitable Briefing Policy

Building and sustaining a truly diverse membership requires targeted initiatives. The Equitable Briefing Policy – adopted by the Council of The Bar of Ireland in June 2022 – is one such initiative and is a priority under The Bar of Ireland's Equality Action Plan.

The Policy is the culmination of extensive research and engagement carried out by the Equality & Resilience Committee over a number of years.

It will launch in March 2023, and the Council of The Bar of Ireland is calling on all organisations and individuals with briefing-making authority, including barristers, to sign up to and support what is a constructive commitment that benefits colleagues, clients and the wider justice sector.

The Policy supports briefing entities in respect of developing a diverse panel of counsel by reference to gender, while respecting that the ultimate choice is with the client/entity. As many organisations engage with similar initiatives and priorities, the Equitable Briefing Policy also puts in place a framework for supporting those goals.

The Equality & Resilience Committee has engaged with leading Irish law firms and State bodies in shaping the policy's development, and this ongoing partnership will be instrumental in helping to drive this Policy forward. Barristers too have a significant role to play in ensuring the success of this initiative.

Full details of the policy, including how to sign up, will be published on www.lawlibrary.ie in March 2023. For more information, contact equality@lawlibrary.ie.

Defence Forces Legal Service Club celebrates centenary

The Defence Forces Legal Service Club recently hosted a centenary symposium in Cathal Brugha Barracks.

This event was to mark and reflect on the centenary of the appointment of Mr Justice Cahir Davitt as first Judge Advocate General and the establishment of a legal section, based in Cathal Brugha Barracks, in the then Adjutant General's Branch of GHQ of the National Army in 1923.

The symposium was chaired by Judge Advocate General Oonagh McCrann SC, with Senator Michael McDowell SC and Colonel Michael Campion (Military Judge) presenting.

From left: Acting Director of the Defence Forces Legal Service, Lieutenant Colonel Richard Brennan BL; General Officer Commanding 2 Brigade, Brigadier General Tony Cudmore; Oonagh McCrann SC, Judge Advocate General for the Defence Forces; and, President of the Defence Forces Legal Service Club Judge John D. O'Hagan SC.

Traveller Mental Health Network recognised

The National Traveller Mental Health Network (NTMHN) has received the 2022 Bar of Ireland Human Rights Award in recognition of its community-based work and advocacy in the area of mental health of the Travelling Community. The award ceremony took place on November 24 in the Gaffney Room and was also streamed online.

From left: Chair of The Bar of Ireland's Human Rights Committee, Aoife O'Leary BL; Chair of the Council of The Bar of Ireland, Sara Phelan SC; and, Mags Casey of the National Traveller Mental Health Network. The NTMHN was this year's recipient of The Bar of Ireland Human Rights Award.

Specialist Bar Association update

Construction Bar Association (CBA)

Reg Jackson SC examined business interruption, insurance and construction at the CBA Tech Talk on October 19. At the November 2 Tech Talk, Sean Carr, Partner at McCann Fitzgerald LLP, reviewed price inflation in the construction industry. James Burke BL chaired both sessions.

Corporate & Insolvency Bar Association (CIBA)

The CIBA held a breakfast briefing on October 12 entitled 'The Protection of Company Capital'. Chaired by Kelley Smith SC, Declan Murphy BL presented on this fascinating topic. On November 16, Keith Farry BL posed the question 'Personal Insolvency, Creditor Friend or Foe?' Keith reviewed, from a creditor perspective, the link between debt recovery and repossession litigation versus personal insolvency protections and outcomes. The briefing also included an update on recent case law.

Cumann Barra na Gaeilge

Reáchtáil Cumann Barra na Gaeilge CPD trí uair an chloig ar Meán Fómhair 28, le nótaí tosaigh ón tOnórach Marguerite Bolger, Breitheamh den Ard-Chúirt. Phléigh Clíona Kimber SC conas teacht slán trí idirbheartaíocht – scileanna idirbheartaíochta and dea-chleachtas (samplaí). Chuir Prionsias O'Maolchaláin BL i láthair an dualgas fáthanna a thabhairt. D'fhéach Aoife McNickle BL ar radharc ar Tuairisc EY. Ar Samhain 29, thug Luán Ó Braonáin SC léacht de chuid Chumann Barra na Gaeilge – Clúmhilleadh, agus an Breitheamh Cian Ferriter ina chathaoirleach ar an imeacht.

Employment Bar Association (EBA)

On October 20, Clíona Kimber SC delivered a very insightful presentation on strategy in equal pay claims in a session chaired by Caoimhe Ruigrok BL. Ruth Mylotte BL reviewed frivolous and vexatious employment claims and the recent judgment of Ferriter J. in *Deirdre Morgan v The Labour Court and others* [2022] IEHC 361 on November 8. Niamh McGowan BL, EBA Chair, chaired this breakfast briefing. The EBA will host its Annual Conference on December 15.

Financial Services Bar Association (FSBA)

Chaired by Una Tighe SC, the FSBA hosted an event on October 26 where Shane Cranley BL and John Breslin SC considered 'Competition Law in The Financial Services Sector'. The FSBA held its first Annual Conference on November 3 in the Distillery Building. This inaugural conference hosted three panels of leading practitioners, who led lively and practical discussions focusing on the investigation phase, the inquiry or hearing phase, and the impact on the regulatory relationship. Speakers included: Ms Justice Nuala Butler; John Breslin SC; Remy Farrell SC; Margaret Gray SC; Elizabeth Corcoran BL; John Freeman BL; David Sweetman BL; Rosaleen Byrne, McCann Fitzgerald; Tony Katz, DLA Piper; Lisa Carty, William Fry; Dario Dagostino, A&L Goodbody; Liam Guidera, MHC; Karen Reynolds, Matheson; Ciara Sharkey, Credit Suisse; Feidhlimidh Wrafter, Western Union; Robert Cain, Arthur Cox; and John O'Riordan, Dillon Eustace.

FSBA Conference Panel 1 (from left): John O'Riordan, Dillon Eustace; Karen Reynolds, Matheson; John Freeman BL; Robert Cain, Arthur Cox; and, Margaret Gray SC.

Immigration, Asylum & Citizenship Bar Association (IACBA)

The IACBA held a breakfast briefing on October 27, where Sarah Cooney BL presented on the recent ECJ judgment of September 15, 2022, *SRS (Subhan) v Minister for Justice* (C-22/21, EU:C:2022:683), and Michael Conlon SC chaired. On November 25, the IACBA held its Annual Conference. Speakers and topics included: Advocate General Anthony Collins on 'The Rule of Law and the Availability of Remedies in Migration Law'; Denise Brett SC on 'The Duty of Candour in Judicial Review in Immigration Cases'; David Leonard BL on 'Internal Relocation and External Challenges'; John Stanley BL on 'Issues connected to the Citizenship Act, 1956'; and, Prof. Siobhan Mullally, University of Galway, on 'Trafficking in Persons, Access to International Protection and Developments in European Human Rights Law'.

Planning, Environmental, and Local Government Bar Association

On November 21, David Browne BL explored recent developments in access to environmental information. Chaired by Stephen Dodd SC, the event was highly informative.

Probate Bar Association

On November 22, the Probate Bar Association held a very interesting breakfast briefing at which Paula Fallon of Paula Fallon & Associates Solicitors presented, and Catherine Duggan BL chaired. The inaugural Probate Bar Association Conference took place on December 9, and gave an essential update for the probate practitioner.

Professional Regulatory and Disciplinary Bar Association (PRDBA)

On October 21, the PRDBA held its Annual Conference on the topic of 'Privacy in the context of statutory regulation, with an emphasis on the Legal Services Regulation Act, 2015'. Ms Justice Emily Egan chaired, with presentations from: Brian Doherty, CEO, Legal Services Regulatory Authority (LSRA) on 'The LSRA Complaints Function'; Caoimhe Daly BL on 'Regulation of the Legal Professions: A UK Perspective'; Brendan Savage BL on 'Complaints to the LSRA: process and procedure'; Frank Kennedy BL

Speaking at the SLBA's October event were (from left): Susan Ahern BL; Brendan Kirwan SC; Leanne O'Leary, Edge Hill University; and, Caradh O'Donovan, co-founder, Global Athlete.

on 'Inquiry Proceedings Before the Legal Practitioners Disciplinary Tribunal'; and, Patricia Dillon SC on 'Applications for privacy in the context of statutory regulation with an emphasis on the Legal Services Regulation Act, 2015'.

Sports Law Bar Association (SLBA)

On October 13, the SLBA hosted an event where Dr Leanne O'Leary FCIArb, Senior Lecturer, Edge Hill University, Caradh O'Donovan, former World and European kickboxer and co-founder of Global Athlete, and Brendan Kirwan SC considered whether individual athletes are workers. The SLBA held its annual conference on December 2. The overall theme of the conference was 'Discipline and Integrity'. Session 1 focused on 'The Modern Integrity Unit', Session 2 discussed 'Regulating for Discipline: the approach of different sports and athletes', and Session 3 examined 'Trends in Discipline, focusing on Integrity Codes and eligibility for office'.

Tax Bar Association

The Tax Bar Association held its first Annual Conference on October 8 in the Distillery Building. Entitled 'Tax litigation, important issues & recent developments', the conference heard from an array of experts in both the tax and legal sectors, with invaluable contributions from the Chief Justice, Mr Justice Donal O'Donnell, and Ms Justice Siobhan Stack of the High Court. Marie-Claire Maney, Chairperson, Tax Appeals Commission, presented on the topic 'Transforming the Tax Appeals Commission', and Michael Ashe KC led a discussion on 'Overview of Evidential Issues'. The topic of 'Jurisdiction in tax litigation', relating to both the Tax Appeals Commission and before the Superior Courts, was considered by Grainne Clohessy SC.

Tort & Insurance Bar Association

Mr Justice Paul Coffey addressed the members of the Tort & Insurance Bar Association on October 18. Chaired by Maura McNally SC, Mr Justice Coffey discussed general damages for personal injuries. On November 16, Tim O'Connor BL asked the question 'Torts, Sports and the Courts: does statutory change of tort liability work?'

The Bar Review Creative Writing Competition 2022

Members of the Law Library were invited to submit a creative writing piece on 'A day in the life of a barrister'.

This year, we held the first *Bar Review* Creative Writing Competition, and our thanks to all who took the time to submit an entry. The standard was very high, and the judges' task was a difficult one, but we hope you will enjoy the winning entry, 'The Age of Consents', which is published below. The winner has asked to remain anonymous, but we hope they are enjoying their prize of a bookshop voucher. We plan to run the competition again next year, and hope to see even more entries!

The Age of Consents

– Can you hear me Registrar?

– Yes Judge, I can hear you; can you hear me?

– Can you hear me Registrar?

– Yes Judge

– Registrar, can you speak some words so that I can confirm if you are muted or whether the problem is my end?

– Yes Judge; testing, one, two, three

– Very well, there's something not working my end; I'll switch device

TIME PASSES

– Can you hear me Registrar?

– Yes Judge, I can hear you

– Very good; so, call the list please

– Shh, the list is about to start, I have to go; I will, I'll try, but he's so difficult, he never agrees to anything…

– Can everyone please mute their microphones unless they are addressing the Court?

– Sorry, Judge

– and turn off their videos

– Ms Whelan

– Can you turn off your camera?

– Ms Whelan, your camera please

– Sorry Judge, I was on mute

– Very well; carry on Registrar

– Are there any adjournments or Orders by consent?

– Judge can I mention No. 40 please?

– No. 14? Very well

– Can you adjourn that by consent for three weeks please?

– No. 14, adjourn three weeks

– Sorry Judge, I'm in 14 and that's a contempt motion and that's not adjourning

– I meant to say 40

– Sorry, there was some background noise

– Can everyone mute their microphones unless they are addressing the court?

– And turn off their video feed?

– Ms Whelan. Your video

– Yes Judge; what button do I press?

– Press the little camera icon

– The blinking red button

– The camera logo

– Sorry, Judge, have it now

– So, start again: Mr McElligott?

– Thank you Judge and sorry for the confusion; No. 14, adjourn three weeks; 40, I meant 40, so sorry

– No. 40, three weeks

– Sorry Judge

– Yes registrar?

– I lost you there; poor connection. I'll have to log out and log back in

TIME PASSES

– Thanks Judge; I'm back now

– Will I continue with the consents?

– Judge?

TIME PASSES

– I can't hear you Judge; you must be on mute

– He's still on consents; it's moving very slowly; have to go; the Registrar's back but now we can't hear the bloody Judge

– Can everyone mute their microphones unless they are addressing the court?

– Apologies

– And turn off their video feed

– Ms Whelan

– Sorry Judge

– What was that first consent? I didn't get to note it down

– It was No. 14 adjourn; adjourn three weeks

– No, sorry Judge, as I said, I'm in 14 and that's a contempt motion and that's not adjourning

– Contempt motion? I'm here to answer that and I am not in contempt and I can prove it

– We'll come to that shortly; please mute your microphone and turn off your video and we will come to it in due course

– Yes; Ms Danaher is quite right – it was No. 30 and it adjourned for four weeks

– 40 and three weeks

– Yes, 40 and three weeks

– Exactly

– Thank you Judge I have that now; any other consents?

– Judge can I mention No. 86 on your list? That's *Mulcahy & others v Tailor Made Solutions Limited*; I'm for the plaintiff, and Ms Muldoon is for the defendant. By consent, strike out the motion, allow three weeks for the delivery of defence and counterclaim, and strike out the motion with costs to the plaintiff

– Very good; No. 86, strike out, three weeks, costs to plaintiff

– To the plaintiff

– Yes, costs to the plaintiff – to be taxed in default

– Yes

– The costs are not to be taxed, they are to be adjudicated

– In default

– Yes

– Adjudicated in default; it's the new Act

– Against the notice party?

– The defendant

– Yes, the defendant

– Judge, can you hear me? I'm the solicitor for the defendant and I have an application to come off record at No. 92 in your list so there is just a small qualification to what my friend just said….

– Judge, sorry to interrupt, but what happened to No. 85 in your list?

– Can you hear me? I'm here for the contempt motion. Hello? Ah for fu-

– Yes we can hear you

– Can everyone mute their microphones unless they are addressing the court?

– Sorry Judge

– Judge, you're freezing on screen

– Very well, bear with me I'll switch devices

TIME PASSES

Father of the Bar

As he retires from the Law Library, Ronnie Robins SC reflects on a career at the Bar that has spanned seven decades, all of them full of fantastic tales.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

One of the best known and respected figures in the Law Library, Ronnie Robins SC retired just before the start of this new legal year. Having begun in the early 1960s, Ronnie's career at the Bar has been over 60 years in the making, but its beginnings were far from the more traditional routes to a career in law.

Originally from Kimmage in Dublin, Ronnie was the son of a cabinetmaker and factory owner, and credits the chairman of his father's board, a barrister named Henry Moloney SC, with sparking his interest in the law. However, the young Ronnie left school at 15 and went to work on the docks in Dublin. A talented rugby player, he played for Wanderers FC, and it was through rugby that he met and became friends with the barrister and playwright Ulick O'Connor: "I always carried something to read with me, generally Anglo-Irish literature, so I always had that with me when I was working down in the docks and then going off to Wanderers to play rugby, and Ulick said to me, 'You should try the Bar', so that was where I took an interest. At that stage, you could pretty well get into the Law Library on an interview. So, that's how it started". While his father's respect for the chairman of his board meant that he supported his son's choice, Ronnie says it was a major sacrifice for his parents to send their son to the King's Inns. This wasn't helped by one of his first cases as a junior: "One of my first cases was from Billy Bloodsmith, whose family were solicitors in Gardiner Street. Billy hadn't much interest in the practice and was very keen on the Rathmines & Rathgar Musical Society. I got a case from him, which was illustrated rather than the customary instructions. It involved two lady tenants and their landlord in a tenement building in Gardiner Street. One of the ladies found that if she put a wire chimney brush down her loo, it would come up in her neighbour's loo, which she more than once did. I was delighted and went home to tell my parents about my new case. That was not quite what they had in mind for me when they were making sacrifices to get me through the King's Inns..."

Horses for courses

Like most barristers at the time, Ronnie didn't specialise in a particular area of law, but took whatever work came his way. He took criminal law cases from a very early stage in his career, but also commercial law: "I devilled with Weldon Park – people used to say he wasn't a barrister, he was an address – but he was very good. He was a really nice man and he

was a chancery lawyer. I got into criminal practice at an early stage, and I enjoyed that. I also got motions in hire purchase because of Weldon Park. They had the virtue that on Monday, when you had your motions and you finished them, the solicitor, who had a large briefcase full of money, paid you in cash for everything you had done that day".

He also worked as a junior to Raymond O'Neill, which led to a great deal of work with Guinness, who were taking over a lot of small independent breweries at that time, and between this and work in building contract law and matrimonial cases, Ronnie says he "repaired my reputation at home".

Ronnie's career in criminal law was a colourful one too, entirely involving defence work, and it came to a suitably colourful end: "I acted for a very clever and successful criminal, a pretty unattractive fascist who had been a political secretary to one of the Mitford sisters. He was, I think, probably one of the serious criminals at that stage, when they were almost becoming professional criminals. He ran out of steam, as so many of them do, and he owed me for a year's work. When his solicitor, Billy Bradshaw, came to me and said, 'He's over in the Bridewell, will you come over?', I said, 'He owes me too much', and I wouldn't. Billy came back to say that he had a horse. I think, being a Protestant, you feel naked without a horse, so I took the horse. After a while, the criminal, who at this stage had run out of money, sued me for larceny of the horse because we hadn't got a receipt, hadn't properly documented it. So that steered me off criminal law".

As for the horse? "I equipped myself in all the gear that you needed for a horse and I kept it up in Jerry Buchanan's field. Jerry Buchanan ended up as a judge and he lived just at the Castleknock entrance to the Phoenix Park. But the horse knew more about my lack of true credentials for owning one and the wretched thing bit me every time I went near it. Ultimately, I was able to pass it off to some real Protestants down in Kilkenny, two sisters who had all the credentials, a big house and lots of land, but they hadn't got much money, so I gave them the horse".

Different timess

Needless to say, Ronnie has seen some extraordinary changes to the Bar and to the Law Library. The number of barristers when he began his career was of course far smaller, and the more intimate surrounds meant that things were done very differently, to say the least: "The changes have been just hard to believe. You couldn't explain to your grandchildren what life was like then; they wouldn't believe you. In the Library, everybody knew everybody, and you were on first name terms. You had your own table, if not your own chair, in the coffee room for your coffee and lunch. Not alone were there no mobile phones, there were actually no fixed phones, other than three outside, in what's now the financial office. There was a crier who sat there on a stool, and if a phone call came for you, he came in and almost took you by the elbow and brought you out to the phone and you went into the cubicle there".

The criers were a vital part of the Bar, in particular the senior crier, who could make or break a young barrister: "He sat up on a high desk inside the Library door and solicitors would come and ask for a barrister. If you were in his good books, he would explain to the solicitor that the solicitor would be lucky if he could get you because you were very busy. 'He's a man who'll go far' was one of his favourite sayings. But if he didn't approve, or if you'd gone and upset him, or not impressed him in any way, then he'd wonder to the solicitor whether you were about, as he hadn't seen much of you!"

"I always carried something to read with me, generally Anglo-Irish literature, so I always had that with me when I was working on the docks, and then going off to Wanderers to play rugby, and Ulick said to me, 'You should try the Bar'."

Legal Express

The image of the barrister pulling a trolley filled with document boxes is a familiar one to all, but that too was once unnecessary, thanks to the Legal Express: "It was a marvellous service. Paddy would collect your brief bag from your desk after the day's work, and deliver it to your home, and then it was collected the next morning at 7.00am, and when you got into the Library, it was there on your desk".

Ronnie also remembers with great fondness a series of caricatures on the walls of the Law Library that made biting comment on some of the best-known legal figures of the day: "There was a judge who was an extraordinarily unpleasant and aggressive judge – I had terrible rows with him when I was doing crime. There was a cartoon of him and a fellow called Jim Maguire, a lovely barrister, a really nice man, but they didn't get on. And there was a cartoon of Jim coming out of court, showing his hand, but stripped of all flesh and just bleeding, and Jim saying 'And I thought I had him eating out of my hand!' The most malicious one was of two brothers, Claude and Pól Sainsbury. They were very caustic and not very charitable about anybody or anything. And there was a very good cartoon of the pair of them with all 27 volumes of the dictionary open on a desk and these spindly fingers tracing through the lines, and the caption was 'Looking for a kind word to say about somebody'".

Even in those days, the law was a demanding career, which could inevitably take its toll on family life: "I don't think there's any doubt that there is a price to be paid by the family. I got up every morning at half five and I dictated, and then I would go into the Library, come home, and proofread what had been typed for me for that day. There's no doubt that it wasn't a normal family life, except to this extent, that I always spent a lot of time at home and if I had just one case that I could hand over comfortably, I would, and I'd stay at home and work for the day. I was around with the family to that extent. We always made the most of holidays. In the summer, we'd drive to the Continent and spend five weeks in France or Spain or Italy".

Inevitable changes

One of the biggest changes of course, has been the move to specialisation, and the level of knowledge and legal literature that comes with the increasing volume of legislation, both national and emanating from the EU. Ronnie talks of famous and eminent barristers who conducted their entire careers with the use of one or two legal tomes, something not many in the profession could do now: "I remember Maeve Binchy's father, William Binchy, was a very clever, very successful barrister. He practised in the Southwestern Circuit, and I think he claimed only to have half a dozen books. And John Willie O'Connor claimed that Roscoe's *Nisi Prius* was the only book he ever referred to. The amount of law, the number of books and authorities and reports now, is just astonishing. I think it's partly due to the fact that there are people who specialise very early. In the beginning, when I was starting, you specialised in what you got".

Whether dealing with every kind of case imaginable, or specialising in one area of law, Ronnie says that the most important skills for a barrister can only be gained by experience in court, and that is one thing that doesn't change: "The experience in court – that's where the strength lies for us. If you're not in court from day one, it's very hard to do it. Being there every day, day in and day out, it becomes sort of second nature. I think we probably learn to read human nature better practising at the Bar".

He's critical of the court systems now, which obviously differ hugely from how things were done at the beginning of his career: "I think the responsibility for the way the system works is not on the Bar, it's the way it's now administered. It's extraordinary to think that when I started the whole system was run by the Chief Justice, the President of the High Court and one or two people who worked in the Library. Now it's just changed so much and I don't think that has improved it. It's hard to believe how you can now have a whole department, and have things jammed up the way they are, with lists. Of course, there should be more judges, of course there should be more courthouses, but it isn't the whole picture. I know there was nothing like the same volume of work [in years past]. You can't compare it and it couldn't have gone on the way it was. But it's hard to believe that at one stage the whole thing was managed by you knocking on the President's door when he was having a sandwich at lunch and getting an answer to something".

Vocation

He also notes changes in the public perception of barristers, and those in the legal professions, during his career, and agrees that adding some element of knowledge of the legal system to education would be helpful: "When I was starting, there was a huge deference to a barrister, and it wasn't justified – I don't think that was right. But now there's enormous cynicism. Certainly, no barrister deserves any special reverence or anything like that, but there does seem to be, in general, a lot of tearing down of institutions. Of course, institutions have contributed a lot to this. We have absolutely no right to any special regard, but I think barristers and solicitors really generally work for their clients. And I think for most barristers, I would say 99% of them, it's a vocation. They want to do the right thing, they want to get the best result for their client. But I don't think that's acknowledged".

"Being there [in court] every day, day in and day out, it becomes sort of second nature. I think we probably learn to read human nature better practising at the Bar."

Now that he has retired, Ronnie misses the camaraderie and the courts: "It's a bit of a wrench. I miss the friendship, the chat. And I really did like the court work. I never had a big advisory practice; it was court and I enjoyed that. And I enjoyed the banter".

Is there anything he won't miss? "No, there's nothing. I never found any aspect of it unpleasant. I was lucky. I made great friends and I was lucky enough that I got on, people were always very good to me and I enjoyed it".

Life in retirement

After such a lengthy career, Ronnie could be forgiven for sitting back, taking it easy, and spending more time with his wife, the artist and designer Glynis Robins, and his two daughters, but that's not in his nature: "I'm not good at doing nothing. I get itchy. I get up early. I'm lucky I never played golf, so I just have to find something to do. I'm very lucky that my health has held up. I'm an inveterate fiddler, and Glynis is delighted to direct me out to the workshop every day, and I have a very good garden".

He's also found a new business venture in the form of a former fish hatchery in Connemara, in which he and his partners are developing a medical devices company, as well as an artists' space run by his artist daughter Alannah: "Hopefully we have something that will give employment, so I'm involved in that fairly heavily now".

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library
BARRA NA HÉIREANN
An Leabharlann Dlí

The Bar Review, journal of The Bar of Ireland

Volume 27 Number 5
December 2022

A directory of legislation, articles and acquisitions received in the Law Library from September 3, 2022, to November 11, 2022
Judgment information supplied by vLex Justis Ltd.
Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.

ADMINISTRATIVE LAW

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Allied Irish Banks Plc v Boyd

Want of prosecution – Delay – Balance of justice – Appellant appealing against the dismissal of his claim by reason of delay – Whether the delay had been inordinate and inexcusable – 21/10/2022 – [2022] IHCA 230

Darcy v Allied Irish Banks Plc

Well-charging order – Solicitor's undertaking – Loan facility – Plaintiff seeking a declaration that there is due and owing monies by the defendants to the plaintiff – Whether the monies stand well-charged on the interest of the defendants in property – 19/10/2022 – [2022] IEHC 581

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Mootness – Strike out – Judicial review – Appellant appealing against the order striking out his proceedings as having become moot – Whether there was a live adverse decision for the appellant to challenge – 26/10/2022 – [2022] IECA 241

Shields v The Central Bank of Ireland

Statutory instruments

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Dixon v Lehane (official assignee in bankruptcy of the estate of Henry Dixon)

Bankruptcy – Extension of time – Delay – Applicant seeking an extension of time to appeal a bankruptcy order – Whether the period of delay in seeking an extension of time was inordinate – 03/10/2022 – [2022] IECA 212

Larkin v Brennan

CHILDREN

Wrongful abduction – Return – Grave risk – Appellant appealing from the judgment and order ordering that two children be returned to the jurisdiction of the Courts of England and Wales – Whether there was sufficient evidence to establish a grave risk to the children – 05/08/2022 – [2022] IECA 194

F. v C.

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COMPANY LAW

Property – Possession – Companies Act 2014 s. 673 – Applicant seeking an order requiring all parties having notice of the order to immediately surrender possession and control of the property to the applicant – Whether the property was one to which the company was prima facie entitled – 25/10/2022 – [2022] IEHC 587

Cerise Glen Ltd v Companies Acts

Disqualification – Restriction – Companies Act 2014 s. 842 – Applicant seeking a disqualification order against the respondents – Whether the respondents had discharged their burden of proving that they acted responsibly in relation to the affairs of the company – 20/10/2022 – [2022] IEHC 590

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Disqualification – Companies – Companies Act 2014 s. 847(1) – Applicants seeking leave to act as directors of companies – Whether it was just and equitable to grant to the applicants relief – 27/07/2022 – [2022] IEHC 513

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Sheeran v Fitzpatrick

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CRIMINAL LAW

Acquittal – Sexual assault – Exclusion of evidence – Applicant seeking a declaration that the trial judge erroneously excluded compelling evidence – Whether the acquittal of the respondent should be quashed – 14/10/2022 – [2022] IECA 248

DPP v B.K.

Sentencing – Sexual assault – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – 10/10/2022 – [2022] IECA 252

DPP v M.C.

Conviction – Murder – Miscarriage of justice – Applicant seeking an order quashing his convictions – Whether a new or newly discovered fact showed that there had been a miscarriage of justice – 14/10/2022 – [2022] IECA 239

DPP v McGinley

Case stated – Drunk driving – Unlawful detention – District judge referring questions for determination by the High Court – Whether there was an obligation on the Gardaí to inform the defendant of the reason for the delay at the roadside after arrest – 02/11/2022 – [2022] IEHC 601

DPP v Smith

Trial – Murder – Jurisdiction – Appellants challenging their return for trial before the Special Criminal Court – Whether the Special Criminal Court had full jurisdiction to try the appellants – 29/07/2022 – [2022] IESC 36

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ELECTORAL

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FAMILY LAW

Qualified cohabitant – Declaratory relief – Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 s. 172 – Applicant seeking a declaration that she was a qualified cohabitant within the meaning of s. 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 – Whether the deceased and the applicant were living

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Sea-fisheries (community control system) (amendment) regulations 2022 – SI 463/2022

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Statutory instruments

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Social housing assessment (amendment) (no. 2) regulations 2022 – SI 446/2022

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

Credit guarantee (amendment) bill 2022 – Bill 103/2022

Communications regulation bill 2022 – Bill 86/2022

Courts and civil law (miscellaneous provisions) bill 2022 – Bill 84/2022

Criminal justice (incitement to violence or hatred and hate offences) bill 2022 – Bill 105/2022

Criminal justice (miscellaneous provisions) bill 2022 – Bill 83/2022

Derelict sites (amendment) bill 2022 – Bill 94/2022 [pmb] – Deputy Thomas Gould

Development (emergency electricity generation) bill 2022 – Bill 99/2022

Employment permits bill 2022 – Bill 91/2022

Eviction ban bill 2022 – Bill 102/2022 [pmb] – Deputy Richard Boyd Barrett, Deputy Mick Barry, Deputy Bríd Smith, Deputy Paul Murphy and Deputy Gino Kenny

Mother and baby institutions payment scheme bill 2022 – Bill 97/2022

National Tourism Development Authority (amendment) bill 2022 – Bill 88/2022

Regulated professions (health and social care) (amendment) bill 2022 – Bill 80/2022

Regulation of lobbying (amendment) bill 2022 – Bill 85/2022

Táilte Éireann Bill 2022 – Bill 82/2022

Work life balance and miscellaneous provisions bill 2022 – Bill 92/2022

Bills initiated in Seanad Éireann during the period September 3, 2022, to November 11, 2022

Assisted decision-making (capacity) (amendment) bill 2022 – Bill 59/2022

Ban on dumping new products bill 2022 – Bill 104/2022 [pmb] – Senator Lynn Boylan, Senator Fintan Warfield, Senator Paul Gavan and Senator Niall Ó Donnghaile

Central Bank (amendment) bill 2022 – Bill 98/2022 [pmb] – Senator Catherine Ardagh and Senator Jerry Buttimer

Civil registration (amendment) (certificate of life) bill 2022 – Bill 96/2022 [pmb] – Senator Regina Doherty and Senator Mary Seery Kearney

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Communications regulation bill 2022 – Bill 86/2022 – Committee Stage

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Development (emergency electricity generation) bill 2022 – Bill 99/2022 – Committee Stage

Electricity costs (domestic electricity accounts) emergency measures and miscellaneous provisions bill 2022 – Bill 93/2022 – Committee Stage

Garda Síochána (compensation) bill 2021 – Bill 50/2021 – Report Stage – Passed by Dáil Éireann

National cultural institutions (National Concert Hall) (amendment) bill 2022 – Bill 76/2022 – Committee Stage

Online safety and media regulation bill 2022 – Bill 6/2022 – Committee Stage

Residential tenancies (deferment of termination dates of certain tenancies) bill 2022 – Bill 100/2022 – Committee Stage

Road traffic and roads bill 2021 – Bill 128/2021 – Report Stage – Passed by Dáil Éireann

Sex offenders (amendment) bill 2021 – Bill 144/2021 – Report Stage – Passed by Dáil Éireann

Tailte Éireann bill 2022 – Bill 82/2022 – Committee Stage

Water services (amendment) (no. 2) bill 2022 – Bill 81/2022 – Committee Stage

Work life balance and miscellaneous provisions bill 2022 – Bill 92/2022 – Committee Stage

Progress of bill and bills amended in Seanad Éireann during the period September 3, 2022, to November 11, 2022

Bretton Woods agreements (amendment) bill 2022 – Bill 32/2022 – Committee Stage

Development (emergency electricity generation) bill 2022 – Bill 99/2022 – Committee Stage

Electricity costs (domestic electricity accounts) emergency measures and miscellaneous provisions bill 2022 – Bill 93/2022 – Committee Stage

Judicial appointments commission bill 2022 – Bill 42/2022 – Committee Stage

Residential tenancies (deferment of termination dates of certain tenancies) bill 2022 – Bill 100/2022 – Committee Stage

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

Bills and legislation

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

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

Supreme Court determinations – leave to appeal granted

Published on Courts.ie – September 3, 2022, to November 11, 2022

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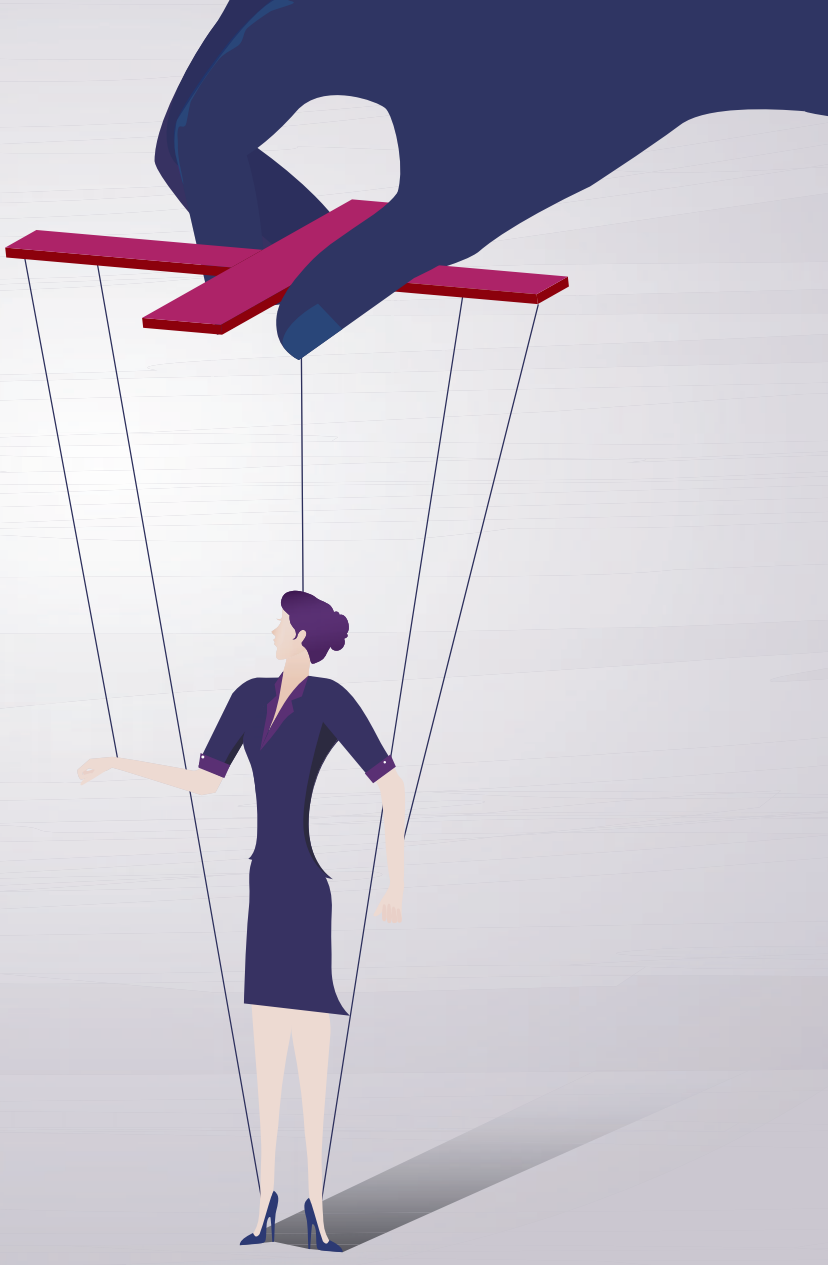
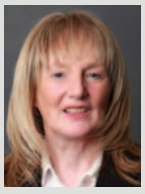
For up-to-date information, please check the courts website:

https://www.courts.ie/determinations

Coercive control and stalking



New legislation and high-profile cases have raised awareness of the offences of coercive control and stalking in Ireland and other jurisdictions.



Eithne Reid O'Doherty BL
Sean Gillane SC

Recent high-profile prosecutions in Ireland and England[1,2] have brought public attention to the offence of coercive control. A new stand-alone offence of stalking is provided for in the Criminal Justice (Miscellaneous Provisions) Bill 2022, which has passed its second stage, and this bill also amends the offence of harassment, which was introduced under section 10 of the Non-Fatal Offences Against the Person Act 1997.

The impetus for legislative change has been the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence (the Istanbul Convention), which Ireland ratified on March 8, 2019. Articles 5 and 7 of the Convention set out the State's legislative obligations in respect of the prevention, protection and prosecution of gender-based violence. Article 34 imposes an obligation on contracting states to criminalise stalking.

Chapter V of the Istanbul Convention also provides that signatory states "shall take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrator", and further provides that victims should have a right to claim compensation from perpetrators of any of the offences established in accordance with the Convention. Ireland has reserved its right to implement Chapter V.

Stand-alone offences

Section 39 of the Domestic Violence Act 2018, commenced on January 1, 2019, provides for the offence of coercive control. This stand-alone provision was proposed in the Seanad by Senator Ivana Bacik based on section 76 of the Serious Crime Act 2015, which applied to England and Wales.[3] In that context, decisions of the English courts are likely to be persuasive in the interpretation of section 39.[4]

In Letterkenny Circuit Court, on February 11, 2020, Judge John Alymer imposed a sentence of two and a half years, with the final nine months suspended, in the first successful prosecution in this jurisdiction of coercive control. The defendant, who pleaded guilty (also to an assault offence), made 5,757 unwanted phone calls to the complainant between March and June 2019.[5] The first conviction by a jury was in November 2020,[6] with a sentence of ten and a half years imposed for coercive control and assault offences.

Behaviour that is commonly understood as 'stalking' has, to date, been difficult to prosecute in the absence of a stand-alone offence. Instead, prosecutions were often brought for harassment under section 10 of

the 1997 Act. The Supreme Court considered the elements of the offence in *DPP v Doherty*.[7] While the Court wrestled with the true meaning of the word "besetting" in section 10, and the majority held that the communications did not come within the definition of besetting, the appeal was dismissed on the basis that the defendant's actions amounted to harassment due to the nature of the communications themselves. Of note, O'Donnell J. (as he then was) stated at paragraph 12 of his judgment:

"What is clear to me is the Law Reform Commission's observations on the 1997 Act, and the desirability of statutory updating, are, if anything, more justified now than when first made. … It is regrettably the case that developments in communications and general technology in the quarter century since the 1997 Act was enacted have only emphasised the many ways in which people, sometimes themselves disturbed, and sometimes simply malicious, can torture their fellow human beings. … It is highly desirable that this area of law is reviewed, and the law updated to provide effective statutory protection from harassment".

Definitions

NGOs, experienced in this area, use the terms 'domestic violence' and 'domestic abuse'. In Ireland there is no legal definition of domestic abuse. An Garda Síochána also uses the term domestic abuse and defines it as "the physical, sexual, financial, emotional or psychological abuse of one person against another who is a family member or is or has been an intimate partner, regardless of gender or sexuality".[8]
Regarding domestic abuse, the gardaí confirm that: "The term abuse, as opposed to violence, is used to ensure that all damaging behaviour is captured by the definition. An Garda Síochána has a pro-arrest policy when it comes to dealing with incidents relating to domestic abuse".[9]

Other jurisdictions and coercive control

Evan Stark coined the term 'coercive control' in his seminal text *Coercive Control: How Men Entrap Women in Personal Life*,[10] published in 2007. Stark argued that the violence model failed to provide for the range or effect of the abuse experienced by victims, and proposed a wider coercive framework based on unequal male/female power relationships. He defined coercion as "the use of force or threats to compel or dispel a particular response" (p. 228), and control as "structural forms of deprivation, exploitation, and command that compel obedience indirectly" (p. 229). Coercion and control together, he argued, resulted in a "condition of unfreedom" (p. 205) that is experienced as "entrapment".[11]
Stark's book was the springboard for further research, advocacy and eventual legislative change across jurisdictions. A 2019 article co-authored by Stark and Hester[12] broadened the male-female coercive model to that of gender-based coercive control, to include LGBTQI+ relationships and children. The failure of a "single incident"-based model informed:

"… the decision to craft new law [which] reflected the shared perception that the focus of the existing criminal justice response on discrete, injurious assaults was too narrow to capture the patterns of coercion and control a growing body of research and personal testimony showed were experienced by many abused women who seek protection".[13]

"It is highly desirable that this area of law is reviewed, and the law updated to provide effective statutory protection from harassment."

England

Prior to introducing section 76 of the Serious Crime Act 2015, the British Home Office, in 2012, conducted a public consultation, which concluded by identifying coercive control as the best framework for a new cross-governmental response to domestic abuse. Section 76 applies to those who are "personally connected", which is defined as family members and those in an intimate personal relationship, or who have been in such. The test is objective. A statutory defence of "'A' believed he or she was acting in 'B's best interest and the behaviour was in all circumstances reasonable", is included. The maximum penalty on indictment is five years. The Home Office reviewed the operation of section 76 and published a report in March 2021 arising out of criticism, *inter alia*, that prosecutions required the abuse to have occurred when the parties were cohabiting. The Domestic Abuse Act 2021 now covers abuse in the post-separation period and familial domestic abuse when perpetrator and victim do not live together.

Scotland

On February 2, 2018, by unanimous vote (119-0), the Scottish Parliament passed the Domestic Abuse (Scotland) Act of 2018. The offence of coercive and controlling behaviour was considered in Scotland but rejected, in an attempt to avoid some of the perceived limitations of the English section 76 of the Serious Crime Act 2015. The Domestic Abuse (Scotland) Act 2018 is a 20-page Act, which at section 1 provides for partner abuse and at section 2 sets out the multiple elements incorporated in partner abuse. There is a rebuttable presumption in respect of the partner relationship. The Act includes sexual violence, and physical and psychological harm, and the maximum penalty on conviction on indictment is 14 years.

Northern Ireland

Northern Ireland enacted the Domestic Abuse and Civil Proceedings (Northern Ireland) Act 2021 on March 1, 2021, which had been delayed due to the suspension of the Northern Ireland Assembly between 2017 and 2020. The 46-page Act is similar to that in Scotland but does not specifically use the term coercive control. Section 1 defines domestic abuse to include physical and psychological harm, and sexual violence. Unlike Scotland, it provides for those "personally connected" to each

other, which it defines to include, like England, family members. The maximum penalty on indictment is 14 years.

Coercive control in Ireland

The Domestic Violence Act 2018 at section 39 (1) provides: "A person commits an offence where he or she knowingly and persistently engages in behaviour that (a) is controlling or coercive, (b) has a serious effect on a relevant person, and (c) a reasonable person would consider likely to have a serious effect on a relevant person". The provision is gender neutral and "serious effect" is judged objectively.

"Serious effect" is defined as where a person is made: (a) to fear that violence will be used against him or her; or, (b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities. Section 39 (4) defines a "relevant person" in respect of another person as: (a) is the spouse or civil partner of that other person; or, (b) is not the spouse or civil partner of that other person and is not related to that other person within a prohibited degree of relationship,[14] but is or was in an intimate relationship with that other person. The maximum penalties are: (a) on summary conviction, a class A fine or imprisonment for a term not exceeding 12 months, or both; and, (b) on conviction on indictment, a fine or imprisonment for a term not exceeding five years, or both.

Either controlling or coercive behaviour constitutes the offence. There is no specific statutory defence as in England, Scotland and Northern Ireland. Unlike England and Northern Ireland, section 39 does not provide for family relationships. Scotland similarly does not specifically provide for family relationships, rather for "partner abuse" with a wide definition of partner.

Stalking

On August 4, 2022, Minister for Justice Helen McEntee TD announced Government approval for the Criminal Justice (Miscellaneous Provisions) Bill 2022, which will provide for stand-alone offences of stalking and non-fatal strangulation, and also injunctive relief for stalking. This Bill is expected to be enacted before year end 2022. The Department of Justice guidance notes state that the offence will comprise any conduct that either: (a) puts the victim in fear of violence (to either the person or another connected person); or, (b) causes the victim serious alarm and distress that has a substantial adverse impact on their usual day-to-day activities.

A wide range of possible acts is included, such as following, communicating, impersonating, interfering with property or pets, etc. Any form of conduct, however, can be the basis of the offence if it causes the above adverse effect. The offence can be committed by a single act and need not be persistent or repeated. It also covers situations where the person finds out about some or all of the stalking acts afterwards. The court can grant a restraining order, if satisfied that there are reasonable grounds for believing that the respondent has engaged in "relevant conduct" towards the applicant, and it is necessary and proportionate to protect the safety and welfare of the applicant. It is not necessarily required to prove any effect on the applicant, or any intention on behalf of the respondent; an order can simply be based on the conduct having occurred.

The offence will be subject to a test that the conduct is such that a reasonable person would realise that it would have the consequences set out. The maximum penalty will be 10 years.

Non-fatal strangulation

A stand-alone offence of non-fatal strangulation is also included. The Department of Justice guidance notes state that: "Internationally, strangulation is the second most common method of killing in adult female homicides (after stabbing). Research also highlights that non-fatal strangulation is frequently used as a tool of coercion, often accompanied by threats to kill".

Coercive control vs stalking

- Both offences are/will be stand alone. There is no "relevant person" criterion for stalking, as is required for coercive control. One can be stalked by anyone, including a "relevant person".
- In *DPP v Doherty*, a prosecution for section 10 harassment, the offender was female. A stalker is usually male, but not always so. In coercive control, the offender is almost always male. England has one recorded prosecution of a female for coercive control.[15]
- The civil remedy of a restraining order will be provided for stalking, even where there is no evidence of any effect on the applicant. There must be reasonable grounds for believing that the respondent has engaged in "relevant conduct" towards the applicant, and that it is necessary and proportionate to protect the safety and welfare of the applicant.
- Protective orders are provided for in the Domestic Violence Act 2018 and, at section 5, factors or circumstances that the court shall have regard to are set out. It provides for "any evidence of deterioration in the physical, psychological or emotional welfare of the applicant or a dependent person, which is caused directly by fear of the behaviour of the respondent". Section 5 protections cover a potentially wider range of people than is provided for under section 39, which excludes close family members.
- To date, coercive control seems to have been prosecuted with other offences, such as assault causing harm and criminal damage. The conviction of Dean Ward on July 28, 2022, included a conviction for rape.
- Neither the offences of stalking nor of coercive control specifically provide for psychological harm. This contrasts with the Scottish and Northern Ireland provisions for abuse and is also contrary to the Istanbul Convention.

International perspectives

In the English case of *F. v M.* [2021] EWFC, Hayden J. considered the English section 76 offence of the Serious Crime Act 2015 and held:

"Key to assessing abuse in the context of coercive control is recognising that the significance of individual acts may only be understood properly

within the context of wider behaviour. I emphasise it is the behaviour and not simply the repetition of individual acts which reveals the real objectives of the perpetrator and thus the true nature of the abuse.[16]
It seems to me that the definition in the FPR[17] (see para 101 above) provides some useful guidance, when it is broken down:

Coercive behaviour:
i. a pattern of acts;
ii. such acts will be characterised by assault, threats, humiliation and intimidation but are not confined to this and may appear in other guises; and,
iii. the objective of these acts is to harm, punish or frighten the victim.

Controlling behaviour:
i. a pattern of acts;
ii. designed to make a person subordinate and/or dependent; and,
iii. achieved by isolating them from support, exploiting their resources and capacities for personal gain, depriving them of their means of independence, resistance and escape and regulating their everyday activities".[18]

Coercive control and homicide have been empirically researched by Prof. Jane Monkton-Smith, Professor of Public Protection at the University of Gloucestershire, England. Monkton-Smith has identified eight recognisable stages that precede murders of an intimate (domestic) partner by a coercive controller,[19] and states:

"As a homicide researcher I have used or seen used temporal sequencing in other forms of homicide, and nobody had done it really with domestic abuse. If you define the crime of passion as a spontaneous response to some kind of trigger, confrontation or challenge: you act spontaneously and grab the nearest weapon and things turn out in a way that nobody could have predicted. That's what I would call a crime of passion. But that is not how coercive control works at all".

Conclusion

Section 39 of the Domestic Violence Act 2018, when compared with international provisions for coercive control, is limited due to the curtailed "relevant person" definition and the absence of a provision for restraining orders. Between 2019 and 2021, An Garda Síochána recorded a domestic abuse motive for 90% of all females who were victims of murder/manslaughter/infanticide, and for 43% of all females who were victims of attempts/threats to murder, assaults, harassments and related offences.[20] Prof. Monkton-Smith, when interviewed by the England and Wales Bar publication *COUNSEL*, stated: "Society needs to make a philosophical, psychological leap where we assess a domestic abuse offender forensically. In their own right they present more risk to society than a normal person".[21]

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9. *Ibid*.
10. Stark, E. *Coercive Control: How Men Entrap Women in Personal Life*. Oxford University Press; New York and London, 2007.
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14. 'Prohibited relationship' is defined in section 2(2) of the Domestic Violence Act 2018 as: "For the purposes of this Act, two people are related to each other within a prohibited degree of relationship if they would be prohibited from marrying each other in the State by reason of relationship".
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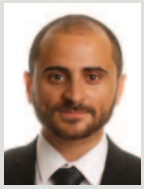
Isaac Wunder orders and administrative tribunals

Although Isaac Wunder-type orders have no statutory basis in Ireland, extensive case law, and certain Constitutional provisions, have allowed for significant development of the law in this area.



Ali Bracken Ziad BL

An Isaac Wunder order is a form of injunctive relief that can be obtained against vexatious litigants engaged in civil litigation. Isaac Wunder orders can come in many different forms; however, in essence they are a species of prohibitory injunction that has developed at common law to protect against the abuse of court processes. In effect, an Isaac Wunder order will restrain a litigant from initiating legal proceedings without the leave of the High Court.

In England and Wales, Isaac Wunder-type orders have been put on a statutory footing, and are described as civil restraint orders. The rules are provided for under Part 3 at Rule 3.11 of the Civil Procedure Rules (CPRs). Practice Direction 3C supplements this rather sparse rule by providing a significant amount of detail on orders of this type. This rule was added to Part 3 of the CPRs by the Civil Procedure (Amendment No.2) Rules 2004 (SI 2004/2072) and came into effect on October 1, 2004. The rule puts the Court's inherent jurisdiction to prevent abuse of its processes on a statutory footing.[1]

In the Irish context, no similar legislation exists. However, it is clear that the existence of a codified constitution in this jurisdiction has had a unique impact on this type of order. Therefore, this article will set out the law on Isaac Wunder orders in Ireland and consider some of the most important recent developments in this area.

Isaac Wunder orders

In the Supreme Court case of *Keaveny v Geraghty* [1965] IR 551, the majority of the Court held that the proper order to be made in the case was that:

"…no further proceedings in the action in the High Court should be taken without the leave of the High Court being first obtained and that if any such proceedings be taken in the action without such leave being obtained the defendant shall not be required to appear to or take any step in relation thereto and such proceedings so taken shall be treated as void and of no effect".[2]

Keaveny involved an action in defamation taken by the plaintiff in relation to the publication of allegedly defamatory statements contained in a letter. It was the defendant's position that the publication occurred on an obvious occasion of qualified privilege. The matter came before the Supreme Court as an appeal against an order of the High Court made on the July 13, 1962, staying all further proceedings in the action. The defendant's motion, upon which the order was made, was grounded upon the claim that the plaintiff's action was frivolous and vexatious, and an abuse of the process of the

Court, and that the statement of claim disclosed no cause of action against the defendant.

The Supreme Court was not unanimous in its decision; however, the decision of the majority clearly represents the law.[3] The learned judgment of Walsh J. contains the ratio of the Court's decision. Both Haugh J. and O'Keefe J. concurred with the order as adjudged by Walsh J. In this regard, the judgment of Walsh J. is an authoritative statement of the law on Isaac Wunder orders. Walsh J. gave detailed reasons for his decision, which are worth quoting in full:

"The learned Judge did not expressly find that the plaintiff's proceedings were either vexatious or frivolous. The materials before the High Court disclosed defects in the statement of claim which would call for amendment and did, as I have said, also disclose enough information to indicate that the case would most probably turn upon the question of express malice, if any. These matters, in my opinion, would not justify an order dismissing the proceedings or an order of like effect. The materials available appear to me to *justify a stay upon the proceedings until such time as the plaintiff, if he can, puts the matter in order and indicates sufficient to satisfy the High Court that he has a stateable case in this action*. This is a step which a Court, as the High Court judge said, would be reluctant to take in the ordinary course of events, but the *previous history of the litigation* arising out of this letter indicates that this is a case somewhat out of the ordinary and is one in which the proceedings, in their present form, coupled with the refusal to furnish the information sought, appear to be *oppressive*".[4] (Emphasis added.)

In the case of *Wunder v Hospitals Trust* (1940) Ltd [1967], from which Isaac Wunder orders derive their colloquial title, Ó Dálaigh C.J. delivered a unanimous decision on behalf of the Court (Haugh J. and Walsh J. concurring). Ó Dálaigh C.J. held that he would make an order in the form approved by the court in *Keaveny*.[5]

Wunder v Hospitals Trust involved an appeal against the order of the High Court dated June 17, 1966, that the plaintiff's action be dismissed on the grounds that the proceedings were frivolous and vexatious. The plaintiff's claim was for negligence and refusal on the part of the defendant to pay on a winning sweep ticket. There was no evidence before the Court to support the plaintiff's claim, and there was documentary evidence produced by the defendant that significantly undermined his case. There was also evidence that the plaintiff had taken several other actions in relation to the sweep tickets. Ó Dálaigh C.J. laid emphasis on the history of the litigation between the parties, noting that the plaintiff had brought five other actions against the defendants claiming prizes in respect of 18 tickets. Ó Dálaigh C.J. held that: "This, however, would not of itself be a sufficient reason for dismissing or staying the proceedings as frivolous and vexatious". The Court held that against the background of the history of litigation between the parties and the nature of the case made by the plaintiff, the Court was "coerced to conclude that these proceedings are vexatious".[6] The learned judge then went on to make an order in similar terms as was made in *Keaveny*.[7]

"The materials available appear to me to justify a stay upon the proceedings until such time as the plaintiff, if he can, puts the matter in order and indicates sufficient to satisfy the High Court that he has a stateable case in this action."

Applicable principles

In the Court of Appeal case of *Údarás Eitlíochta na hÉireann The Irish Aviation Authority and DAA PLC v Monks* [2019] IECA 309, the Court affirmed the order of the High Court in granting an Isaac Wunder order. Haughton J. also helpfully approved a series of applicable principles identified by MacMenamin J. in *McMahon v WJ Law & Co LLP* [2007] IEHC 51. Those principles are as follows:

1. The habitual or persistent institution of vexatious or frivolous proceedings against parties to earlier proceedings.
2. The earlier history of the matter, including whether proceedings have been brought without any reasonable ground, or have been brought habitually and persistently without reasonable ground.
3. The bringing up of actions to determine an issue already determined by a court of competent jurisdiction, when it is obvious that such action cannot succeed, and where such action would lead to no possible good or where no reasonable person could expect to obtain relief.
4. The initiation of an action for an improper purpose, including the oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights.
5. The rolling forward of issues into a subsequent action and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings.
6. A failure on the part of a person instituting legal proceedings to pay the costs of successful proceedings in the context of unsuccessful appeals from judicial decisions.[8]

The Irish Aviation Authority was an appeal to the Court of Appeal from an order of the High Court made on October 9, 2017, in a motion in which the plaintiffs sought an order restraining the second named defendant from issuing any further proceedings against the plaintiffs in respect of lands known as McCabe's Field without prior leave being granted by the Court. The plaintiffs required the field for the construction of a new control tower at Dublin Airport.

The separate concurring judgment of Collins J. is of particular assistance, as it addresses the law on Isaac Wunder orders in detail. Collins J. introduces the concepts of proportionality and necessity into the legal framework underpinning Isaac Wunder orders. It is clear from his learned judgment that these concepts arise as a result of the constitutional right of access to the courts. The Court held as follows:

"It is, therefore, critically important that a court asked to make an Isaac Wunder order should anxiously scrutinise the grounds advanced for doing so. It should not be seen as some form of ancillary order that follows routinely or by default from the dismissal of a party's claim, whether on its merits or on a preliminary strike-out motion".[9]

It can be seen from the jurisprudence on Isaac Wunder orders that there is no easily identifiable test that can be used in every case. Rather, there are several factors the courts take into account, and in many respects each case will turn on its own facts in this regard. However, if there is anything at all resembling a test, it might be the following portion of Collins J.'s judgment:

"The court must in every case ask itself whether, *absent such an order, further litigation is likely to ensue that would clearly be an abuse of process*. Unless the court is satisfied that such is the case, no such order should be made. It is equally important that, where a court concludes that it is appropriate to make such an order, *it should explain the basis for that conclusion* in terms which enable its decision to be reviewed. It is also important that *the order made be framed as narrowly as practicable* (consistent with achieving the order's objective)".[10] (Emphasis added.)

Abuse of process, reasons and proportionality

The three elements – abuse of process, reasons, and proportionality – arise from the above. On the issue of proportionality, and by reference to Collins J.'s words,[11] it is submitted that the Isaac Wunder order made in any particular case must be appropriately tailored to address the mischief that arises and go no further.

Another judgment of the Court of Appeal that is helpful in relation to the law on Isaac Wunder orders is that of *Kearney v Bank of Scotland* [2020] IECA 92. This case again was an appeal from the judgment and orders of the High Court. The plaintiff issued proceedings by way of plenary summons on December 13, 2017. The plaintiff's claim related to disputes over loans he obtained with Bank of Scotland (Ireland) between 2003 and 2006, and land against which the loan facilities were secured. In the High Court the defendants sought, *inter alia*, an Isaac Wunder order restraining the plaintiff from taking any further proceedings in relation to the loan facility set out in the first part of the schedule to the notice of motion dated March 5, 2018, or in relation to the deed of mortgage and charge described in the second part of the schedule without first obtaining leave from the Court. The High Court made an order restraining the plaintiff from bringing any further proceedings, without leave of the Court, against the defendants or any other party challenging the receivership or the right of the receiver to act on foot of his authority as receiver over the secured property.[12]

On behalf of the Court of Appeal, Whelan J. held that there were cogent reasons for granting an Isaac Wunder order, but that the order made by the High Court was "arguably somewhat excessive".[13] The learned judge thereby varied the order, noting the principles of proportionality for doing so. In the course of her learned judgment, Whelan J. set out a series of factors the Court may have regard to such as, *inter alia*, the history of litigation between the parties, that further proceedings will be instituted, the issue of costs, and whether scurrilous or outrageous statements are asserted, including fraud against a party to litigation or their legal representative.[14]

The judgment of Collins J. on behalf of the Court of Appeal in *Houston v Doyle* [2020] IECA 289 is also recent authority on the importance of proportionality in granting Isaac Wunder orders. The plaintiff had engaged in a history of litigation against the defendant in several related issues. The case came before the Court of Appeal as an appeal against four orders of the High Court, one of which was that the plaintiff be "restrained from instituting any further proceedings in the High Court without the prior leave of President of the High Court". Collins J. reiterated many of the points he made in *The Irish Aviation Authority*, while also noting the following in relation to the particular order made by the High Court judge:

"But the order made by the Judge – which restrains Ms Houston from instituting any further High Court proceedings whatsoever, regardless of the nature of the claim or the identity of the intended defendant(s), without the prior leave of the President – appears to go well beyond what might be considered necessary or proportionate to address those understandable concerns. Such a blanket restriction on access to the courts would appear to require very particular and compelling justification".[15] (sic)

There is a very obvious emphasis on the issue of proportionality in the more recent case law, and it is thereby submitted that the wording of the Isaac Wunder order sought in a particular case should be drafted with this concept in mind. Due to the fact that an appeal will exist for the party subject to an Isaac Wunder order, being in a position to highlight that the issue of proportionality has been considered by the party seeking same will yield obvious advantages in the event of such appeal.

Morgan v Labour Court

A recent question that has arisen on the topic of Isaac Wunder orders is whether such an order is available in this jurisdiction to restrain a litigant from initiating legal proceedings before administrative tribunals. Following the recent High Court judgment of Ferriter J. in *Morgan v Labour Court and ors* [2022] IEHC 361, it is clear that such orders are available in Ireland. The learned judge held the following:

"In my view, it follows as a matter of principle that the High Court has jurisdiction in appropriate cases to prevent abuse of process before statutory tribunals which are administering justice, such as the WRC, by the making of Isaac Wunder-type orders preventing the institution of proceedings before such tribunals without the Court's permission if the criteria set out in the case law for the making of Isaac Wunder orders in respect of the institution of court proceedings are also satisfied as regards the question of institution of proceedings before such tribunals".[16]

The respondent and notice party in *Morgan* sought orders pursuant to the High Court's inherent jurisdiction restraining Deirdre Morgan (hereinafter the appellant) from instituting any further proceedings in whatever court or forum, including the Workplace Relations Commission (WRC), or from making any complaints to the WRC against the Minister or Board, concerning any

matter related to the suspension or termination of her contract of employment, and her pension and gratuity entitlements, without the prior leave of the High Court (the Minister and the Board having been put on notice of any such application for leave).

The appellant in *Morgan* had instituted successive sets of different legal proceedings regarding a series of events that ultimately led to her removal from office. The appellant was employed by Co. Wicklow Vocational Education Committee (VEC) as a post-primary teacher of art. She commenced her employment in that position in September 2000. In July 2013, Co. Wicklow VEC was dissolved and replaced by Kildare and Wicklow Education and Training Board (KWETB), and KWETB became her employer thereafter.

On August 20, 2010, the appellant made an allegation of sexual harassment against a student in one of her art classes. In September, the VEC put the appellant on protective paid leave to ensure that she was not exposed to any potential acts of sexual harassment. Independent counsel was appointed by the VEC to investigate the allegation made by the appellant. Notwithstanding the fact that the appellant withdrew her allegations of sexual harassment, counsel concluded in December that the allegations were without foundation, vexatious, malicious, and made to victimise the subject of her complaint.

Thereafter, in January 2011, the VEC advised the appellant of its intention to commence disciplinary action against her. Following a lengthy process of investigation and inquiry, the appellant was removed from her post in June 2015. At this stage the appellant had already made complaints to various administrative tribunals. Subsequent to her removal from her post, the appellant pursued a wide range of different sets of proceedings in many different legal forums. All of these proceedings stemmed from the same or similar set of facts.

Ferriter J. embarked on a detailed consideration of the facts and concluded that: "This is a manifestly appropriate case in which to make Isaac Wunder orders in the terms sought".[17] The learned judge held that it was:

"… entirely appropriate that Isaac Wunder orders now be made to prevent the appellant from bringing any further court proceedings, or complaints or applications to the WRC (or any other statutory tribunal engaged in the administration of justice), on matters relating to her employment and removal from her employment, including any pension matters relating to same, without the Court's prior leave … To answer the question posed by Collins J. in *Monks*, absent such order, further litigation is likely to ensue that would clearly be an abuse of process. The administration of justice must be protected".[18]

The foregoing represents a significant development of the common law in Ireland on the topic of Isaac Wunder orders. Although there is always the potential that the Court of Appeal or Supreme Court can diverge from the decisions of the High Court, it is to be hoped that Ferriter J.'s learned judgment in *Morgan* will be affirmed in future judgments. Ferriter J. grounds his conclusion that Isaac Wunder orders are available in relation to proceedings before administrative tribunals in the constitutional basis for their existence. The court held the following on this point:

"In my view, while the English authorities are helpful, the jurisdiction of the Irish High Court to make orders preventing abuse of the system of administration of justice including the administration of justice in non-court statutory tribunals such as the WRC is arguably on a stronger constitutional footing in light of the provisions of articles 34 and 37 of the Constitution and the supervisory role of the High Court to ensure proceedings of statutory tribunals are conducted in accordance with law".

Conclusion

It is evident from Ferriter J.'s judgment in *Morgan* that Isaac Wunder orders are available in this jurisdiction to restrain a vexatious litigant from initiating legal proceedings before administrative tribunals. Although the Irish law on Isaac Wunder-type orders has not been put on a statutory footing, as is the case in England and Wales, Morgan illustrates that the development of the law in this area is still possible at common law in the absence of statutory intervention by the legislature.

References

1. *The White Book* 2021, Volume 1, at [3.11.1].
2. [1965] IR 551 at 562.
3. Ó Dálaigh C.J. dissented on grounds that were specific to the facts of the case, and his learned judgment is not thereby material to the law on Isaac Wunder orders. Lavery J. was of the view that the appeal be dismissed and the order of the High Court affirmed. As the High Court judge's order did not amount to an Isaac Wunder order, Lavery J.'s learned judgment cannot be said to represent the law on such orders. Notwithstanding this, the learned judge does make some helpful comments on the inherent jurisdiction of the High Court, which might be said to inform the law generally on Isaac Wunder orders.
4. *Ibid*. The Supreme Court order as it was when perfected is helpfully provided on page 563 of the reported judgment.
5. *Wunder v Hospitals Trust* (1940) Ltd [1967] at page 3.
6. *Wunder v Hospitals Trust* (1940) Ltd [1967] at page 2.
7. *Wunder v Hospitals Trust* (1940) Ltd [1967] at page 3.
8. [2019] IECA 309 at [26].
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14. [2020] IECA 92 at [132].
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Methods of dramatically increasing judicial capacity

Judicial capacity is an issue both in Ireland and internationally, and other jurisdictions have applied a variety of approaches to address this, some of which may be applicable here.

Michael Judge BL

Last year, Irvine P. stated that to help clear the backlog of cases and "to make a real difference", the High Court alone requires 17 new judges.[1] The lack of judicial resources intersects with another issue that is presently under review across the common law world: the appropriate age of retirement for judges. In fact, the Association of Judges of Ireland requested that the Department of Justice conduct a review of the retirement age for judges in 2019, to which a public response has not been forthcoming.[2]

In circumstances in which there isn't the requisite appetite at a political level to meet Irvine P.'s request and to create a long-term solution, this article advocates in favour of legislative change to increase judicial capacity by allowing otherwise retiring judges to continue to hear and determine cases on a reduced-capacity basis. To this end, this article draws inspiration from the system of senior status found in the US federal judiciary and proposes the creation of a similar model in this jurisdiction. The potential of senior status to dramatically increase judicial capacity is clear from the fact that senior judges handle approximately 20% of the US federal courts' caseload annually.[3]

This article also considers the UK Supreme Court's supplementary panel and the role of part-time judges in the UK, but does not consider either to be constitutionally viable options in respect of the superior courts. However, the availability of deputy judges at the District and Circuit Court levels may be a beneficial method of increasing judicial capacity on an *ad hoc* basis. This article notes that the UK has recently increased its mandatory age of retirement for judges to 75, but considers this bright-line approach to be less ideal in this jurisdiction, in circumstances in which there are constitutional limitations that prevent future full-time judges from developing experience in the same manner in which the future judicial pipeline is developed in the UK.

Comparative practices

Senior status in the US

In general terms, senior status is a form of semi-retirement for federal judges who have the requisite years of service. A senior judge may reduce his or

her caseload by about 50%, keep his or her office, secretarial and clerking staff, and may continue to receive his or her full salary.

In the US prior to 1869, there was neither a resignation nor a retirement system available for federal judges, and older judges were compelled to remain in office as a regular active judge or resign without any retirement benefit whatsoever.[4] By the Act of 1869, a judge appointed pursuant to Article III of the US Constitution could resign at age 70 after 10 years of service, with a continued right to receive his or her salary for life thereafter. Glasser J. observed that this Act of 1869 "made no provision for continued judicial service and deprived the federal judiciary of the service of many very experienced and able judges who were willing to continue to work, at least part-time, if they were unable to continue to do so full-time".[5]

In recognition of this fact, Congress in 1919 created the office of senior judge "and thus enabled the federal judiciary to continue to benefit from the service of many dedicated and experienced judges".[6]

In the US, a judge appointed pursuant to Article III of the Constitution may take senior status after meeting the age and service requirements of the rule of 80: a judge's age and years of service must add up to 80. A judge takes senior status by writing to the US President and stating that they intend to retire from regular active service but that they wish to continue to render substantial judicial service as a senior judge. Critically, by taking senior status, this paves the way for a new judge to be appointed as a replacement.[7]

Block J. has stated that senior status gives judges the opportunity to exert greater control over the quantity and quality of their workload, without loss of pay, provided the judge in question continues to render "substantial service", which must be certified on an annual basis by the Chief Justice.[8]

Senior status is an asset to the judiciary in the US. In statistics dating from September 2006, senior judges reflected 36% of the total complement of District Court judges, and between July 1, 2005, and June 30, 2006, senior judges disposed of 17% of all compromised cases and presided over 18.3% of all trials.[9] During the same timeframe, senior judges represented 37% of all Circuit Court judges and participated in 17.1% of the Court's cases.[10] Block J. concluded that "the federal judicial system would be enormously burdened if the senior judges were to retire rather than continuing to serve…".[11]

Finally, while Supreme Court judges in the US may take senior status, they may only be assigned to lower courts and may not continue to hear Supreme Court cases. O'Connor and Souter J.J. regularly sat on Circuit Court appellate panels following their retirement.[12]

UK Supreme Court supplementary panel

S.39 of the UK Constitutional Reform Act, 2005, provides for the creation of a supplementary panel of persons upon whom the President of the Supreme Court may call when additional judges are needed to form a panel. Pursuant to s.39(4), a judge of the Supreme Court, or a senior territorial judge, becomes a member of the supplementary panel if he or she, while holding office, or within two years of ceasing to hold office, has his or her membership of the panel approved in writing by the President of the Supreme Court and the President gives the Lord Chancellor notice in writing of the approval. Pursuant to s.39(5), a retiring President of the Supreme Court is automatically added to the supplementary panel unless he or she opts out. S.39(9) provides that a person ceases to be a member of a supplementary panel upon reaching the age of 75 or, if earlier, five years after the last day on which the former judge held qualifying office.

Of particular note, the UK Supreme Court appears to manage its supplementary panel in such a way as to ensure that the Court retains subject matter specialists in particular areas of law. Lord Reed has recently stated that the appointment of Lord Lloyd-Jones to the supplementary panel "… will be of particular assistance to the Court in dealing with appeals in the field[s] of international law and criminal law…".[13]

Temporary judges

Additionally in the UK, pursuant to s.9(4) of the Senior Courts Act 1981 (as amended), where it is "expedient as a temporary measure" in order to facilitate the disposal of business in the High Court, the Lord Chief Justice is empowered to appoint a person qualified for appointment as a judge of the High Court to be a deputy judge of the High Court. There is also the facility to appoint persons as deputy Circuit Court judges, deputy District Court judges and recorders. All deputy judicial positions are awarded following an open competition run by the Judicial Appointments Commission.

Further, arising from recent reforms in the UK pursuant to the Public Service Pensions and Judicial Offices Act, 2022, persons who retired from judicial office prior to the mandatory retirement age may return as a judge "sitting in retirement" where it is expedient to make the appointment to facilitate the disposal of business in a court or tribunal listed in schedule 3 of the Act.

Increased retirement age

In Ireland, perhaps the most straightforward solution to the problem of a lack of judicial resources is to increase the retirement age. The UK Government has recently decided to increase the retirement age of judicial office holders to 75.[14] Similarly, the Law Society of Western Australia advocated in favour of raising the compulsory retirement age to 75 on the basis that since the age of 70 was set in 1937, "societal norms, medical knowledge and life expectancy have evolved significantly".[15] In fact, one commentator has reasoned that the best approach is to entirely remove age-based limitations on judicial tenure.[16]

A workforce planning consequence of increasing the judicial retirement age is that it reduces opportunities for new judges to be appointed and to develop their expertise. While the UK has adapted solutions to address this difficulty in the form of ensuring sufficient sitting opportunities for deputy judicial positions, as they are a pipeline to full-time judicial office, the constitutional limitations to a similar approach being adopted in this jurisdiction are discussed in the next section. It has also been observed that mandatory retirement ages have utility in promoting judicial diversity.[17]

Constitutionality of comparative measures

UK Supreme Court's supplementary panel and temporary judges

A supplementary panel for retired superior court judges still willing to adjudicate on a part-time basis is unsuitable in this jurisdiction in circumstances in which Article 35.3 requires that no judge shall "hold any

other office or position of emolument". In contrast, members of the UK Supreme Court's supplementary panel "are free to undertake other remunerated work".[18] In this regard, retired justices of the UK Supreme Court have accepted appointment as arbitrators, conducted inquiries, sat as judges of foreign courts, given speeches to commercial or trade promotion organisations, participated in the work of the House of Lords, and contributed to public debate. While none of these post-retirement activities "necessarily runs counter to the UKSC Conduct Guide…" some of them are capable of presenting risks to public confidence in the independence and impartiality of panel members, and in the Supreme Court generally.[19]

Murray C.J. in *Curtin v Clerk of Dáil Éireann* discussed judicial independence and observed that:

"[a] necessary corollary of judicial independence is that the judges themselves behave in conformity with *the highest standards of behaviour* both personally and professionally".[20] (Emphasis added.)

It is submitted that certain post-retirement activities undertaken by supplementary panel members of the UK Supreme Court would also be *prima facie* incompatible with the highest standards of behaviour required pursuant to Article 35.2. Indeed, a cautionary experience in permitting part-time judges to adjudicate can be found in the wake of the public criticism of Lord Sumption in respect of Covid-19 measures,[21] which led to his resignation from the UK Supreme Court's Supplementary Panel and the email from Lord Hodge to Lord Reed that same "is a relief".[22]

That being said, the Supreme Court in *McKee v Culligan* considered whether the appointment of a District Court judge on a temporary basis is incompatible with the guarantee of judicial independence.[23] The Court stated that permanent District Court judges having greater protections than their temporary counterparts:

"… does not… in any way render the appointment of judges of the District Court for fixed short periods inconsistent with any provision of the Constitution, nor does it in any way interfere with or limit their constitutionally guaranteed independence".[24]

Accordingly, supplementary panels and part-time judges are, in all likelihood, unconstitutional in respect of adjudication in the superior courts. However, temporary judges in respect of courts of local and limited jurisdiction are *prima facie* constitutional, and it is open to the legislature to make modern provision for open competitions for deputy judicial positions in line with the procedure for same adopted by the UK Judicial Appointments Commission.

Senior status

It is submitted that a form of senior status in Ireland in which a senior judge continues to receive his or her full salary but benefits from a reduction in his or her caseload and maintenance of support staff is *prima facie* constitutional. Article 36.i provides for the regulation in accordance with law of the number of judges of the superior courts, their remuneration, pension and age of retirement. Additionally, Article 36.iii provides for the regulation in accordance with law of the organisation of the courts and the distribution of jurisdiction and business among the courts and judges, and all matters of procedure. Taken together, these provisions provide strong support for the proposition that a system of senior status for superior court judges could be created by legislation.

There is a tension between the power to regulate in accordance with law the retirement age of judges pursuant to Article 36.i and the requirement pursuant to Article 35.4.1 that a judge of the superior courts shall not be removed from office "except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his [or her] removal". In respect of the general appointment of judges for a fixed, temporary period in the superior courts, Whyte *et al*. have observed that such a procedure "would seem to run squarely against the guarantee contained in Article 35.4.1".[25] This seems correct. However, if legislation regulating senior status provided for a maximum age in which a senior judge may act, this would be *prima facie* compatible with Article 36.i.

A more difficult situation is one in which a senior judge could continue to adjudicate, subject to annual certification. As discussed above, a senior judge in the US is required to be certified annually by, *inter alia*, the Chief Justice.[26] It is noteworthy that s.2 of the Courts of Justice (District Court) Act, 1949, contained the power to extend the retiring age of a District Court judge if he or she applied for continuation to a committee comprising the Chief Justice, the President of the High Court and the Attorney General. While the terms of Article 36.i, which limit the regulation of judicial retirement to the "age of retirement", indicate that an annual certification of the fitness to continue to act may not be permissible in this jurisdiction, a periodic extension of the age of retirement of superior court judges may be constitutional.

Increased retirement age

For completeness, in circumstances in which Article 36.i provides for the regulation in accordance with law of the age of retirement of judges, there is no constitutional limitation to increasing the age of retirement of judges generally in this jurisdiction.

Reform in the UK

In its response to a consultation published on March 8, 2021, the UK Government announced that it had decided to raise the mandatory retirement age of judges to 75, which was enacted pursuant to s.121 of the Public Service Pensions and Judicial Offices Act, 2022.[27] This increased retirement age reflects "the current resourcing pressure on many judicial offices in England and Wales and the improvements in life expectancy" of judges since the mandatory retirement age of 70 was set over 25 years ago.[28]

While accepting that the increased mandatory retirement age of 75 will reduce the need for judges to sit in retirement, the consultation stated that:

"… in exceptional circumstances, drawing upon our retired judiciary where they are so willing remains an important flexibility for the judiciary to help meet immediate demands of courts and tribunals, where there may be temporary shortages".[29]

The tension in increasing the mandatory retirement age of judges is that by allowing existing judges to work for longer periods, it reduces the availability of new judicial positions. The UK Government recognised this issue and observed that as deputy judicial positions are the "pipeline to salaried office", the Lord Chancellor and the judiciary have a shared objective in ensuring that sufficient sitting opportunities are provided to fee-paid judges to allow them to develop the expertise required for salaried office.[30] Arising from the discussion above that supplementary panels and part-time judges are, in all likelihood, unconstitutional in this jurisdiction at the superior court level, an increase in the mandatory retirement age of superior court judges alone would not address this difficulty.

Conclusion

Across the common law world, there is a trend of retired judges continuing to work, with many returning to private practice as arbitrators and mediators.[31] To the extent that judges who reach the mandatory retirement age wish to continue to hear and decide cases, and are able to discharge their constitutional responsibilities, this should be facilitated. With a view to balancing the competing objectives, this author advocates in favour of the creation of senior status in this jurisdiction modelled on the approach found in the US federal system.[32]

Through the creation of a system of senior status, Irish courts would have a greater complement of judges appointed pursuant to the Constitution to hear cases. The facility to replace a senior judge with a new judge, while retaining the senior judge on a reduced capacity basis, could significantly increase the efficiency of the courts. It is also worthy of note that in the private sector, a flexible, half-retirement approach by employers has been described as a best practice approach to adapting to an ageing workforce.[33]

Finally, if senior status is created, as a matter of policy, consideration would need to be paid to whether senior judges should sit on Supreme Court panels. In this regard, the US Supreme Court and the UK Supreme Court have taken opposing approaches.

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Snake in the grass

The Supreme Court has found the ratification of CETA to be unconstitutional – will a referendum now follow?

Clíona Kimber SC

In Greek mythology, an ouroboros is a serpent that devours itself, and it is often depicted doing so tail first. It was to an ouroboros that Mr Justice Peter Charleton compared the ratification by Ireland, through legislative means, of the Comprehensive Economic Trade Agreement (CETA) between Canada and the EU. If the Government seeks to press ahead with ratification of the treaty, without a referendum, it seems likely that the Government itself, and not just the legislation allowing for such ratification, will end up devouring itself.

What is CETA?

CETA, or at least the controversial part of CETA, is an example of an investment protection treaty, which establishes a court system, known as Investor State Dispute Settlement (ISDS), which is only available to foreign investors in a country.

Long opposed by environmental groups, not least in Ireland, investment protection treaties are seen by many as blocking countries' ability to protect the environment and citizens' rights, without the threat of being sued.

Originally, investment protection treaties were adopted by former European colonial powers as a means to constrain the newly won sovereignty of former colonies. No longer able to rely on military force to protect the assets of European companies operating abroad, the colonial powers, with guidance from World Bank officials, turned to ISDS treaties for robust legal protection. The aim of such treaties is to ensure that the democratically made choices of states do not affect the value of these investments. Their provisions require damages to be paid, often amounting to billions of dollars, if an ISDS tribunal considers a measure to constitute unfair treatment or expropriation of foreign investments.

While this may sound reasonable, difficulties arise because the meaning of unfair treatment and expropriation have been stretched beyond all recognition by ISDS tribunals. These tribunals also pay little heed to – and certainly do not feel bound by – citizens' constitutional or environmental rights. Thus, windfall taxes on oil companies, such as those being considered by the EU, are routinely found to constitute expropriation, so that a state imposing the tax would have to repay it all, with interest, at the behest of the ISDS tribunal. Similarly, foreign investors being refused, or even delayed, permission to open a mine or extract oil, is a regular source of cases before ISDS tribunals.

No option to review

What really separates investment protection treaties from other treaties, such as the European Convention on Human Rights (ECHR), is that awards of ISDS tribunals are automatically enforceable in courts around the world, with no effective power to review those decisions.

At the level of international law, a decision of the ECHR to order damages be paid for a breach of a person's human rights is roughly equivalent to an invitation to a brother's wedding – you should go along with it, the family might not be happy if you don't, but no one is going to physically drag you along and force you to make small talk with Aunt Roisín or Uncle Conan. While the international family of nations will not be happy if Ireland does not pay an ECHR award of damages, the Irish courts – and certainly no foreign court – would ever force Ireland to comply with an award. That is due to the international deference to the sovereignty of nations.

That is not the case with CETA and other investment treaties. Under such treaties, the Irish courts are mandated to enforce awards, both against Ireland and other states, without the opportunity to question those decisions to ensure that they do not breach constitutional or other rights. It is this automatic enforcement that caused the Supreme Court to find that the ratification of CETA would be unconstitutional.

Unusual step

However, in an unusual step, the Supreme Court did suggest a possible solution: to create legislation to allow the High Court to look behind decisions of the CETA tribunals, to ensure that they did not, among other things, "compromise the constitutional identity of the State or fundamental principles of our constitutional order".

The problems with this solution are twofold. Firstly, the very purpose of CETA is to ensure that national law and "our constitutional order" does not get in the way of CETA decisions being enforced; therefore, any legislation designed to look behind decisions of the tribunals would be problematic in the first instance. Secondly, once ratified by Ireland and the EU, the obligation in CETA to automatically enforce decisions becomes part of EU law, so Ireland would not have the option to maintain the legislation required to allow for ratification.

Thus, if the Supreme Court proposal were followed, the head of the CETA ouroboros would eat the legislation required for ratification and "the constitutional identity of the State" would be left utterly unprotected. Thankfully, EU law would almost certainly step in to prevent such a farce.

The Government has already wasted two years, the working hours of many public servants, and damaged its credibility by trying to illegally ratify CETA. The only way in which any government that seeks to ratify CETA will avoid eating itself, is to seek the leave of the people of Ireland in a referendum.

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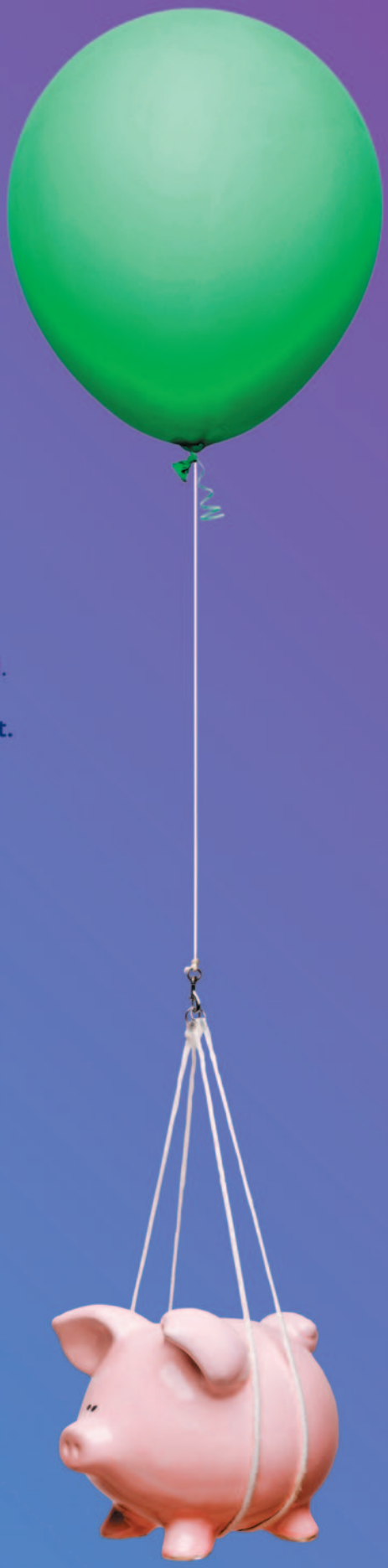

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