LAW IN PRACTICE
Human rights in the Supreme Court

INTERVIEW
The four leaders of the young Bars

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THE BAR REVIEW

VOLUME 28 / NUMBER 5 / DECEMBER 2023

INSTRUMENT OF CHANGE

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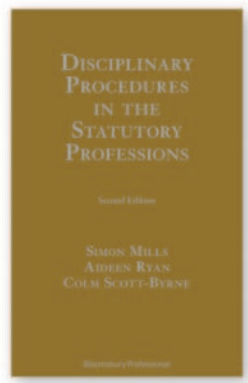

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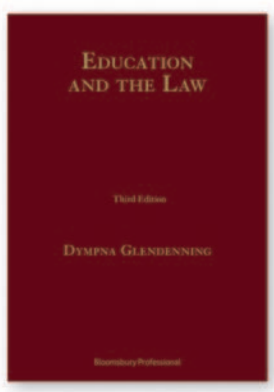

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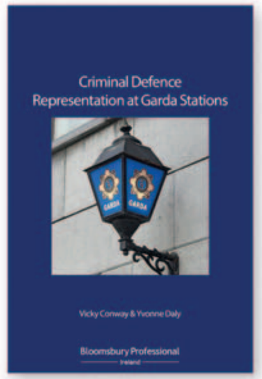

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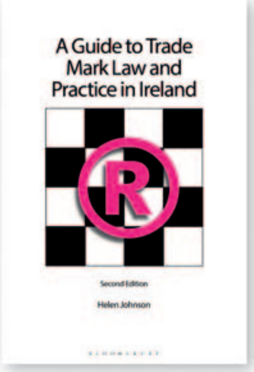

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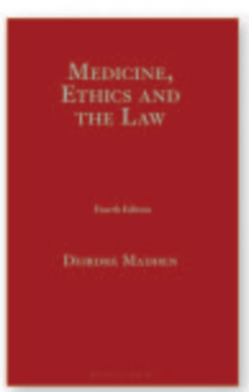

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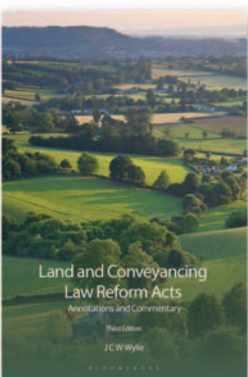

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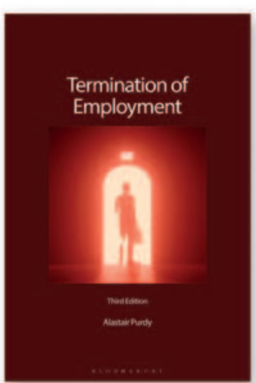

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DECEMBER 2023

CONTENTS

151
Message from the Chair

152
Editor's note

153
News
Call to the Inner Bar
In Plain Sight

160
News feature
Consult on complaints

162
Interview
The four leaders of the young Bars

165
Law in practice
The feeling's not mutual

xxx
Legal update

171
Law in practice
Instrument of change

176
Law in practice
Supreme rights

183
Closing argument
Protecting professional practice

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NEW WAYS
TO WORK

Changes to the Courts Service and to civil procedure will likely impact significantly on members of the Law Library.

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

My first Chair's message of this legal year reflected on the need to embrace change if we are to successfully evolve and flourish into the 21st century and beyond. That message focused primarily on change from within. This month I would like to take the opportunity to draw your attention to some external changes that will no doubt have a significant impact on our profession in the months and years to come.

Court changes

On February 24, 2023, two reports were published: the Judicial Planning Working Group (JPWG) report; and, the OECD report on Modernising Staffing and Court Management Practices in Ireland. Since then, a significant number of additional judges have been appointed, but the appointment of additional judges was not the only recommendation contained in the JPWG report (there were 54 recommendations in total) and, as noted by the Courts Service on February 24, "some of the recommendations will require systemic change impacting not only on the Courts Service and the judiciary, but the wider courts system". No doubt we will begin to see the impact of this "systemic change" in the not-too-distant future, and the Council of The Bar of Ireland is hopeful of working with the judiciary and the Courts Service in implementing these changes, which may well include modifications to our traditional working days and weeks, and to the courts' vacation periods.

The Courts Service is also moving apace with its 10-year modernisation programme, which will deliver a new operating model – designed around the user, with simplified and standardised services and accessible data to inform decisions – all delivered through digital solutions. While changes to date have related to end-user experiences such as an online platform for jury service, and an update to the website relating to family law, the Council is represented on the Courts Service Modernisation Programme Legal Practitioners Engagement Working Group, and members will be apprised of any relevant practice proposals/changes as they may arise in the future.

Civil law

Changes to civil procedure are also in the air as the

Superior Courts Rules Committee continues to implement the reforms proposed by the report into the Review of the Administration of Civil Justice (the Kelly report). Members are likely to see rule changes in the coming months, including standardisation of provisions relating to appearances, a requirement to combine a notice for particulars with a notice for further information under section 11 of the Civil Liability and Courts Act 2004, and the removal of the requirement to seek the permission of the court in most categories of High Court litigation to serve interrogatories. The Bar of Ireland made several detailed submissions to the Review Group and will continue to work with its nominees on the Superior Courts Rules Committee to bring practitioners' perspectives to bear on the proposed changes.

Access to the profession

The Legal Services Regulatory Authority (LSRA) will shortly report on access to the barrister and solicitor professions, and this report will no doubt make for interesting reading. While the Council has made significant strides in the past number of years with initiatives such as the Denham Fellowship, the TY Programme – Look into Law, and our more recent university outreach activity, we certainly cannot rest on our laurels and more work remains to be done. This brings me neatly back to the Council's objectives for 2023/24, which include further consideration of the Hannah Carney and Associates report from June 2023 and a review of our current business model, practice supports for members, and promotion of the profession to prospective new entrants. These reviews and the changes they may bring about will hopefully make the Law Library and practice at the independent referral Bar fit for purpose for the 21st century and beyond.

Finally, may I take this opportunity to wish you all a pleasant holiday period. I hope it brings an opportunity for rest and relaxation with a view to greeting practice in 2024 with renewed hope and enthusiasm.

VALUABLE INSIGHTS

Human rights and employment rights are both covered in this edition, along with an interview with the Chairs of the Young Bars in the four jurisdictions.

Helen Murray BL
Editor
The Bar Review

As the first term draws to a close and a New Year beckons, *The Bar Review* has a broad selection of material and interviews to keep you occupied over the vacation.

Clíona Kimber SC provides a valuable insight into the work at the Council of Europe on the subject of climate change and human rights. This article explores how the negative change to our environment can be addressed by the courts of EU member states.

The recent Supreme Court decision in *Karshan Midlands Ltd t/a as Domino's Pizza* is comprehensively discussed by Roderick Maguire BL.

David Perry BL gives a presentation of the latest Supreme Court decisions in the area of human rights: essential reading for members regardless of their field of expertise.

Representatives from the Young Bars in Ireland, England and Wales, Scotland, and Northern Ireland are the focus of this edition's interview. One of the best attributes of the Bar is that with age comes experience and wisdom, but that doesn't mean that the insights of our younger colleagues aren't just as valuable and important.

Finally, Darren Lehane SC outlines the role of the Professional Practices Committee and reminds us of our obligations regarding CPD. And if you weren't already aware, there will be a random audit of 100-300 members. Like the Lotto, but definitely not as welcome, "It could be you!".

Specialist Bar Association news

Probate Bar Annual Conference 2023

The sold-out Probate Bar Association (PBA) Annual Conference took place on November 3. The theme of the day was s. 117 of the Succession Act 1965, which provides for a child's right to bring a claim against a parent's estate that 'proper provision' has not been made. Attendees heard the perspectives of judges, barristers, solicitors, tax practitioners, and the Probate Office of the Courts Service over the course of the afternoon on how to manage or prevent section 117 claims. The conference was kindly sponsored by Finders International.

Among the speakers was solicitor Susan Martin, who spoke on 'Practical Issues when Defending a Section 117 Claim'.

On defending such claims, Susan commented: "Are you carrying enough PII insurance to cover the value of the entire estate?" She also advised taking photo ID of the testator on the creation of a will, saying: "Better looking at it than looking for it".

Vinog Faughnan SC at the Probate Bar Annual Conference.

Fifty years of EU law in the Irish legal system

Pictured at the EUBA Annual Conference were (from left): Brian Kennedy SC; Judge Suzanne Kingston (General Court of the EU); and, Mr Justice Gerard Hogan.

Attendees at the EU Bar Association (EUBA) Annual Conference on October 20 benefited from two panel discussions on the topics of EU competition law and EU environmental law. In both instances, a line-up of specialist practitioners traced the evolution of EU law in Ireland over the past 50 years and discussed the future potential of EU law.

Mr Justice Gerard Hogan, speaking on Article 267 references to the Court of Justice for preliminary rulings on interpretation of EU law remarked: "Over the last five years I think we can say that Irish practice has reached a Goldilocks level, neither too few nor too many".

Employment Bar Association

The Employment Bar Association Annual Conference took place on Friday, November 10. In light of the recent unanimous judgment of the Supreme Court in *The Revenue Commissioners v Karshan (Midlands) Ltd. t/a Domino's Pizza*, Roderick Maguire BL gave a presentation on the status of the worker under Irish law entitled 'The feeling's not mutual'. Other speakers included Ruth Mylotte BL on 'New penalisation regime under PDA 2022', and Declan Harmon BL on 'GDPR and employment litigation'.

Roderick Maguire BL addresses the EBA Conference, while panellists Ruth Mylotte BL and Declan Harmon BL look on.

Media, Internet and Data Protection Bar Association

The Media, Internet and Data Protection Bar Association (MIDBA) held a topical CPD on the legal issues around artificial intelligence on November 1. In discussing generative AI, Victor Timon, Head of Technology Group at Byrne Wallace, remarked that the original ChatGPT used the digital equivalent of one million feet of book space to educate itself. Emma Redmond from OpenAI, the creator of ChatGPT, highlighted that ChatGPT was estimated to have reached 100 million monthly active users by February of this year, making it the fastest growing consumer application in history. The panel, which also included Darragh Troy BL, went on to discuss user issues around GDPR compliance, intellectual property, fake news, and personal safety.

Immigration, Asylum & Citizenship Bar Association

At a CPD event held on October 26, Maria Hennessy, Assistant Protection Officer at UNHCR Ireland, spoke on the role of the UNHCR in third-party (*amicus curiae*) interventions both at the regional EU and national level. In acting as an *amicus curiae*, Maria described how the UNHCR makes submissions on the interpretation and application of legal principals arising from the Refugee Convention and other relevant refugee legislation. In the German pending preliminary reference of *AH and FN v Bundesamt für Fremdenwesen und Asyl* (C-608/22 and C-609/22) on the persecution of women and girls in Afghanistan, Maria explained that the UNHCR submits that "protection is presumed to be required due to the persecutory measures taken by de facto authorities in Afghanistan, which affect women and girls solely on the basis of their gender".

Hilkka Becker, Chairperson of the International Protection Appeals Tribunal, gave a summary of recent jurisprudence.

Hilkka presented a case study of *NG v International Appeals Tribunal* [2023] IEHC, which concerned an Albanian national who claimed he faced threats in his country of origin in relation to a business disagreement and unpaid debts. In the context of this case, Hilkka explained that the refugee definition contains two elements: (a) apprehension of serious harm; and, (b) that there is no effective state protection in respect of said apprehended serious harm. In this instance, Phelan J. determined that there was effective state protection available and therefore the components of the definition were not met.

Cumann Barra na Gaeilge

Thug Gearóid Mac Unfraidh AS seimineár tráthúla ar 'Coimhlint Armtha agus an Dlí Idirnáisiúnta Daonnúil' ar an 7ú Samhain. Sular thosaigh sé ag cleachtadh mar abhcóid, chaith Gearóid seal san arm agus ar fianas leis na Náisiún Aontaithe. Rinne sé cur i láthair ag stádas comhraiceoirí agus na rialacha a bhaineann le spriocanna míleata faoin Coinbhinsiún na Ginéive.

Comhdháil: 'Éire – 50 Bliain de Dhlí na hEorpa'. Sa phictiúr: An Breitheamh Cian Ferriter; An Breitheamh Úna Ní Raifeartaigh; An Breitheamh Nuala de Buitléir; An Breitheamh Conor Dignam; Gearóid Mac Unfraidh SC; Sara Phelan SC, Cathaoirleach Chomhairle an Bharra; Catherine Donnelly SC; An Dr Eimear Brown, Óstaí an Rí; Ciarán Delargy, Céad Rúnaí, Buanionadaíocht na hÉireann don AE; Rosita Hickey, Stiúrthóir na bhFiosrúchán; agus, Cormac Ó Dúlacháin SC.

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Fee Recovery Manager
Ext: 5053
feerecovery@lawlibrary.ie

Waad Alias
Fee Recovery Administrator
Ext: 5409
feerecovery@lawlibrary.ie

Dublin International Arbitration Day 2023

On Friday, November 17, 2023, Arbitration Ireland hosted the 11th International Arbitration Day Conference in Dublin. Dublin International Arbitration Day is Ireland's leading conference on arbitration.

This year's conference offered an outstanding line-up of domestic and international arbitration practitioners on topics of including: artificial intelligence, ChatGPT and arbitration; ESG issues in arbitration; and, government perspective on international arbitration.

From left: Jeffrey Sullivan KC, Debevoise & Plimpton, London; Ruth Byrne KC, King & Spalding, London; Lucinda Low, Steptoe & Johnson LLP, Washington DC; Lena Sandberg, Gibson, Dunn & Crutcher, Brussels; Dr Markus Perkams, Addleshaw Goddard, Frankfurt; Catherine Gilfedder, Dentons, London; and, David Herlihy, Allen & Overy, Dublin.

From left: Paula Gibbs, A&L Goodbody LLP, Dublin; Dr Nils Rauer MJI, Pinsent Masons, Frankfurt; Tunde Oyewole, Of Counsel, Orrick, Paris; Sanaa Babaa, Director, EY, London; and Stephen Dowling SC, The Bar of Ireland/TrialView.

In Plain Sight: Frances Moran SC

Unveiling the 2023 In Plain Sight commission of Frances Moran SC were (from left): Hugh Mohan SC, Chair of the Honorable Society of King's Inns; artist Vera Klute; and, Sara Phelan SC, Chair, Council of The Bar of Ireland. (Photo: Conor McCabe Photography.)

The second annual In Plain Sight portrait was unveiled at an event in the King's Inns in October. 2023 marks the second year of this initiative, and the commission was this year awarded to the renowned artist and sculptor Vera Klute. Frances Moran SC, the first woman to achieve senior counsel status in either Ireland or the UK, is the subject of the second In Plain Sight portrait commission. In Plain Sight is an initiative of The Bar of Ireland and the Honorable Society of King's Inns, which celebrates women barristers and their leadership, influence and contribution to the legal system and barrister profession.

Charting the evolution of a profession

The Bar of Ireland recently hosted the launch of *Barristers in Ireland: An Evolving Profession since 1921* by Dr Niamh Howlin.

The book is the first to examine the profession from the turbulent twenties until the Celtic Tiger years, looking at who the barristers were, how they worked, and how they were perceived. It also examines the impact of partition, the experiences of women at the Bar, and traces how the profession changed over the course of the 20th century.

From left: Hugh Mohan SC, Chairman of Council, the Honorable Society of King's Inns; Rossa Fanning SC, Attorney General of Ireland; author Dr Niamh Howlin; and, Sara Phelan SC, Chair, Council of The Bar of Ireland.

Call to the Inner Bar

On October 4, 2023, 18 members of The Bar of Ireland were called to the Inner Bar at the Supreme Court. The call to the Inner Bar, or 'taking silk', represents the shift from junior counsel to senior counsel status for barristers who have been recognised for their exceptional skills in various legal domains, and their wide range of expertise from within the criminal and civil law disciplines. There are now 381 senior counsel at The Bar of Ireland, of which 20% are female.

The 2023 Call to the **Inner Bar**

Patricia McLaughlin
Senior Counsel

Cathy Maguire
Senior Counsel

Karl Finnegan
Senior Counsel

Derek J. Sheahan
Senior Counsel

Andrew Beck
Senior Counsel

Niall F. Buckley
Senior Counsel

David Bulbulia
Senior Counsel

Eoghan Cole
Senior Counsel

Alan Keating
Senior Counsel

Patricia Brazil
Senior Counsel

Mark Lynam
Senior Counsel

Brian F. Conroy
Senior Counsel

Emily Egan McGrath
Senior Counsel

Caren Geoghegan
Senior Counsel

David Casserly
Senior Counsel

Niall Handy
Senior Counsel

Nathy Dunleavy
Senior Counsel

David Browne
Senior Counsel

Strengthening global ties

It was great to catch up with colleagues old and new at the 2023 International Bar Association (IBA) Annual Conference. The event, held in Paris from October 29 to November 3, provided a unique opportunity for The Bar of Ireland to reconnect with colleagues and establish new relationships. Notable attendees included Mark Woods from the Law Council of Australia, Nick Vineall KC from The Bar Council of England and Wales, Sara Phelan, Chair of the Council of The Bar of Ireland, Justice Ngozika Okaisabor from Nigeria, and Derek Chan SC from Plowman Chambers, Hong Kong Bar Association. During the conference, Sara Phelan SC chaired an impactful session titled 'Without Fear or Favour: The Role of the Independent Referral Bar in Upholding the Rule of Law in a Rapidly Changing World'.

Above left: Sara Phelan SC, Chair, Council of The Bar of Ireland, chaired a session at the IBA Conference in Paris. Above right: Pictured at the IBA Conference were (from left): Mark Woods, Law Council of Australia; Ms Justice Ngozika Okaisabor of Nigeria; Derek Chan SC, Plowman Chambers, Hong Kong Bar Association; Sara Phelan SC, Chair, Council of The Bar of Ireland; and, Nick Vineall KC, The Bar Council of England and Wales.

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Independent Referral Bars – Responding to Global Challenges

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Royal Courts of Justice | Titanic Hotel | Dublin Castle | Christchurch Cathedral

Every two years, the International Council of Advocates and Barristers organises an international legal conference in different cities worldwide, bringing together members of the independent referral Bar from around the world for three days of debate and discussion on issues and topics of relevance.

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- Rule of Law Under Fire: Existing in an Age of Conflict
- Humanity on the Move: Legal Frontiers in Migration and Human Rights
- AI Unleashed: Tomorrow's Legal Landscape and the New Normal?
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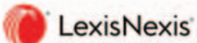

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CONSULT ON COMPLAINTS

The Bar's Equality and Resilience Committee is expanding its Consult a Colleague service to assist members who are the subject of a complaint to the LSRA.

Aoife Farrelly BL

Peter Stafford BL

Since 2020, the Legal Services Regulatory Authority (LSRA) has published periodic reports on complaints made about solicitors and barristers in Ireland. More recently, these published reports have been accompanied by analyses of the trends seen by the LSRA of issues that give rise to complaints, and case studies about complaints and sanctions that have been imposed on lawyers.

In 2022, the LSRA's Complaints, Resolutions and Investigations Department received a total of 1,352 complaints about legal service providers. A total of 1,310 complaints were made against solicitors, while 42 related to barristers. The largest category of complaints received, at 861 (64%), related to claims of misconduct. A total of 433 (32%) were about inadequate standards of legal services, and a further 58 (4%) were about excessive costs.

What barristers need to know

The process whereby the executive staff of the LSRA determine the admissibility of a complaint before attempting to informally resolve the issue or, failing that, to refer the complaint to its internal Complaints Committee and ultimately to the High Court for enforcement, is something that most lawyers would prefer never to have to know. However, it is clear from the LSRA's publications that more and more complaints are being received about the standard of conduct of legal service providers.

The LSRA may receive a complaint against a barrister about their past misconduct at any time, even well past the point when the action itself is considered by the courts and the lawyers to be complete.

While barristers may take comfort from the fact that 42 of the 1,352 complaints received relate to the work of barristers, it is important to note that while complaints about inadequate legal services or excessive costs can be made to the LSRA only by either the client of a legal practitioner or a person acting on behalf of a client, any person, not just a client, can make a complaint to the LSRA where he or she believes that there is evidence of misconduct on the part of a legal practitioner. There is no statutory time limit for complaints relating to alleged misconduct, which account for 64% of all complaints received.

Because there is no formal statute of limitations on when a complaint about conduct must be made, the LSRA may receive a complaint against a barrister about their past misconduct at any time, even well past the point when the action itself is considered by the courts and the lawyers to be complete.

> Legal practitioners who have received notice of a complaint from the LSRA may wish to consult a colleague informally for assistance.

The danger of ignoring claims of misconduct

Recent reports from other professions, such as teachers and the medical profession, have highlighted the emotional and professional stress that can accompany receipt of a claim of misconduct. No complaint, however vexatious it may be, should be ignored. It is clear from the LSRA's own publications that ignoring a complaint or a direction of the LSRA is the worst possible approach a lawyer can take.

The LSRA's advice to lawyers is stark: "Notification of complaints to legal practitioners is mandatory. Legal practitioners must appreciate that complaints are part of modern life and can happen at any career stage. What is certain as an outcome is that a legal practitioner who ignores a complaint from us at this early stage will not succeed in making it go away".

In June 2022, the Chief Executive of the LSRA stated: "In 2022, due to the failure of a small number of legal practitioners to comply with directions made following the investigation of a complaint, the LSRA began applying to the High Court for enforcement orders. Where a direction has been made by the LSRA or one of its committees, and the legal practitioner fails to comply within the required timeline, the LSRA will apply to the High Court for enforcement and will also seek an order for costs".

So by ignoring a complaint, not only must the lawyer eventually deal with the underlying complaint, but they may accrue the additional burdens of satisfying the LSRA about their actions, and potentially explaining their inaction before the High Court.

The benefits of early engagement

A constant theme from the LSRA's publications is that early and proactive engagement by the lawyer who is the subject of a complaint can make an enormous difference to resolving the issue. In the March 2023 report, the LSRA CEO noted: "I am pleased to report that in this reporting period a total of 83 complaints were resolved between the parties in the pre-admissibility process through early engagement. A further 13 complaints were resolved with the assistance of the LSRA's trained mediators".

The CEO went on: "There is a clear benefit to both legal practitioners and to complainants of taking a positive and pro-active approach to resolving complaints, as this can avoid protracted and costly investigations and reduces the costs of the LSRA, which are passed on to all legal practitioners through the annual levy".

In the April 2020 edition of *The Bar Review*, Sean Gillane SC, Chair of the Professional Practices Committee, reviewed the first LSRA report and noted: "One feature that cuts across almost all complaints is, perhaps unsurprisingly, communication. Where a legal practitioner fails to properly respond and adequately explain issues to clients, then complaints will inevitably follow. Perhaps our communications are something that we should all be mindful of".

While good engagement with clients, instructing solicitors and colleagues can certainly prevent complaints being made, it is also vital that where a complaint is made, barristers take it seriously, engage with the LSRA as early as possible, and harness all of the professional supports available.

Seeking support

The LSRA has stated: "Legal practitioners who have received notice of a complaint from the LSRA may wish to consult a colleague informally for assistance. Other supports available include those provided by the representative bodies for solicitors and barristers".

The Equality and Resilience Committee of The Bar of Ireland has a dual function to oversee initiatives that promote equality and diversity, and to support members to face the challenges of practice as a self-employed member of an independent referral Bar.

To focus on the latter, the Committee introduced the Consult a Colleague helpline in 2017 to provide informal support and signposting for members who find themselves in challenging situations.

As the role and experience of the panel has developed over the last six years, so have the tests and trials of professional life as a barrister and, in tandem, the difficulties that arise as a result.

The service is in the process of expanding to cover these additional areas, to include situations where colleagues find themselves the subject of a complaint to the LSRA. The purpose of the panel is to augment the well-established collegiate tradition of the profession where colleagues, while not signed up to the panel, have largely provided help, support, guidance and a listening ear at a time of personal and professional concern.

The Committee will continue to chart the themes emerging from the LSRA reports of complaints and, through continuous proactive review of the messages from the LSRA, will take whatever steps are necessary to ensure that The Bar of Ireland provides our members with the supports they need when a complaint is made.

The Consult a Colleague Helpline is a confidential, non-advisory, active listening service and can be contacted via the Law Library website at: https://members.lawlibrary.ie/members-area/personal-support/consult-a-colleague/?src=home.

THE FOUR LEADERS OF THE YOUNG BARS

Michael Harwood, Antonia Welsh, Declan Harmon and Sarah Minford – leaders of the junior Bars of the four jurisdictions – talk about collaboration, challenges and the future of the Bar.

Stuart McMillan
Policy and Programmes Manager at the Bar Council of England and Wales.

> It's easy to assume they were always destined for the Bar yet their routes to this point are all different and, in some cases, the result of a chance encounter or decision.

"It's always important to take opportunities to bring young barristers together and expand their communities and networks," says Michael Harwood, Chair of the Young Barristers' Committee of England and Wales. "Particularly when it comes to the four jurisdictions – I think it's really useful to understand the commonality between our legal systems, how they differ, and what works and what doesn't."

"Michael is absolutely right," says Declan Harmon, Chair of Ireland's Young Bar Committee. "We've so much in common."

The Chairs are discussing the annual Four Jurisdictions Conference, held in Belfast this year, which has become something of a meeting point for their respective junior Bars.

Antonia Welsh, Chair of Scotland's Young Bar Association, highlights how formative the 2022 conference was in the creation of their own junior association: "[It was] very much from looking at the other jurisdictions that I came up with the idea and thought: why does Scotland not have this already?"

"It is a really good way to meet people from other jurisdictions and broaden horizons within your own," adds Sarah Minford, immediate past Chair of Northern Ireland's Young Bar Association.

Between them, they make up the leadership of the young Bars of the four jurisdictions. It's easy to assume they were always destined for the Bar yet their routes to this point are all different and, in some cases, the result of a chance encounter or decision.

Declan began his career in the business world and made the switch in his late 20s. "That experience has been very useful because [you understand] what clients want and expect from their lawyers," he says.

Sarah and Michael made the decision to study law at university while Antonia was inspired

Antonia Welsh, Chair, Junior Bar Association (Scotland).

Declan Harmon BL, Chair, Young Bar Committee (Ireland).

by working in a law clinic. "I was given a four-day employment tribunal against quite a big restaurant chain," Antonia says. "I was only in my second year of university – I really enjoyed it despite being completely terrified the whole time. That's the part of the law that I really wanted to do – I wanted to be looking at the legal problem or in the courtroom."

Key priorities

Now that they are leading their respective junior Bars, what are their key priorities and what they are doing to support their members?

"Our main priority is to offer support," Antonia says, citing bullying as a key issue in this regard – with which all four agree. "It can be intimidating for someone at a very junior level to approach that issue without someone there to say: 'Right, I'll happily raise this on your behalf'," she adds.

Supporting professional development is another important focus as well as resolving issues caused by Covid. "A lot of those in the years below me had a 'pandemic' pupillage or university course and didn't have the same networking opportunities as people in the years above me," Sarah says. "So, we tried to hold as many social events as we could to give them an opportunity to meet more senior barristers."

The four leaders go on to discuss the issues of isolation and the lack of a support network driven by the move to working from home heavily.

"Our [law] library is empty on many days," Antonia says. "A lot of people are preferring to work at home – how do we get people to come back in? It's an incredibly difficult question." Sarah concurs, noting that the Bar Library in Northern Ireland was "a real hive of activity" but "unfortunately Covid wiped out the practice of people coming in to work".

Michael raises the impact on pupillage: "The great strength traditionally of our profession was that you watch this other person do their job: you sit with them, you listen to them, you learn from them, and then we send you off to go and do it yourself. And that seemed to work well, but it's been turned into quite a fundamental weakness because we are now not putting everybody under one roof."

But all are keen to emphasise the benefits such a shift has had for diversity and inclusion at the Bar. "It's about being able to reap the benefits that we have but also being very mindful [of the challenges]," Michael says.

Collaboration

On further scope for collaboration between the four junior Bars, the response is positive and unequivocal. But all four stress that it only works if junior members get stuck in and want to be involved in their respective associations' business.

Declan says: "If you want to effect change within the profession... then you need to get involved. If you care about it, don't just sit and talk about it – get involved in being that change that you want to see."

"One of the main reasons I would encourage anyone to join their Young Bar [association] is from a welfare perspective. If you even know that one person

Michael Harwood, Chair, Young Barristers' Committee (England and Wales).

Sarah Minford, Immediate Past Chair, Young Bar Association (Northern Ireland).

is in the same boat as you, never mind 100 people in the same boat... that can be a very heartening feeling," Sarah adds.

Antonia and Michael agree. "We need young barristers speaking for young barristers, and that's really the answer," Michael adds.

Hope for the future

As our time together draws to a close, I ask how hopeful they are about the future of the profession.

"I am optimistic, but only if we're open to change and if we recognise the reality that the change of pace in wider society is so great that it is impossible to think that the Bar will not change," Declan says.

Michael concurs: "I think you've got to be [optimistic], really. You can rail against the inevitable or look further into the future and say, 'how can we turn this into an opportunity?'"

Antonia, who is part of a working group set up by the Scottish Government to consider the future of the legal profession, says: "I'm trying to be part of that change and encourage the ministers to consider these issues. One thing that made me particularly optimistic this year is that half of our Devils [pupils in England and Wales] are female and I think that's a really positive change."

Sarah adds: "The more we strive to be a more equal and diverse profession, the more hope that comes with that. We represent people from all social, racial and economic backgrounds, and it's so important that [barristers] are equally as diverse and can represent what society looks like."

I am struck by how much passion these leaders have for their work and culture of the Bar, and leave our interview with a strong sense that, whatever the future holds, they will stand side by side with their colleagues and friends at the Bar, ready and willing to face it head on.

This interview was first published in the December issue of Counsel*, the Magazine of the Bar of England and Wales.*

About the interviewees

An elected member of the Bar Council since 2020, **Michael Harwood** specialises in public and regulatory law, local government and public inquiries, and is currently Second Junior Counsel to a major public inquiry.

Antonia Welsh has been involved in a wide variety of litigious work, including financial provision on divorce, and child abduction claims. Antonia founded the Scottish Junior Bar Association in 2021.

Declan Harmon BL practises across various civil matters, specialising in employment law, where he acts regularly for employers and employees. He is also a member of disciplinary panels for sporting bodies.

Sarah Minford enjoys a varied practice with a particular focus on cases in criminal, civil and commercial litigation. Sarah is the Young Bar Representative of the Criminal Bar Association 2022-24.

THE FEELING'S NOT MUTUAL

Roderick Maguire BL

The recent Supreme Court decision in *The Revenue Commissioners v Karshan Midlands Ltd T/A Domino's pizza.*

"...The term 'mutual obligations' when used in this context has generated unnecessary confusion. This, I think, will be most effectively avoided in the future if the use of the phrase in this arena is discontinued."

This article offers a précis of the recent Supreme Court ruling in The Revenue Commissioners v Karshan Midlands Ltd T/A Domino's pizza [2023] IESC 24, and seeks to highlight some of its important points.

Background to the case

Revenue contacted the company concerned, Karshan, and demanded two years' contributions – amounting to over €215,000 in payments for 2010 and 2011 – in relation to their workers, saying that they had been misclassified as independent contractors when they were employees.

The company disputed that the workers were employees. The Tax Appeal Commissioner (the Commissioner) made a decision in 2018 that they were employees, having heard evidence from workers and former workers. This decision was appealed by way of case stated to Mr Justice O'Connor in the High Court, who agreed with the Commissioner. That decision of O'Connor J. was in turn appealed to the Court of Appeal who, in a majority decision (Costello and Haughton JJ. with a dissent by Whelan J.) overturned the decision of the High Court and found that the workers were not employees.

The case was appealed to the Supreme Court, who heard it in February 2023, and the judgment was issued in October 2023. The Court was comprised of O'Donnell C.J., Dunne, Baker, Woulfe, Hogan, Murray and Collins JJ., and the sole judgment of the Court was given by Murray J.

From the outset, it should be noted that this was a taxation case, under s. 112 of the Taxes Consolidation Act (TCA) (a point repeatedly made by the Court). Therefore, the only parties that were present in the appeal before the Supreme Court were the Revenue Commissioners, who were appealing the majority decision of the Court of Appeal, and the employer, Karshan. This did not involve any employment law rights such as unfair dismissal or terms of employment, and the workers themselves were not represented.

Essentially, the Court found that the workers were employees when they were carrying out their work, and therefore their earnings should be taxed under Schedule E of the Tax Consolidation Act, 1997, instead of Schedule D, which applies to the self-employed, under s. 112 of the TCA.

The employees were employed under an "over-arching" or "umbrella" contract, which is set out in six pages at the end of the judgment. They were then rostered for periods of time that would include various shifts. It was these rostered periods that the Court found constituted an employer/employee relationship. As the application of s. 112 of the TCA does not depend on whether an employee was in continuous employment when earning, the Court did not have to consider the status of the "umbrella" contract and explicitly left that over for a future determination in another case.

In making the finding that the workers were employees when carrying out the work, Mr Justice Murray engaged in a very detailed and broad-ranging analysis of the case law in this area, and in short removed the notion of "mutuality of obligation" as a decisive factor in employment law, bringing the examination of whether workers are employees or self-employed back to a state as it was after *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1996] 1 ILRM 418 (High Court), [1998] 1 IR 34 (Supreme Court) (*Henry Denny*).

Mr Justice Murray required that we should not use the notion of "mutuality of obligation" as it has been used until now. He says at para. 211 that:

"... the term 'mutual obligations' when used in this context has generated unnecessary confusion. This, I think, will be most effectively avoided in the future if the use of the phrase in this arena is discontinued".

Ultimately, Mr Justice Murray decided that there should be a five-step process for determining whether someone is an employee or an independent contractor. He sets this out twice in full (at para. 253 and 281), as well as applying it to the case at hand in detail

The agreements describe "contractors" who will deliver pizzas and that they will remain as "independent contractors" providing their own vehicles.

point by point, so there can be no doubt but that the Court expects to see this applied as a new standard.

At the beginning of the judgment, Mr Justice Murray sets out the historical context of the distinction between employee and independent contractor, highlighting the importance of the concept. He refers to the various 'tests' for determining the status of a worker, and it is notable that he uses single quotation marks here. As he states later on, these are not in fact tests as more commonly known, but indicators.

In particular, he notes that all parties accepted a version of a requirement of 'mutual obligations'. However, he says that they differed on its constituents and whether it was satisfied in this case. The question arises as to whether it is part of Irish law, and if so, how it should be interpreted and applied. The Court of Appeal had granted leave to appeal in respect of three questions:

"(a) The proper construction of contracts where individuals work pursuant to an umbrella contract but where the work done is paid for on the basis of what are apparently individual tasks paid at a particular and set rate.

(b) The proper criteria whereby, under the Taxes Consolidation Act 1997, a worker should submit a tax return pursuant to Schedule D, as a self-employed person, or pursuant to Schedule E as a person engaged in an employment contract.

(c) The proper order of the court in light of the legal analysis".

When reviewed at the end of the judgment, some questions perhaps remain. In particular, while the Court focused on the second point, it specifically left over for another case the consideration of umbrella contracts in general, and decided this case only on the basis of the work done pursuant to the individual rotas. At the very end, the order of the Court is not exactly crystal clear in relation to the status of monies that have been paid by the drivers on a self-employment basis, although it "assumes" that Revenue will offset the tax or social welfare contributions paid by the drivers "in some way". It is not entirely clear what the impact of the 2008 decision by an Inspector at the Department of Social Welfare is in relation to this company, which decision found that the workers were not employees, and was apparently never appealed. In para. 278, Mr Justice Murray opines about a "legitimate grievance" that the company would have if they were now to be "penalised by one arm of the State for conducting business in accordance with the law as interpreted and applied by another department of Government".

Over-arching or umbrella contract

Mr Justice Murray engages first with the overarching contract. He sets out that Karshan makes food, in particular pizzas but also other items, and serves them in store, or delivers them to customers who order by phone or via the internet. The agreements are open ended. The agreements describe "contractors" who will deliver pizzas and that they will remain as "independent contractors" providing their own vehicles.

They will receive two payments: one for the delivery of pizzas and a separate payment for brand promotion – wearing fully branded company-supplied clothing and/or logos temporarily fixed to the driver's vehicle. If they do not have a vehicle, they can rent one from the company.

The agreement sets out repeatedly, at various stages, that the contractor is responsible for the risks and rewards, and the company does not warrant a minimum number of deliveries.

The contractor says that they will operate their own accounting system and will provide a weekly invoice to the company.

The contractor could engage with other similar entities so long as they do not deliver the same type of products in the same area at the same time, where a conflict could be possible. Clauses 12, 14 and 15 were much discussed in the judgment and bear setting out in full:

"12. The Company accepts the Contractor's right to engage a substitute delivery person should the Contractor be unavailable at short notice. Such person must be capable of performing the Contractor's contractual obligations in all respects….

14. The Company does not warrant or represent that it will utilise the Contractor's services at all; and if it does, the Contractor may invoice the company at agreed rates. The Company, furthermore, recognises the Contractor's right to make himself available on only certain days and certain times of his own choosing. The Contractor, in turn, agrees to notify the Company in advance of his unavailability to undertake a previously agreed delivery service.

15. The Company reserves to itself the right to terminate this Agreement forthwith but in such event, such of the provisions hereof as are expressed to operate or have effect thereafter, shall so operate, and have effect, and shall be without prejudice to any right of action already accrued to either party in respect of any breach of this Agreement by the other party."

Clause 17 says that the contractors understand that they are "independent contractors", and that they acknowledge that Karshan "has no responsibility for deducting and/or paying PRSI or tax on any monies [they] may receive under this agreement".

The drivers had to sign two agreements, one in relation to payment of a deposit for branded clothing, and one headed "social welfare and tax considerations", which stated that the driver acknowledged that they were undertaking the work as an independent contractor, and that the company had no liability for deducting PRSI.

Tax Appeal Commissioner's decision

The company's case before the Commissioner was that there was no "mutuality of obligation" between the company and the workers, and therefore the relationship could not be one of employer/employee. This, they said, was because: (a) the drivers could unilaterally choose not to provide their services, even though they had been rostered for work, without any sanction being imposed on them; and, (b) because under the overarching contract Karshan was not required to provide any work to any driver.

The Revenue Commissioners in turn said that there did indeed need to be "mutuality of obligation", but that it was fulfilled in this case as the drivers entered into specific contracts of employment at the point at which they agreed to be rostered for specific shifts, and these contracts required them to attend as agreed and Karshan was obliged to pay the drivers when they did attend for the work.

Therefore, Revenue said, the drivers were operating under the control of Karshan and in accordance with its directions, they were not carrying on business on their own account and they were fully integrated into what was a fundamental part of Karshan's business.

Revenue, the Supreme Court said, appeared to accept that while there was a contract in existence in which mutuality was present, that this was not enough "mutuality" to give rise to a contract of employment.

Tax case – remember!

It should be remembered that this is a tax case – the only requirement for the Revenue Commissioners to be correct was that the drivers were employees when they were working. Revenue did not have to show that at the time when the overarching contract alone was operating, the drivers were employees.

Murray J. recited that the Commissioner found that once a driver was rostered for work (which roster encompassed one or more shifts), there was a contract in place in respect of which the parties undertook mutual obligations (at p. 16):

"As soon as a driver arrived for work, she found they were obliged to clock in, to arrange their cash float, to be uniformed, to have their vehicle insured, to deliver pizzas, and at the conclusion of their work, to clock out. She found that the drivers clocked in and clocked out on the computerised system in use in Karshan's business using their driver numbers".

Case law

Mr Justice Murray then embarks on a very extensive review of the case law in order to place "mutuality of obligation" in context.

> It would seem that there is a significant number of low-income self-employed people, and that we are adding them to our economy at a high rate.

I. The 'tests'

He outlines the development of the "control" test through *Yewens v Noakes* (1880) 6 QBD 530, *Moroney v Sheehan* (1903) 37 ILTR 166, *O'Donnell v Clare County Council* (1913) 47 ILTR 41, and *Clarke v The Bailieborough Co-operative Agricultural and Dairy Society Ltd.* (1913) 47 ILTR 113.

He states at this point, and it is notable, that these cases did not require "ongoing obligation of the kind contended for in this case", dealing with day-to-day work by workmen providing their own equipment, labourers who were retained for particular jobs but free to work for others, and those who were paid by reference to the loads transported rather than a fixed salary. The Court stated that what was central to the cases was the degree of control exercised by the employer and goes on to set out the three broad approaches that have developed.

1. First, the power of direction and authority, which was much more remote as considered in *Beloff v Pressdram Ltd.* [1973] 1 All ER 241.

2. Second, which of the parties bears the economic risk of the commercial enterprise? The building contractor in *Graham v Minister for Industry and Commerce* [1933] IR 156 was not an employee because, though he was paid a fixed sum per week, he hired his own staff, held himself out as an independent contractor and bought materials in his own name when required. Murnaghan J. in the Supreme Court said that "when a person engages a skilled artisan or tradesperson, the presumption is that the person engaged is his own master over the work to be done and is not under the control of the other so as to be his servant".

3. The third discernible broad approach, said the Court, was the test of integration, which developed around the same time that the control test was being modified to reflect the economic reality between the parties. The Court cites Lord Denning in *Stevenson, Jordan and Harrison v MacDonald and Evans* [1952] 1 TLR 101 as first formulating this test:

"… One feature which seems to me to run through the instances is that, under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services his work, although done for the business, is not integrated into it but is only accessory to it".

In *Karshan*, the Court points out that this was the first time that control was not only relevant, but a mandatory element of the contract of employment, but that control did not necessarily extend to the operational direction of how the work was to be done. Further, this notion of control could encompass other considerations, including economic risk and the position of the worker in the business of the employer.

Mutuality of obligation

The Supreme Court then examined the concept of mutuality of obligation, saying that "the phrase has acquired a particular meaning in employment law, signifying not simply an agreement involving consideration moving from each party to the contract, but instead demanding particular features before the agreement could be characterised as giving rise to the relationship of employer and employee".

The Court broke this contention down into four sections:

(i) First, there is not just an obligation on the worker to perform work and the employer to pay for it – there has to be a specific obligation on the employer to provide work.

(ii) Second, the obligations must be ongoing – referred to as an element of "stability" by Karshan.

(iii) Third, as argued before the Court, the obligations must extend into the future. Though every executory contract extends into the future, the Court said, what was envisaged was "a gap that was more than merely momentary between the assumption of the obligation to work, and the obligation to provide (and then when done, pay for) that work. It was thus Karshan's position that it was not sufficient for the driver and Karshan to enter into the agreement immediately before the work was undertaken: there had to be an obligation to provide work that predated that point. This gave rise to an obvious issue of definition".

(iv) Fourth, the Court said, the formulation involved "an extension of what was said in RMC, which never expressly articulated any obligation on the part of the employer (ongoing or otherwise) to provide work".

The Court concludes that mutuality of obligation has been overused and under-analysed, and has become "wholly ambiguous". Murray J. criticises its elevation from describing the consideration that must exist before a contract can be capable of being a contract of employment, to being a defining feature. He also says that the mutual obligations underlying a contract of employment will not necessarily be different from those that underly a relationship of independent contractor and employer. Instead, the Court reduces the test as to whether a worker is an employee to five questions:

1. Does the contract involve the exchange of wage or other remuneration for work? (There must be a promise to do work, almost immediately or in the future, and for the employer to confer some benefit on the worker.)

2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer? (There can be limited substitution.)

3. If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement? (The employer should have the right to generally – or in the case of skilled workers, residually – control the type of work, the means, time, place and way that the work is done.)

Although he expands on the question of control and uses the example of Clarke C.J. in *Minister for Education and Skills v The Labour Court and ors* [2018] IESC 52 as to what this means, he admits that here is a certain circularity in relation to this (though he later says at para. 246 that this can allow necessary flexibility).

Murray J. specifies that the first three questions above are a filter, and if any are answered in the negative there can be no contract of employment. However, if they are all answered positively, the decision maker must proceed to look at all the facts and circumstances to ascertain the true nature of the relationship:

4. If these three requirements are met, the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.

5. Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the Court to adjust or supplement any of the foregoing.

Some 'takeaways' from this delivery case

Employers should review the workforce and the contractual rights of these new employees.

1. While we await future cases in relation to overarching contracts, all employers need to review their employment structures in light of the five-point test and consider whether people they had classified as independent contractors actually now are employees.

2. The new Directive (EU) 2022/2041 of October 19, 2022, on adequate minimum wages aims to improve the adequacy of minimum wages and promote collective bargaining and access to protections. While the EU average for employees earning two-thirds or less than the national median gross hourly earnings was 15.8%, it was almost 33% higher in Ireland at 19.78%.

3. The National Economic and Social Council report of November 2020 reported that in Ireland, employees have higher incomes than self-employed people. This contrasts with Europe where, on average, self-employed people earn more: see 'The Position of the Self-Employed Background Paper'.[1]

It would seem that therefore there is a significant number of low-income self-employed people, and that we are adding them to our economy at a high rate. There will clearly be much work needed in relation to these people, and employers will have to review their position as a matter of urgency.

Taken together with broader legislative changes emanating from Europe, this judgment should result in a clearer and hopefully fairer working environment. If it results in higher prices for services because those providing the service now have better protections, that may just be the cost we have to pay, and something that, until now, was a hidden charge.

This article is based on a paper delivered at the annual Employment Bar Association Conference on November 10, 2023.

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VOLUME 28 / NUMBER 5 / DECEMBER 2023

A directory of legislation, articles and acquisitions received in the Law Library from the September 2, 2023, to November 9, 2023
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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.

Anaerobic Digestion (National Strategy) Bill 2023 – Bill 74 of 2023 [pmb] – Deputy Christopher O'Sullivan
Commissions of Investigation (Amendment) Bill 2023 – Bill 68/2023 [pmb] – Deputy Kathleen Funchion and Deputy Martin Kenny
Competition and Consumer Protection (Unfair Prices) Bill 2023 – Bill 73 of 2023 [pmb] – Deputy Ged Nash
Developer Profits Transparency Bill 2023 – Bill 75 of 2023 [pmb] – Deputy Cian O'Callaghan
Domestic, Sexual and Gender-Based Violence Agency Bill 2023 – Bill 67/2023
Electricity Costs (Emergency Measures) Domestic Accounts Bill 2023 – Bill 71/2023
Electoral (Amendment) Bill 2023 – Bill 77 of 2023
Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023 – Bill 76 of 2023
Finance (No. 2) Bill 2023 – Bill 70/2023
Finance (State Guarantees, International Financial Institution Funds and Miscellaneous Provisions) Bill 2023 – Bill 66/2023
Local Government (Community Gardens) Bill 2023 – Bill 78/2023 [pmb] – Deputy Marc Ó Cathasaigh, Deputy Steven Matthews, Deputy Patrick Costello, Deputy Francis Noel Duffy and Deputy Brian Leddin
Mortgage Interest Rates Cap Bill 2023 – Bill 72/2023 [pmb] – Deputy Richard Boyd Barrett, Deputy Paul Murphy, Deputy Mick Barry, Deputy Gino Kenny and Deputy Bríd Smith

Bills initiated in Seanad Éireann during the period September 2, 2023, to November 9, 2023

Sex Offenders (Amendment) (Coercive Control) Bill 2023 – Bill 69/2023 [pmb] – Senator Fiona O'Loughlin and Senator Lisa Chambers

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Control of Exports Bill 2023 – Bill 38/2023 – Committee Stage – Report Stage
Credit Union (Amendment) Bill 2022 – Bill 112/2022 – Committee Stage
Domestic, Sexual and Gender-Based Violence Agency Bill 2023 – Bill 67/2023 – Committee Stage
Electricity Costs (Emergency Measures) Domestic Accounts Bill 2023 – Bill 71/2023 – Committee Stage – Passed by Dáil Éireann
Energy (Windfall Gains in the Energy Sector) (Cap on Market Revenues) Bill 2023 – Bill 65/2023 – Committee Stage – Report Stage
Finance (No. 2) Bill 2023 – Bill 70/2023 – Committee Stage
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Health (Termination of Pregnancy Services) (Safe Access Zones) Bill 2023 – Bill 54/2023 – Committee Stage
Historic and Archaeological Heritage and Miscellaneous Provisions Bill 2023 – Bill 2/2023 – Report Stage – Passed by Dáil Éireann
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Screening of Third Country Transactions Bill 2022 – Bill 77/2022 – Report Stage – Passed by Dáil Éireann

Progress of Bill and Bills amended in Seanad Éireann during the period September 2, 2023, to November 9, 2023

Animal Health and Welfare (Dogs) Bill 2022 – Bill 54/2022 – Committee Stage
Control of Exports Bill 2023 – Bill 38/2023 – Committee Stage – Report Stage
Garda Síochána (Recording Devices) Bill 2022 – Bill 79/2022 – Committee Stage – Report 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 2, 2023, to November 9, 2023

John Conway v An Bord Pleanála [2023] IESCDET 118 – Leave to appeal from the High Court granted on the 13/10/2023 – (Baker J., Hogan J., Collins J.)
Michelle Maher v Dublin City Council [2023] IESCDET 121 – Leave to appeal from the High Court granted on the 17/10/2023 – (Baker J., Hogan J., Collins J.)
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The People at the suit of the Director of Public Prosecutions v William Twomey [2023] IESCDET 113 – Leave to appeal from the Court of Appeal granted on the 09/10/2023 – (O'Malley J., Baker J., Hogan J.)

For up-to-date information, please check the courts website: https://www.courts.ie/determinations.

INSTRUMENT OF CHANGE

Clíona Kimber SC

DO WE NEED A LEGAL RIGHT TO A HEALTHY ENVIRONMENT? – PROPOSALS FOR THE EUROPEAN CONVENTION ON HUMAN RIGHTS.

> As regards recognising a binding human right to a healthy environment, Europe is lagging behind – its position contrasts with other regional conventions and decisions of human rights courts.

There is currently a triple planetary crisis: pollution; biodiversity loss; and, climate change. This ongoing degradation of the environment has grave implications for the enjoyment of human rights and undermines the shared values that international human rights bodies, including the Council of Europe,[1] are dedicated to upholding. The degradation and pollution of the places where people live, how we produce our food, and where we go for our amenity will have a disproportionate effect on those most vulnerable, on indigenous peoples and on children, thereby affecting rights protected by the European Convention on Human Rights.

The Council of Europe is presently looking at drafting a new legal instrument to supplement the European Convention on Human Rights. But what is the legal basis for this and what kind of rights are engaged?

International legal basis for a European regional right

There is a good international basis for such a right. One of the most significant is the United Nations General Assembly Resolution UNGA 76/302, adopted on July 28, 2022, which states that the right to a clean, healthy and sustainable environment is a human right. The voting record on the resolution was impressive: of the countries in the UN, 161 voted for, none against, and there were only eight abstentions.

Yet the resolution is soft law only; it does not set out who the rights holder is, nor does it prescribe any substantive or procedural rights. Notwithstanding the resolution adopted in 2021 by the Parliamentary Assembly of the Council of Europe on human rights and the protection of the environment,[2] there is no binding recognition of a right to a clean and healthy environment at European regional level. It was for this reason that the 2021 resolution called for the Committee of Ministers of the Council of Europe to draw up an additional protocol to the European Convention on Human Rights and the European Social Charter on the right to a safe, clean, healthy and sustainable environment, based on the terminology used by the United Nations, and to strengthen the obligations of corporate environmental responsibility by revising Recommendation CM/Rec(2016)3 on human rights and business.

As regards recognising a binding human right to a healthy environment, Europe is lagging behind – its position contrasts with other regional conventions and decisions of regional human rights courts. For example, the African Charter on Human and Peoples' Rights was one of the first human rights conventions to include in its Article 24 a right to a general satisfactory environment, and has been relied on successfully before the African Commission, in a case in which the applicants – two human rights NGOs – had alleged that operations of the State oil company had caused environmental degradation and health problems among the Ogoni people of Nigeria.[3]

The central issue was that the Government of Nigeria had been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC). The NNPC was the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC). It was alleged that NNPC operations caused environmental degradation and health problems, resulting in the contamination of the environment of the Ogoni people. The damage was caused through the disposal of toxic waste into the land and local waterways in violation of applicable international environmental standards, by neglecting to maintain its facilities. The result was a number of avoidable spills in the proximity of villages, which caused contamination of water, soil and air, leading to serious short- and long-term health impacts.

The complaint alleged that the Nigerian Government had neither monitored operations of the oil companies nor required safety measures that were standard procedure within the industry. Further, the Government had not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production. Article 24 of the African Charter provides that: "All peoples shall have the right to a general satisfactory environment favourable to their development". According to the African Commission – the adjudication body under the African Charter:

"The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter, or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources".

Interestingly, it found that this right was an aspect of Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party. The ICESR requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene (Ireland ratified and acceded to this International Covenant in 1989). The African Commission made various findings, including that all attacks stop on the Ogoni people, human rights investigations take place, environmental impact assessments take place, and the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry. Ultimately, the decision was used as the basis for other litigation, resulting in the rulings in 2021 in the Netherlands against Shell Nigeria and orders for payment of extensive compensation for environmental damage.

The Inter-American Court of Human Rights (IACtHR) has held that the American Convention, despite its silence on the issue, includes a right to a healthy environment. In an *obiter dictum*, the IACtHR held that the right to a healthy environment is a right that is encompassed in the right to realisation of the economic, social and cultural right set out in Article 26 of the American Convention on Human Rights.[4] In the 2020 decision *Indigenous Communities Members of the Lhaka Honhat Association vs Argentina*, the IACtHR held that Argentina violated an autonomous right to a healthy environment, to indigenous community property, cultural identity, food, and water. For the first time in a contentious case, the Court analysed the rights in Article 26 of the American Convention and ordered specific measures of reparation to their restitution, including actions for access to adequate food and water, for the recovery of forest resources and indigenous culture.

Litigation

There is litigation pending under the European Convention on Human Rights; the *Duarte Agostinho and others v Portugal and 32 other States* and *Klimaseniorinnen v Switzerland* cases[5] were heard in the summer of 2023, and judgment is awaited sometime in the middle of 2024. In these cases, the claimants allege that the respondent countries have violated their human rights by failing to take sufficient action on climate change. They seek an order requiring them to take more ambitious action.

In the first case, *Duarte Agostinho and others v Portugal and 32 other States* (application no. 39371/20), and *Carême v France* (application no. 7189/21) were heard together. In *Agostinho*, six young Portuguese citizens have taken actions against 33 European countries, in which they plead that because of the impact of wildfires and climate change on their human rights in recent years in Portugal, their rights under the European Convention on Human Rights have been breached. The basis of the complaint is Articles 2, 8, and 14 of the European Convention, namely the right to life, right to privacy, and entitlement to enjoyment of rights without discrimination. The complainants claim: that their right to life is threatened by the effects of climate change in Portugal such as forest fires; that their right to privacy includes a right to protection of their physical and mental well-being, which is threatened by heatwaves that force them to spend more time indoors; and, that as young people, they stand to experience the worst effects of climate change. In particular, they assert that the named countries, which are signatories of the Convention, have failed to take sufficient action on climate change and have failed to reduce emissions.

A similar complaint is made in the *Carême* case, in which additional measures on the part of France are sought to meet the Paris Agreement objective of reducing greenhouse gas (GHG) emissions by 40% by 2030. Other municipalities were added as claimants. While the French court found for the claimants, and ordered the Government to take additional measures by March 31, 2022, to achieve the goal of reducing GHG emissions by 40% by 2030, it rejected the application brought by the applicant as an individual, on the basis that he had not established sufficient interest in the case since his claims were limited to the argument that, as an individual, his home was situated in an area likely to be

subject to flooding by 2040. The individual complained to the European Court of Human Rights (ECtHR) that the French Court had erred in rejecting his application as an individual. His case was joined, on his application, to *Agostinho*.

In the second case, *Klimaseniorinnen v Switzerland* (application no. 53600/20), an association of senior female citizens argued that their human rights are being violated due to climate change, in particular as a result of seasonal summer heatwaves because as senior women they are more likely to die or have serious health impacts from excess temperatures. The application listed three main complaints:

1. Switzerland's inadequate climate policies violate the women's right to life and health under Articles 2 and 8 of the European Convention on Human Rights.
2. The Swiss Federal Supreme Court rejected their case on arbitrary grounds, in violation of the right to a fair trial under Article 6.
3. The Swiss authorities and courts did not deal with the content of their complaints, in violation of the right to an effective remedy in Article 13.

However, there are significant challenges to litigation that relies upon current law. The European Convention on Human Rights protections are not designed to provide general protection of the environment *per se*, but are rather directed to protecting humans who are denied a particular right. Thus, an applicant needs to demonstrate their victim status to have standing. This is difficult when relying on an injury to a particular right arising out of climate and environmental damage, which affects everyone. Climate change issues in particular also suffer from a burden of proof when it comes to having sufficient scientific evidence to prove something that has such a diverse and fragmented damage and responsibility.

There are issues of causality, particularly in relation to climate or environmental issues, whereby the source of the damage or the actions causing the damage may be difficult to map directly onto a particular victim. Furthermore, it is not clear whether environmental non-governmental organisations (ENGOs) can have standing under the Convention.

In addition, there are issues around the extraterritorial jurisdiction of the Convention and there are questions about whether and to what extent it is possible to litigate against non-state actors using the Convention.

As can be seen from the above, there are a number of questions that must be addressed. In a bid to resolve some of these issues and questions, the Council of Europe's Steering Committee for Human Rights wrote a 'Manual on Human Rights and the Environment'. This document provides a detailed description of how the ECtHR has ruled on over 300 environmental matters and sets out the principles emerging from the case law of the ECtHR, and the decisions and conclusions of the European Committee of Social Rights.[6]

While the judgments in *Duarte Agostinho* and *Klimaseniorinnen* are eagerly awaited, these cases may show the limits of the ECtHR system.

How is the Council of Europe responding?

Following the 2021 recommendation of the Parliamentary Assembly of the Council of Europe referred to above, in 2022 the Committee of Ministers adopted Recommendation CM/Rec(2022)20 addressed to member states, that they actively consider adopting in their national legal systems, a right to a healthy environment.[7]

Subsequently, at the Council of Europe summit in May 2023, member states launched the 'Reykjavík process' to make environmental protection a visible priority for the Council of Europe.

Most significantly, the Council of Europe Steering Committee for Human Rights has been given a mandate to look at the need for and feasibility of drafting a new legal instrument on human rights and the environment.[8] A number of the questions that such an instrument would need to look at would be as follows:[9]

1. What should the rules of standing be for bringing environmental cases – should a right to a healthy environment allow individuals or NGOs to make claims related to the public interest of environmental protection without being affected personally and/or in a direct way? Should there be provision for an *actio popularis*?
2. What way should such a right be approached? Should the right be anthropocentric as part of human rights to live in a clean and healthy environment, or should there be a standalone right for the environment itself?
3. Who is the holder of the right – could 'Nature', as such, be considered a right holder? What about the right holders of future generations?
4. What will be the extraterritorial jurisdiction of the European Court system for transboundary environmental harm if it wishes to adjudicate on environmental damage or damaged human rights within contracting members of the Council of Europe in relation to damage being caused by states or non-state actors outside the European Convention system or vice versa?

5. Should there be collective rights mechanisms?
6. What should the procedure for exercising substantive rights be? The need to exhaust domestic remedies is time consuming and costly, especially when faced with an imminent crisis for the environment.
7. How will environmental issues link in with the sustainable development goals and human rights?
8. How should a court's limited power or willingness to order environmental remedies be managed? The payment of compensation for damage is a limited remedy; remedial measures of a general nature are required to put an end to structural environmental problems.
9. Would there need to be protection of human rights defenders in order to create a safe place for environmental activism? There is a shrinking space for civil society engagement and public protest in areas of environmental activism. Environmental defenders are faced with derogatory labels, which stigmatise them, and are subjected to SLAPP (strategic lawsuits against public participation) proceedings. However, legitimate concerns need to have a space for consideration and adjudication, particularly when many of the issues are being raised by children and young persons who currently have no right to vote or take part in a political process if they are underage.

Most of these issues being considered by the Council of Europe are issues that are universally valid for all national and legal systems. Its work in scoping out the parameters of a right to an environment will therefore be invaluable to the legal systems of member states in dealing with their own obligations to protect the environment and respond to domestic litigation.

Time is of the essence to ensure real life protection of the environment. Current legal systems suffer from fragmentation, lack of enforcement and legal systems in which environmental rights do not fit easily because of issues of standing causation, burden of proof, scientific evidence and the use of experts. The work of the Council of Europe in developing a legal instrument to consider and address the structural and procedural legal issues hampering effective environmental protection is of great value. Legal practitioners throughout Europe have an important role to play in the development of the proposed legal instrument, and in using the law and legal scholarship of the Council of Europe to advance legal arguments in national courts. The Council of Europe has been reaching out to national legal professionals through its programme for human rights education for legal professionals. Lawyers and jurists will inevitably be involved in resolving disputes and dealing with environmental litigation. The leadership role of the Council of Europe is to be welcomed.

References

1. The Council of Europe is an international organisation established in the wake of World War II to uphold human rights, democracy and the rule of law in Europe. The headquarters are in Strasbourg. It is composed of four principal bodies: the Committee of Ministers; the Parliamentary Assembly; the Congress of Local and Regional Authorities of Europe; and, the Secretariat. It has devised 160 international legal instruments, the most important being the European Convention on Human Rights. The Council of Europe established a number of specialist bodies and expert committees, including the European Court of Human Rights.
2. PACE Recom 2211(2021)CM Rec 2022 (20). The Resolution contains an Appendix with a proposed text for an additional protocol to the European Convention on Human Rights, concerning the right to a safe, clean, healthy and sustainable environment.
3. Communication 155/96, ACHPR/COMM/A044/1 of May 27, 2002.
4. The text of Article 26 is as follows: "PROGRESSIVE DEVELOPMENT. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires".
5. *Duarte Agostinho and others v Portugal and 32 others* (application no. 39371/20), *Carême v France* (application no. 7189/21), and *Klimaseniorinnen v Switzerland* (application no. 53600/20).
6. The Steering Committee for Human Rights (CDDH) of the Council of Europe published the third edition of its 'Manual on Human Rights and the Environment' in 2021. The way in which the Convention and the Charter reflect the relationship between human rights and the environment is explored in detail in the Manual.
7. Recommendation CM/Rec(2022)20 of the Committee of Ministers to member States on human rights and the protection of the environment (adopted by the Committee of Ministers on September 27, 2022, at the 1,444th meeting of the Ministers' Deputies).
8. The detailed work has been delegated to the Drafting Group on Human Rights and Environment. See the [DRAFT] CDDH report on the need for and feasibility of a further instrument or instruments on human rights and the environment (CDDH-ENV(2023)04 08/09/2023) at https://rm.coe.int/steering-committee-for-human-rights-cddh-drafting-group-on-human-right/1680aae37e.
9. See the detailed discussion of all the issues in the [DRAFT] CDDH report on the need for and feasibility of a further instrument or instruments on human rights and the environment – CDDH-ENV(2023)04 08/09/2023.

SUPREME RIGHTS

A number of Supreme Court judgments over the last year have addressed issues of human rights.

David Perry BL

Different considerations might arise in relation to a vulnerable person or a person insufficiently aware of a particular situation.

This article provides a review of judgments from the Supreme Court over the last year that touch on the fundamental rights protected by the Constitution of Ireland and the European Convention on Human Rights.

The rights of prisoners

In *P. McD. v Governor of X Prison*,[1] the Supreme Court considered issues relating to the duty of care owed to prisoners and the obligation to provide a functioning complaints system in prison.

While the appellant was serving a custodial sentence, he went on a hunger strike in protest against changes in his regime. The appellant subsequently instituted proceedings in which he argued that the delay of six weeks by the Governor of the prison in resolving two written complaints made in accordance with Rule 57B of the Prison Rules had led to the continuation of his hunger strike, which had serious detrimental effects on his well-being.

The High Court agreed with this argument and awarded damages for negligence in the sum of €5,000 to the appellant. The High Court also granted a declaration that the treatment of the appellant's written complaints was in breach of the terms of the Irish Prison Service Prisoner Complaints Policy. The Court of Appeal overturned these orders.

The majority of the Supreme Court concluded that the appellant's claim for damages for negligence could not succeed. MacMenamin J. noted that while prison authorities owe a range of duties of care to prisoners, it is not a general duty of care. It could not be said that the Governor in this case owed a duty to prevent the appellant from embarking on his

> Charleton J. held that, on the facts of this case, the delay constituted an oppressive disruption to family life.

hunger strike, where he sought to place pressure on the authorities to agree to his demands, when this was inherently an autonomous decision. MacMenamin J. held that, in the context of the law of negligence, the premise is that a person of sound mind must be held responsible for his or her own actions. It was accepted however that different considerations might arise in relation to a vulnerable person or a person insufficiently aware of a particular situation.

In addition, the negligence claim failed on the issue of causation. The evidence was that the hunger strike was caused by the Governor's refusal to accede to the appellant's demands, not the delay in responding to his complaints.

The Court went on to consider the nature of the complaints system that was in place. MacMenamin J. noted that there was a need for an "an effective, confidential complaints system in a prison". This was seen as being a necessary corollary of the rights enjoyed by prisoners. It emerged in the evidence in this case that the complaints system in this prison was not functioning. In those circumstances, MacMenamin J. proposed a declaration to the effect "that the administration of the Irish Prison Complaints Policy Document, introduced in the year 2014, did not comply with the requirement to provide an effective complaints system in the case of the appellant". However, the majority of the Court disagreed that there was any basis for granting declaratory relief.

Inviolability of the dwelling

In *Clare County Council v McDonagh*,[2] the Supreme Court considered the extent of the protection provided under Article 40.5 of the Constitution and Article 8 of the European Convention on Human Rights in respect of caravans and mobile homes that are unlawfully present on another's land.

The appellants were members of the Traveller community who were illegally occupying lands that were the property of the respondent county council, and had placed caravans and mobile homes on that property. Clare County Council had applied for a mandatory interlocutory injunction directing the removal of the appellants' caravans, vehicles and associated property from that land. This injunction was granted by the High Court and upheld by the Court of Appeal. However, the Supreme Court overturned the order, holding that the appellants had raised a fair case to be tried as to whether this removal would breach their rights under the Constitution and Convention.

In delivering the judgment of the Supreme Court, Hogan J. noted that the High Court and Court of Appeal had exclusively considered Article 8 of the Convention. He held that Article 40.5 of the Constitution had to also be "properly considered and addressed". This was because the Convention did not have direct effect in Irish law and had been enacted at sub-constitutional level by the European Convention on Human Rights Act 2003. He held that any other conclusion would mean, in effect, that the Court had yielded a sort of constitutional primacy to the Convention. Consequently, the Convention acquired a form of quasi-constitutional status, which it had never been accorded.

Hogan J. went on to hold that the caravans and mobile homes occupied by the appellants were clearly "dwellings" for the purposes of Article 40.5. He noted that it was sufficient that any person asserting the protection of Article 40.5 actually resided there, and the caravans and mobile homes were places where the appellants actually resided. He further held that the appellants had raised an arguable case as to whether the caravans constituted a "home" under Article 8 of the Convention.

Hogan J. further held that an illegally constructed or occupied dwelling attracts, at some level of the principle, the protections of the Constitution and Convention. The force of that protection is greatly diluted, such that there very much remains a presumption in favour of enforcement of planning laws. However, Hogan J. held that the substance of the rights would be "compromised if the making of such an order was not subject in these circumstances to an appropriate proportionality analysis". In those

circumstances, an order for removal of the caravans and mobile homes in this case could only be made if it represented a proportionate interference with the appellants' rights.

Hogan J. went on to hold that there were factors that raised a fair question as to whether an order directing the removal of the appellants' caravans would be disproportionate. These included: the fact that the application concerned the rights of a vulnerable minority group who have struggled for recognition of their cultural identity and way of life; that the case concerned an application brought by a council in its role as a landowner and planning authority, and that it was arguable that the respondent had failed in its duty as a housing authority to offer suitable accommodation to the appellants; and, that if a mandatory interlocutory injunction were to be granted, the "effects on these marginalised and vulnerable appellants would be catastrophic as there is really nowhere else at present where they could lawfully go".

Family rights

In *Minister for Justice v Palonka*,[3] the Supreme Court considered the circumstances in which extradition may be refused on the basis that it would amount to a disproportionate interference with the family rights protected by Article 8 of the Convention.

The appellant was convicted in Poland in July 1999 of a drugs offence. He received a ten-month suspended sentence. The appellant moved to Ireland in 2005. Subsequently, in 2006, the sentence was activated in the appellant's absence. In 2015, the Irish courts refused to order the appellant's surrender in respect of another unrelated offence from 2003. Following this, in 2019, the Polish authorities sought the surrender of the respondent under a European Arrest Warrant to serve the sentence imposed in 1999.

Charleton J. noted that the appellant had lived in Ireland for 17 years and "has established himself in a family relationship with progeny", and that surrender would interfere with his family life in the State. He stated however that surrender under a European Arrest Warrant could only be refused on the basis that it would pose interference with family rights in a case that could be "genuinely characterised as exceptional". Charleton J. noted in this regard that delay "may enable the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention in a genuinely exceptional way as set in the context of the individual procedural circumstances of the case".

Assessing the facts of this case, Charleton J. noted: that there had been a 23-year delay in seeking the surrender of the appellant; that there was no explanation for why surrender was only sought after proceedings for an unrelated offence failed in 2005; and, the establishment of roots and family life by the appellant in the State. On that basis, Charleton J. refused surrender, noting at para. 31 of his judgment that: "This is not a case of potential infringement of fundamental rights. Rather, what is involved is a real, exceptional and oppressive disruption to family life in the most extreme and exceptional of circumstances".

Charleton J. held that, on the facts of this case, the delay constituted an oppressive disruption to family life and that the establishment of life in Ireland by Mr Palonka pointed to exceptional circumstance justifying the refusal of surrender.

Hogan J. delivered a concurring judgment. He noted that the facts of the case were exceptional insofar as the delay of 23 years between conviction and surrender was inordinate and had not been excused by the Polish authorities.

The right of reasonable access to a solicitor

In *DPP v McDonald*,[4] the Supreme Court gave some consideration to the right of reasonable access to a solicitor insofar as it might affect the admissibility of DNA samples obtained by consent.

The appellant was convicted of murder. Central to that conviction was a DNA specimen taken from the appellant during his time in garda detention. At the invitation of gardaí, the appellant had consented to providing that DNA specimen. On appeal, the appellant argued that he had not yet had access to his solicitor in person prior to giving this consent, and this meant that the evidence was unlawfully obtained.

Charleton J. held that while argument had been addressed to the issue of whether or not legal advice was appropriate prior to a person consenting to giving a sample, the reality in this case was that the appellant had spoken to his solicitor for two minutes by telephone prior to a sample being taken. Further, there was no evidence of any coercion or unfairness by way of a trick, which might call the validity of the appellant's actions into account. Charleton

> The appellants were not able to specifically identify a risk of a breach of their right to a fair trial as the judges who would hear their cases remained undetermined.

J. noted that a solicitor was not required to be present during the course of an interview, and in this case, where what was at issue was the taking of a physical sample, this reasoning became stronger. Overall, Charleton J. concluded, at para. 34, that:

"...[T]here is no basis for any ruling that the consensual taking of a blood sample from a person in custody who has been given a notice of rights and who has availed of a telephone conversation with a solicitor was unlawfully taken".

Hogan J. gave a concurring judgment in which he noted that the gardaí could and would have lawfully taken a DNA swab irrespective of the appellant's consent. In those circumstances, the issue of whether the appellant either did have or was entitled to have a solicitor present during the course of his detention was of no materiality.

Rule of law concerns and extradition

In *Orlowski v Minister for Justice*,[5] the Supreme Court considered the circumstances in which fair trial rights might result in a refusal to surrender a person requested under a European Arrest Warrant.

The appellants were Polish nationals resident in Ireland. They were subject to European Arrest Warrants seeking their surrender to Poland. They objected to surrender on the basis that it would breach their fair trial rights, as there was a possibility that the Polish courts hearing their cases would not be properly established by law or independent.

Dunne J. held that a complaint concerning the generalised deficiencies concerning the appointment of judges cannot result in refusal of surrender. Here, the appellants were not able to specifically identify a risk of a breach of their right to a fair trial as the judges who would hear their cases remained undetermined. They could only make the argument that there was no effective remedy in Poland by which they could challenge the appointment of the court assigned to preside over criminal proceedings. Dunne J. held that this was not enough: a generalised complaint as to the possibility that the court dealing with either of the appellants may contain a judge or judges who were appointed under particular laws was not, in and of itself, sufficient to give rise to a real risk of breach of the right to a fair trial. Dunne J. acknowledged that this placed the appellants in a "Catch-22" situation, but held that there was no alternative but to order the surrender of the appellants.

The right to liberty

In *G.E. v Commissioner of An Garda Síochána*,[6] the Supreme Court considered a novel issue relating to the award of general damages for the tort of false imprisonment.

The question was whether, in circumstances where a plaintiff can establish that he or she has been unlawfully detained, a defendant can defeat any consequential claim for compensatory damages if it can be shown that had the plaintiff not been unlawfully detained, he or she could and would have been lawfully detained. The UK Supreme Court had held in *R. (Lumba) v Secretary of State for the Home Department*[7] that a plaintiff in such a case would only be entitled to nominal damages.

By way of background, the Supreme Court had previously found on an appeal in the context of an Article 40.4.2° inquiry that the plaintiff had been unlawfully detained following an arrest in 2011; the plaintiff, whose application for subsidiary protection was then pending, had left the State and then re-entered by bus from Northern Ireland. He was refused permission to land and was arrested. Although he could lawfully have been detained in the circumstances, his initial detention was unlawful owing to a defect in the form of the warrant used to ground his detention. There was subsequently a delay in releasing the plaintiff following the judgment of the Supreme Court, and after his release he was re-arrested and detained on foot of a new detention order. He brought a further *habeas corpus* inquiry and the High Court concluded that the delay in releasing the plaintiff on August 26, 2011, was unlawful. The court therefore held that the plaintiff had been inadvertently deprived of his constitutional right to liberty for that period.

The defendants in *G.E.* argued that the *Lumba* principle ought to be adopted in Ireland. The plaintiff disputed this. The High Court (Faherty J.) found for the plaintiff and held that *Lumba* does not reflect the law in this jurisdiction. She awarded the sum of €7,500 to reflect 26 days of false imprisonment, with such sum also reflecting the plaintiff's conduct and credibility deficits in his evidence. The decision of the High Court was upheld by the Court of Appeal.

The defendants appealed to the Supreme Court. Their case was that where a plaintiff who has been falsely imprisoned has suffered no loss or damage for the simple reason that his imprisonment was substantively justified and

inevitably would have occurred without the irregularity had the authorities been aware of it, the plaintiff should only be entitled to nominal damages. They argued that the defendant had suffered no real loss because if, for example, the warrant authorising his detention had contained the appropriate recitals, he could and would have been lawfully detained. The plaintiff cross-appealed in respect of the quantum of damages.

Hogan J. gave the unanimous judgment of the Supreme Court dismissing the appeal and finding that *Lumba* does not represent the law in Ireland. He stated that he agreed generally with the analysis of the Court of Appeal. In his view, the issue was whether it could ever be appropriate to award purely nominal damages to someone who has genuinely and actually been deprived of their liberty by reason of the illegal actions of the State or its agents. *Lumba* had been based on the principle that damages in English tort law are essentially compensatory in nature; a plaintiff is not entitled to be compensated for an illegal detention where he had suffered no real loss. However, Hogan J. took a different view to the decision in *Lumba*. He observed that vindicatory damages are an established part of the common law tradition insofar as trespassory torts like false imprisonment are concerned, and that the same are required by the words of Article 40.3.2° of the Constitution, which requires the State "in the case of injustice done" to "vindicate" the rights of the citizen.

Next, Hogan J. considered the relevance of the conduct of the plaintiff for the award of damages. He confirmed that the plaintiff's personal conduct can be relevant when it comes to assessing damages, even in a false imprisonment case. Having regard to the fact that the plaintiff had shown a want of care in unilaterally leaving the State without the Minister's permission and then seeking to re-enter in circumstances where he had no obvious entitlement to do so, Hogan J. was of the view that the plaintiff could not be entitled to the full measure of damages for false imprisonment. Nonetheless, Hogan J. confirmed that the illegality of the detention could not be marked by purely nominal damages. As a result of the judicial obligation to vindicate the rights of the citizen, "[t]he award of nominal damages in respect of anything but the most technical or fleeting instances of false imprisonment would seriously devalue the tort", and the award should contain an element of vindicatory damages to represent the inherent importance of the constitutional right to personal liberty.

Finally, Hogan J. dismissed the cross-appeal on damages. He noted that the High Court had found that there were material discrepancies in the plaintiff's evidence and that he had been less than forthcoming regarding his nationality and other matters. Thus, provided the starting point for the award contains a sum sufficient to mark the inherently serious nature of illegal detention, the courts are entitled to reduce the award having regard to the unreasonable or unsatisfactory conduct of the plaintiff.

Protection from inhuman or degrading treatment

In *Minister for Justice v Damji*,[8] the Supreme Court considered the circumstances in which extradition is prohibited due to the risk of inhuman or degrading treatment.

The appellant was convicted and sentenced to five years' imprisonment in the UK in 2016. She was released on licence in 2019 but breached the conditions of her release. She was prosecuted for these breaches, attended the first three days of the trial, and then absconded to this jurisdiction before conviction and sentence. She was convicted and ultimately sentenced to 18 months' imprisonment. In the relevant warrant, the UK authorities requested her return to complete the balance of the custodial sentences. The appellant objected on the basis that she was a psychologically vulnerable person, and that, while she was in prison in the UK earlier, there was a failure to diagnose her condition accurately, and that, were she surrendered, she would not receive the forms of therapy she required for her condition. It was argued therefore that surrender would lead to her being exposed to inhuman or degrading treatment.

In assessing the case, the Supreme Court noted that the protections under the Constitution and Convention in respect of inhuman or degrading treatment were not identical. The constitutional obligation to vindicate the "person of the citizen" entailed more than a prohibition of physical intrusion, and could also be seen as a protection of an individual's psychological well-being. However, there was no constitutional authority providing that there is an absolute duty to provide the best medical treatment, irrespective of circumstances, to a prisoner. The constitutional obligation is, rather, to provide medical treatment that would be as good as reasonably possible, in all the circumstances of the case.

This essentially requires the same treatment as that to which the State authorities in the issuing state have committed themselves to providing for the community as a whole. The Supreme Court held that just as there can be no obligation on this State to provide the best medical treatment, irrespective of circumstance, so also the Constitution cannot place a high obligation on a requesting state in an extradition matter, where the same duty would not involve providing the same treatment to the community. For that reason, it was not open to a person facing surrender to identify one highly specialised form of therapy, not easily obtained even by members of the community at liberty, and on that basis contend that their surrender should be refused.

The Supreme Court held that for surrender to be refused on this basis, there would need to be cogent, coherent evidence to establish that there is a serious risk that the relevant treatment would not be provided. The court held that, in this case, the evidence simply did not go far enough.

Search warrants

In *Corcoran v Commissioner of An Garda* Síochána,[9] the Supreme Court considered the entitlement of An Garda Síochána to access material while investigating serious crime that may identify journalistic sources.

The applicant was a journalist. During the course of a criminal investigation, gardaí seized the applicant's mobile phone pursuant to a search warrant granted by the District Court under s. 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. Following this, the applicant brought judicial review proceedings seeking to quash the warrant, and an order directing the return of any information and data accessed on the phone, together with deletion of any copies retained by the respondents.

Hogan J. noted that the appeal had exposed clear weaknesses in the operability and general workability of s. 10 of the 1997 Act in relation to issues of journalistic privilege. However, he held that a District Court judge was not obliged to grant a warrant under the section simply because the statutory grounds for granting the warrant were satisfied. Instead, it was open to a District Court judge to refuse to issue a warrant where it would involve a breach of a journalist's rights under Article 10 of the Convention or under Article 40.6.1°. Hogan J. held in this regard that one might say that the Oireachtas could never have intended that the exercise of the s. 10 power was to be mechanical or directionless or that the District Court could not have had regard to the fact that its order will have the effect of infringing the rights guaranteed by those provisions.

Hogan J. noted that the judicial discretion to refuse to grant a warrant on that basis could not be exercised in a meaningful fashion unless the judge called upon to do so stands possessed of all the relevant materials pertinent to the exercise of that discretion where this might breach the State's obligations to uphold rights.

> ... when the subject matter of the search has rights that are directly relevant to the search, the District Court judge must be informed of the facts supporting that right.

For that reason, where the subject matter of the search has rights that are directly relevant to the search, the District Court judge must be informed of the facts supporting that right.

Hogan J. held that, viewed objectively, the information sworn in this case failed to adequately set out the facts as they omitted to record that Mr Corcoran had already been interviewed under caution over three months previously and that he had declined to identify his sources or to allow his mobile telephone to be accessed, citing journalistic privilege. In those circumstances, Hogan J. held the warrant ought to be quashed and set aside simply by reason of the objective failure of the grounding information to disclose a highly material fact, namely, the fact that journalistic privilege had already been claimed by the journalist in question.

In *DPP v Quirke,* the Supreme Court gave further consideration to the seizure of computer devices under a search warrant.[10] Charleton J. held that a computer device – including a mobile phone – is a portal to a digital space. Judicial authorisation is required for gardaí to enter lawfully into that space, in the same

way it would be required for a home or premises. Accordingly, Charleton J. held that where a computer device was seized under a search warrant, it could only be "opened and interrogated as to the digital space" in one of two situations. The first was where the warrant that was applied for was granted on the basis of sworn information setting out why a digital search was needed as part of the investigation for the particular crime in respect of which the warrant was issued. Secondly, in the event that the warrant did not cover seizure of computer devices, a further warrant would have to be obtained to allow the search of the digital space provided by those devices.

In the appellant's case, Charleton J. held that the search of the appellant's computer, as a search within the digital space, had not been authorised by a judge. An information was sworn before the issuing judge seeking physical items only. The need to search in the digital space was not brought to the attention of the judge. This meant that the search of the computer was unlawful.

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4. [2022] IESC 29 (unreported, Supreme Court, June 30, 2022).
5. [2022] IESC 37 (unreported, Supreme Court, August 4, 2022).
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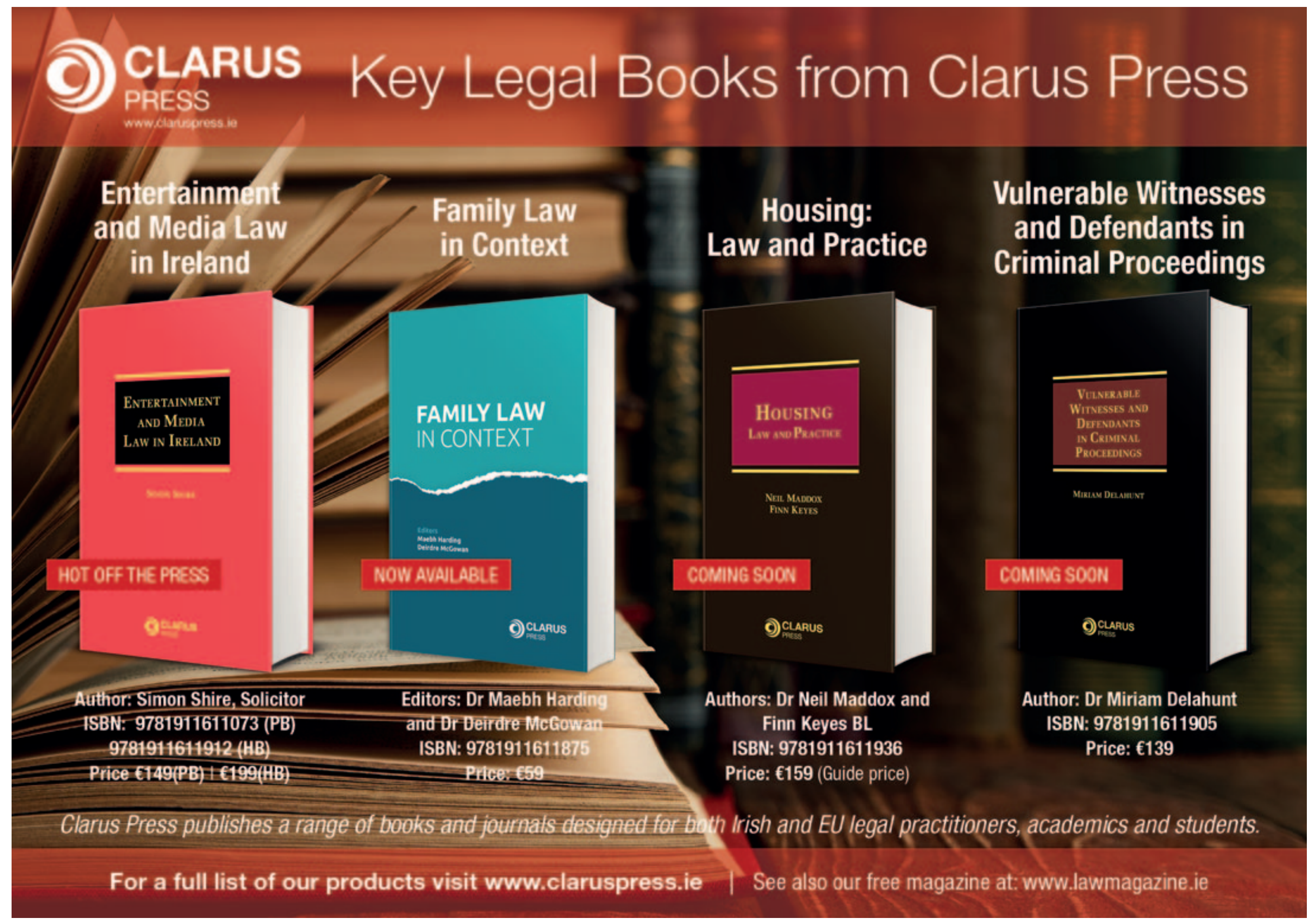

PROTECTING
PROFESSIONAL PRACTICE

The Professional Practices Committee of The Bar of Ireland works to support members in a range of practice areas.

Darren Lehane SC

The Professional Practices Committee exists because of the commitment of the Bar to maintaining the highest professional and ethical standards. Public awareness that the Bar adheres to these standards is one of the reasons why the independent referral Bar endures.

Most citizens who never need or meet a barrister are aware in general terms of the 'cab rank' rule and take confidence from the fact that should they ever need legal representation, the members of the Law Library are accessible to all. That confidence, which has been built up and maintained by generations of barristers, is essential not only to the survival of the Bar but to public confidence in the justice system as a whole. Public confidence in the administration of justice is integral to a properly functioning democracy. Recent developments in other common law jurisdictions show how easily the justice system can become a target once that confidence is lost or reduced.

The Professional Practices Committee is a permanent committee of the Council of The Bar of Ireland. It is composed of members of the Council and external members, both junior and senior counsel, from all over Ireland and all practice areas. It generally meets every two weeks during term time and Committee members are available to deal with urgent queries. The Committee monitors all matters relating to professional practice and may investigate and, if necessary, refer and present complaints against any member of the Law Library without the necessity of having the matter referred by a third party.

Objectives

Each year the Professional Practices Committee sets out its strategic objectives. The objectives for 2023-2024 are as follows:

1. The Committee shall continue to provide an advisory service for the benefit of all members to assist them to identify, interpret and comply with their professional obligations and the Code of Conduct of The Bar of Ireland.

2. The Committee shall oversee continuing professional development (CPD) certification for 2022/2023, and define and prepare for CPD certification 2023/2024, and for the first CPD audit in Michaelmas 2024 of 100 to 300 members. Members will also have noticed the CPD output of the Committee on matters relating to knowledge of the Code of Conduct, truthfulness, conflict of interest, self-awareness, instructions and respect.

3. The Committee shall supervise the transfer of data to the Legal Services Regulatory Authority (LSRA), the data being information relating to professional indemnity insurance (PII) renewal.

4. The Committee shall promulgate the work of the ethics subcommittee. This subcommittee oversees the development and publication of guidance for members on the Ethics Hub portion of the website.

5. The Committee shall proactively engage with the implementation of the Legal Services Regulation Act, 2015.

6. The Committee shall promote awareness among members of the Law Library of the role of the LSRA as the external regulator of the profession.

7. The Committee shall use a triage process to ensure that its heavy workload is proportionally distributed across the whole expertise and competence of the Committee, thus ensuring that the Committee members 'on call' in between meetings represent a broad spectrum of the Bar through gender, geography and experience.

8. The Committee shall continue to work on the disciplinary provisions of the LSRA Act 2015 and will devolve structures (under the Disciplinary Regulations) to deal with any disciplinary issues affecting members of the Law Library that might fall outside the LSRA's remit.

9. The Committee shall undertake such additional work or actions as may be required by the Council from time to time, including drafting and providing guidance for members. A current project is the preparation of guidance regarding issues arising from the use of AI language models (including ChatGPT) in legal practice.

It is very important that members avail of the assistance offered by the Professional Practices Committee and its secretariat when the need arises. As the old adage goes: "A stitch in time saves nine".

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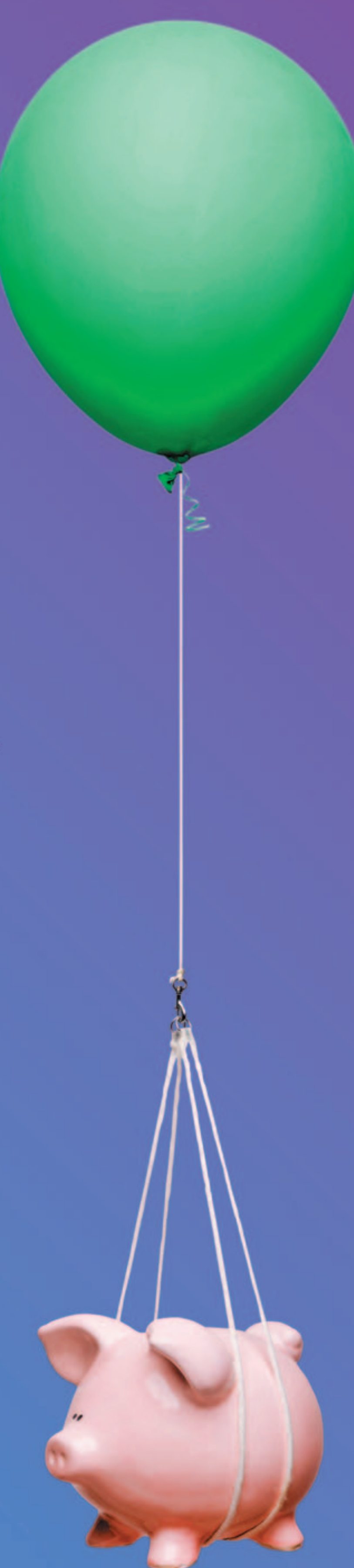

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