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The Criminal Procedure Act 2021

INTERVIEW
Ms Justice Marie Baker

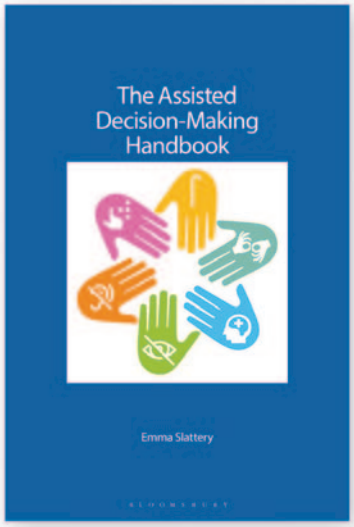
CLOSING ARGUMENT
Costs in family law

THE BAR REVIEW

VOLUME 29 / NUMBER 1 / FEBRUARY 2024

LESSONS FROM MEDIATING THE GOOD FRIDAY AGREEMENT

BLOOMSBURY PROFESSIONAL IRELAND'S SPRING 2024 PUBLISHING HIGHLIGHTS



The Assisted Decision-Making Handbook

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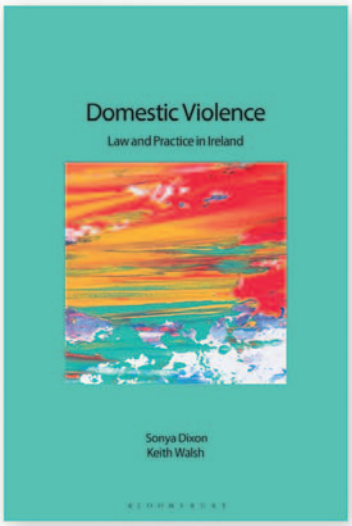

Domestic Violence: Law and Practice in Ireland

By Sonya Dixon and Keith Walsh

A practical and easily digestible explanation of recent case law and changes to this area, such as the protections now available to victims of domestic violence including giving evidence by live television link.

Pub Date: Feb 2024 | **ISBN:** 9781526522399
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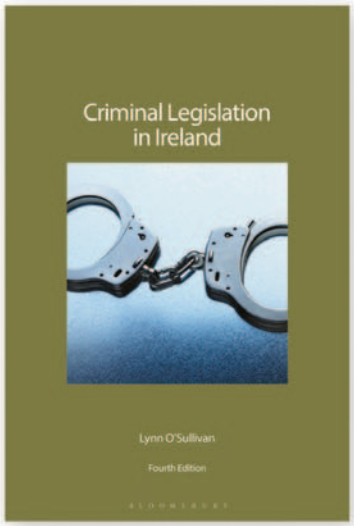
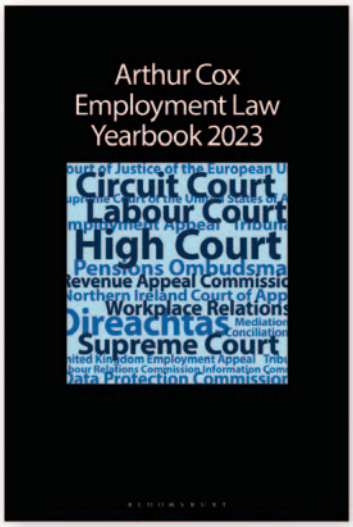


Criminal Legislation in Ireland, 4th edition

By Lynn O'Sullivan

Consolidates the most important and frequently-used pieces of criminal legislation and facilitates easy reference to legislation for criminal practitioners and students alike.

Pub Date: Feb 2024 | **ISBN:** 9781526529183
Paperback Price: €205 | **eBook:** €180.99



Arthur Cox Employment Law Yearbook 2023

Set out in alphabetical format for ease of use, the Yearbook covers developments during 2023 in employment law, equality, industrial relations, pensions, taxation relating to employment and data protection law.

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FEBRUARY 2024

CONTENTS

4
Message from the Chair

5
Editor's note

6
News
Advanced negotiation
Denham Fellowship

11
News feature
Time for new traditions?

14
News feature
New developments with Lexis

i
Legal update

18
Interview
Full circle

23
Law in practice
Impact of the Criminal Procedure Act 2021

28
Law in practice
Lessons from mediating the Good Friday Agreement

34
Closing argument
Costs in family law

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NEW YEAR, NEW RESOLUTIONS!

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

I'd very much like to take this opportunity to welcome members back after the Christmas vacation and, as we head into 2024, suggest a new year's resolution for each and every one of us: to embrace the physical space that is our Law Library and make use of it to facilitate and encourage chats and conversations. After all, we are a social species and it's much easier (and far more effective) to meet and mingle in person rather than communicating by phone/text or chatting online. Whether it's to hear about recent happenings in court, discuss ongoing cases, negotiate settlements, debrief after a stressful day or simply shoot the breeze, let's 'embrace our space' and look out for the professional and personal well-being of all our colleagues! And in doing so, we can also support the Barristers' Tea Rooms and the newly reopened Café in the Distillery Building.

World Bar Conference

Continuing the theme of meeting and mingling, members will hopefully be aware that the World Bar Conference, under the auspices of the International Council for Advocates and Barristers (ICAB), will be hosted by The Bar of Ireland and The Bar of Northern Ireland in Belfast and Dublin, from May 15-17. Every two years, the ICAB organises an international legal conference in a different city worldwide (with the Bar in the host city being responsible for the running of the conference) and it is the only conference that brings together all members of the ICAB and guest jurisdictions for three days of debate and discussion. Planning for this prestigious conference is well underway and members are encouraged to register early at https://www.worldbar2024.com/ for what promises to be a world-class gathering of legal minds.

Something 'old'

You will recall that at the beginning of the 2023/24 legal year, Council took the relatively unprecedented step of recommending a one-day withdrawal of services for criminal practitioners on October 3. There was overwhelming support for such protest action, and one week later the Government announced, in conjunction with Budget 2024, an increase in funding for professional fees for criminal barristers. This funding allocation represents an unwinding of the

10% cut that was uniquely applied to barristers in 2011. However, even with the restoration of this 10%, the full range of FEMPI-era cuts imposed across the public sector continues to apply to our profession. That situation has caused a real crisis in attracting and retaining skilled barristers at the criminal Bar, and constitutes a threat to the integrity of the criminal justice system, and it simply cannot be justified. To that end, the announcement by the Government to review the structure and level of fees paid to criminal barristers was welcomed and the Council, through the Criminal State Bar Committee, will continue to pursue our claim for further unwinding of the cuts, and restoration of the link with public sector pay agreements.

The revised fee structure has been implemented with effect from January 1, 2024, and discussions have already commenced with Department of Justice officials to advance the review of the Criminal Legal Aid scheme. That process is expected to come to an early conclusion in recognition of the significant delay in resolving this issue since the 2018 review and in order to avoid any further withdrawal of professional services.

And something 'new'

Members cannot but be aware of the appointment, in 2023, of 24 new judges. These appointments have come about by reason of recommendations contained in the Judicial Planning Working Group (JPWG) report, published in February 2023. The Courts Service has commented that "some of the recommendations will require systemic change impacting not only on the Courts Service and the judiciary, but the wider courts system".

Members' attention is drawn to the article on the JPWG recommendations on page 11 of this edition of *The Bar Review*.

PRACTICE AND PROCEDURE

An interview with one of our most eminent judges, and a look at what mediators can learn from the peace process.

Helen Murray BL
Editor
The Bar Review

We usher in the New Year at *The Bar Review* with an interview with Ms Justice Marie Baker, Supreme Court judge and Chair of the Electoral Commission. Ms Justice Baker speaks of her unusual route to the Bar and recalls the experiences, and certain cases in particular, which have influenced her over the course of her career to date.

Amy Heffron BL examines the breadth of the Criminal Procedure Act 2021; this law in practice article investigates the effect of preliminary trial hearings on substantive trials and explains the position on the documentation that can be given to deliberating juries.

Turlough O'Donnell, recently retired from The Bar of Ireland, writes about mediation and, in particular, the lessons to be learned from the Northern Ireland peace process for those mediating disputes.

This article references a recent interview with retired United States Senator George Mitchell in the *Harvard Business Review*. As mediation is becoming an increasingly popular means of resolving disputes, this is essential reading for practitioners.

Finally, Ferga McGloughlin BL draws our attention to some recent costs decisions in family law. In most cases, parties to family law disputes pay their own costs, regardless of the outcome. However, it would appear that parties who are responsible for protracted litigation may well have to pick up the tab.

Specialist Bar Association news

Sports Law Bar Association

The Sports Law Bar Association (SLBA) marked the end of 2023 with its Annual Conference on December 1. Attendees heard from two panels of experts in the areas of discipline and governance in sport. In the style of fireside chats, Mark Curran BL and Emma Davey BL chaired discussions around disciplinary fairness in sports, and the complexities in maintaining a just and equitable sports environment.

Chair of the SLBA, Tim O'Connor BL, spoke on 'Disciplinary Fairness in Sport', while a fascinating and insightful panel on 'Governance in Sport' was chaired by Emma Davey BL, with John Twomey of Irish Sailing, Kevin Hoy of Sports Ireland, Rachel Barry of Irish Hockey, and Niall Geaney of Fédération Internationale de l'Automobile (FIA).

From left: Fiona Horlick KC; Mark Curran BL; and, Aoife Farrelly BL listen to Chair of the SLBA, Tim O'Connor BL, speaking on 'Disciplinary Fairness in Sport'.

Immigration, Asylum and Citizenship Bar Association

From left: Marie Flynn BL; Dr Clíodhna Murphy; Patricia Brazil SC; Mr Justice Maurice Collins; Rossa Fanning SC, Attorney General of Ireland; and, Michael Conlon SC, Chair, IACBA.

Attendees at the Immigration, Asylum and Citizenship Bar Association (IACBA) Annual Conference on November 24 benefitted from a panel of speakers including leading experts, judges and advocates discussing notable European Court of Human Rights case law, developments in asylum cases, and judicial perspectives on the Irish citizenship regime. The event offered a unique platform for legal professionals, academics and the public to gain insights into the evolving legal landscape concerning asylum and citizenship in Ireland and Europe.

Professional, Regulatory and Disciplinary Bar Association

The Professional, Regulatory and Disciplinary Bar Association (PRDBA) held its Annual Conference, 'Fair Procedures in Fitness to Practice Inquiries', on December 8. President of the High Court Mr Justice David Barniville chaired the event and lent his expertise to guide conversations on the essential aspects of fair procedures within fitness to practice inquiries. Conversations explored common issues arising in fitness to practice proceedings, including the rules of evidence, hearsay, and the issue of delay.

Frank Beatty SC, Chair of the PRDBA, delivers the opening remarks at the Annual PRDBA Conference.

Climate Bar Association

Dedicated to pursuing pro-environmental initiatives within the Law Library and in society, the Climate Bar Association hosted its latest event, 'Year of Environmental Justice: Broader Remedies for Environmental Law?' as the kick-off for The Bar of Ireland's Natural Justice campaign.

The event focused on the proposed Protection of Hedgerows Bill, which aims to protect the native Irish hedgerow. This is a significant feature of our landscape and natural heritage, providing essential ecosystem services such as carbon sequestration and reservoirs of biodiversity.

The Natural Justice initiative aims to improve public knowledge on the intersection of law and the environment, build a community response to environmental issues, and equip individuals to act. The initiative also represents an opportunity to showcase the work undertaken by The Bar of Ireland in respect of its own Environmental Sustainability Roadmap. The launch event served as the first of many engagements under the Natural Justice campaign.

From left: Steven Matthews TD, Green Party; Leesha O'Driscoll SC; Dr Alan Moore, Hedgerows Ireland; Sara Phelan SC, Chair, Council of The Bar of Ireland; Neil Foulkes, Hedgerows Ireland (Tipperary); Clíona Kimber SC; and, Brian Leddin TD, Green Party.

Financial Services Bar Association

Mark your calendars! The Financial Services Bar Association will host its 2024 Annual Conference on Thursday, February 15. Three lively panel discussions will cover topics such as 'Anti-Money Laundering', 'Claims' and 'Criminal Enforcement', and attendees will hear from a variety of practitioners in this practice area and across the industry.

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Advanced negotiation

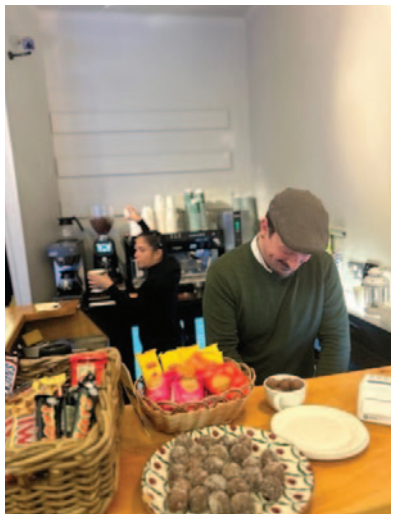
Eighteen participants and 15 facilitators took part in January's advanced negotiation course in the Dublin Dispute Resolution Centre. The two-day course was organised by the Advanced Negotiation Committee, and comprised role play negotiations with two case files, along with one-to-one feedback sessions, and seminars in psychology in negotiation and drafting settlement terms.

Pictured at the recent advanced negotiation course were: Back row (from left): Catherine Dunne BL; Gerard Colleran BL; Karl Quinn BL; Barra McCabe BL; Gerard Kennedy BL; Medb McDonagh BL; Niall Buckley SC (Chair, Advanced Negotiation Committee); Jalil Rizvi BL; Gearóid Costelloe BL; and, William Abrahamson SC (course faculty). Front row (from left): Jack Fenton BL; Shelley Horan BL (course faculty); Paul Hegarty BL; Catherine Needham BL (Advanced Negotiation Committee); Jennifer Good BL; Ingrid Miley BL; and, Dympna Devenney BL.

Barristers and baristas

The Bar of Ireland is delighted to announce the return of fresh roasted coffee to the Distillery Building. The Bar extends its thanks to Jorge, Margaret, the Estates team, Council, and all involved in getting this project across the line.

Open from 8.00am to 5.00pm, Monday through Friday, come in to catch up with colleagues with a coffee and pastry.



Come see our baristas Jorge and Margaret for a cappuccino on the ground floor of the Distillery Building on Church Street.

Celebrating the Denham Fellowship

The continuing success of the Denham Fellowship was celebrated in December. In attendance were Denham Fellows, past and current, along with their masters and mentors, as well as members of the current Denham Fellowship Committee, and past members of the Denham Fellowship Board, including its former chair, former Chief Justice Mrs Justice Susan Denham.

From left: Cathy Maguire SC, Chair of the Denham Fellowship Committee; Mrs Justice Susan Denham, former Chief Justice and former Chair of the Denham Fellowship Board; and, Sara Phelan SC, Chair, Council of The Bar of Ireland.

TIME FOR NEW TRADITIONS?

The recommendations contained in the report of the Judicial Planning Working Group have the potential to bring about a sea change in how the courts, and members of the Law Library, carry out their work.

Sara Phelan SC
Chair, Council of The Bar of Ireland

> As part of its 2020 'Programme for Government: Our Shared Future', the Government "prioritised reforming the courts to make their processes more efficient, affordable and accessible".

In Anatevka (*Fiddler on the Roof*), Tevye sang that tradition enabled the villagers to keep their balance, and in many respects life at the Bar is not much different. Tradition is an anchor and gives us a sense of security amidst the business and busyness of our daily lives. But over time, traditions can change and evolve.

When I commenced practice in October 1996, the Courts and Court Officers Act 1995 had not been long commenced and the wearing of my new wig, purchased at a not-inconsiderable cost, was no longer a mandatory requirement.[1] It took a number of years (perhaps subconsciously I wanted to 'get my money's worth' out of the investment?) before I stopped wearing my wig altogether, and now, in 2024, wig-wearers in the Law Library, and among the judiciary, are the exception rather than the norm. Within less than a quarter of a century, the tradition of wig-wearing has changed and evolved.

Judicial Planning Working Group

So too, perhaps, will the tradition of the Long Vacation and many of the other traditions we currently associate with our professional lives. As part of its 2020 'Programme for Government: Our Shared Future', the Government "prioritised reforming the courts to make their processes more efficient, affordable and accessible".[2] This led to the establishment by the Department of Justice in 2021 of a Judicial Planning Working Group (JPWG) to

"identify reform initiatives and evaluate [the] staffing needs required to enhance the efficient administration of justice"[2] in the context of broader justice sector reforms. The Bar of Ireland made a submission to,[3] and participated in a (brief) online meeting with, the JPWG in July 2021.

On February 24, 2023, two reports were published: the JPWG Report;[4] and, the OECD Report on 'Modernising Staffing and Court Management Practices in Ireland: Towards a More Responsive and Resilient Justice System'.[5] The reports were welcomed by, among others, the Chief Justice and Presidents of all courts, and the Courts Service. As noted by the Courts Service on the day of publication, "some of the recommendations will require systemic change impacting not only on the Courts Service and the judiciary, but the wider courts system",[6] and we have already begun to see the impact of this "systemic change" with, for example, the publication of the Notice from the President of the High Court, Mr Justice David Barniville, on December 21, 2023, regarding a pilot project for the 2024 Long Vacation.[7]

Recommendations

While the JPWG Report makes 54 recommendations in total, from improving services to court users, and the effective use and management of judicial resources, to judicial skills and training, and data collection and management, it is clear that some recommendations will have a greater impact on practitioners than others. The most significant of these impacts are, firstly, the appointment of additional judges, with a view to providing access to justice in a timely manner and addressing existing backlogs and excessive waiting times, and secondly, recommended modifications to our traditional working days and weeks, and to the courts' vacation periods.

Many other recommendations are directed at, for example, the Courts Service, with a view to "support[ing] the increased number of judges recommended in [the] Report and the enhanced roles required to be carried out by the Courts Service, to support the judiciary".

Chapter 3: Judicial Resources

The JPWG recommended that a phased approach be taken to addressing judicial resourcing and that 44 additional judges be appointed between February 2023 and the end of 2024 in two phases, with 24 judges to be appointed in 2023 and, subject to satisfactory review against metrics agreed between the judiciary, the Courts Service and the Department of Justice, a further 20 judges to be appointed before the end of 2024. It was also recommended that additional numbers in further phases should be determined by a review in 2025 of judicial needs up to 2028. We have already seen the impact of this recommendation, with the appointment of 24 additional judges in 2023, and the appointment of additional judges in 2024 is eagerly anticipated.

> Of all of the descriptors in the legal world, surely the 'Long Vacation' is one of the most misleading.

Chapter 4: Effective Use and Management of Judicial Resources

Of all of the descriptors in the legal world, surely the 'Long Vacation' is one of the most misleading. 'Long' it may be, by reference to the fact that the Courts (with the exception of the District Court) heretofore did not sit for routine business during the months of August and September, but a 'Vacation', by reference to the traditionally understood meaning of that word, it is most certainly not! For the members of the Bar and the judiciary alike, a significant period of the Long Vacation is an opportunity to catch up on matters that perhaps cannot be attended to during busy court sitting weeks, such as paperwork, practice administration and judgment writing.

While the JPWG Report does not appear to suggest that vacation periods should be changed in the short term, it is very clear that a longer working year is envisaged in the long term, "with any period of court closure limited to some days in December and a short period in summer". In the medium term, a pilot project is recommended to consider "staggering court vacation periods across different courts".

The Report also reviews the maximisation of courtroom use and recommends that "District Court and Circuit Court sittings, should, where possible, be scheduled over five days (Monday to Friday) subject to the direction of the relevant Court Presidents" and that, "[s]ubject to adequate resources being available, a number of hearings should be scheduled over longer hearing days through, for example, allocated time slots".

On any level, more judges with more sitting days can only mean a greater throughput of cases in a more timely manner, benefitting litigants and the confidence of the public in the efficient administration of justice. Clearly, a knock-on advantage has to be more work for practitioners and the benefits of this cannot be gainsaid. But the potential loss of the traditional vacation period means that practitioners in the future may need to consciously set aside holiday periods for themselves, in addition to time to attend to paperwork and practice administration, and this sea change is certainly something that will take getting used to.

That said, for those practitioners with school-going children, for example, it may mean that taking 'time off' in July and August to coincide with school holidays (and taking time off to coincide with midterm breaks) becomes the norm, and it will fall to each of us to set the parameters of the work–life balance to which

we aspire. It should also become more acceptable to instructing solicitors, clients, the judiciary, and the Courts Service that practitioners are not required to slavishly adhere to the Courts' sitting calendar, and flexibility by all concerned will assist in the transition as this is implemented.

The Report also recommends that the District Court be "restructured into a smaller number of larger districts (and aligned as required with Circuits) with a view to the more effective and efficient use of resources, and achieving better service delivery to Court users", and that "Circuit Court geographical areas should be reviewed in parallel with the District Court areas". This restructuring may well affect Circuit Court and District Court practitioners in the years to come.

Chapter 6: Improving Services to Court Users

Many of the recommendations under this heading may also positively impact upon practitioners, in addition to litigants and other court users, in terms of streamlining procedures and pre-hearing processes, and the development of comprehensive information technology systems, court and case management techniques, and the enhanced use of digitalisation in courts, including the use of e-documents.

Continuing to build on the options for remote and hybrid hearings is also recommended, with a note that "the impact of virtual hearings on judicial workloads should be monitored". Presumably, the impact of virtual hearings on the user experience (from the perspective of litigants, witnesses and practitioners) will also be monitored to ensure the best possible outcomes for those litigants and access to justice for all.[8]

The Council of The Bar of Ireland is of the view that virtual hearings should only be 'the norm' where such hearings are administrative/procedural rather than being substantive /dispositive in nature.

Presumably, the impact of virtual hearings on the user experience will also be monitored to ensure the best possible outcomes for litigants and access to justice for all.

Enhanced utilisation of alternative dispute resolution (ADR) processes is also recommended, as are support and training to "ensure that litigants are offered early opportunities to choose a non-litigation route", and enhanced information to support lay litigants.

Consultation

Council notes that the President of the High Court intends "to consult with the Chair of the Bar Council and with the President of the Law Society"[6] in early course, and the Council has recently corresponded with the Department of Justice regarding practitioner inclusion on the Sub-group on Stakeholder Engagement under the auspice of the Judicial Resources Implementation Steering Group. The Report also recognises the importance of "the sustained involvement of relevant stakeholders" regarding the phased automation of work processes, and the Council anticipates practitioner consultation and involvement in this regard. We remain committed to working with the judiciary and the Courts Service in implementing the many changes recommended by the JPWG.

References

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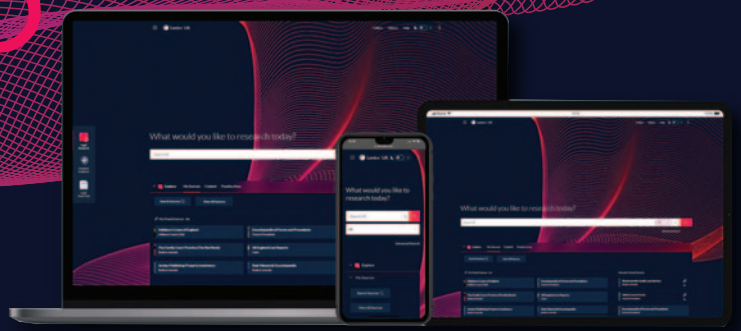
NEW DEVELOPMENTS WITH LEXIS

Important new changes to Lexis resources use the latest technology to create an improved service for members.



Nuala Byrne
Director of Library & Information Services

Lexis Library and Lexis PSL are now known as Lexis+. The two resources have been brought together onto the same platform, allowing searching and retrieval of relevant and connected content from one search interface. Having been implemented on January 31, 2024, Lexis+ is now available to all members on Barrister's Desktop.

What's new with Lexis+?

Jeff Pfeifer, Chief Product Officer, LexisNexis UK and North America, has this to say about the new resource: "Lexis+ has been designed for the ways that lawyers work … Deeply integrated product components, cutting-edge technologies and modern design elements put LexisNexis applications, content and data that lawyers need right at their fingertips".

Certainly, at first glance, the user interface is clean, modern and uncluttered. Search and navigation are intuitive, and the accessible content is clearly visible. Lexis+ is available to access from any PC/laptop or mobile device.

The resources provided in the Help section are comprehensive and clear. Both text and short videos are provided. Help is also context related in that relevant help prompts are provided throughout, thus enhancing the user experience. On deeper examination, it is clear that the changes offer more than a modern look and feel. The level of technology implemented allows for comprehensive, powerful and efficient searching with the ability to integrate the product into a workflow and collaborate with others. Lexis+ has been built with collaboration in mind. Various features assist with workflow management, including permanent storage work folders that may be shared with others, and the ability to personalise documents by adding notes and highlighting sections of the text.

Familiar content and the *Irish Reports*

Lexis+ contains the familiar content from LexisNexis Library as well as Lexis PSL.

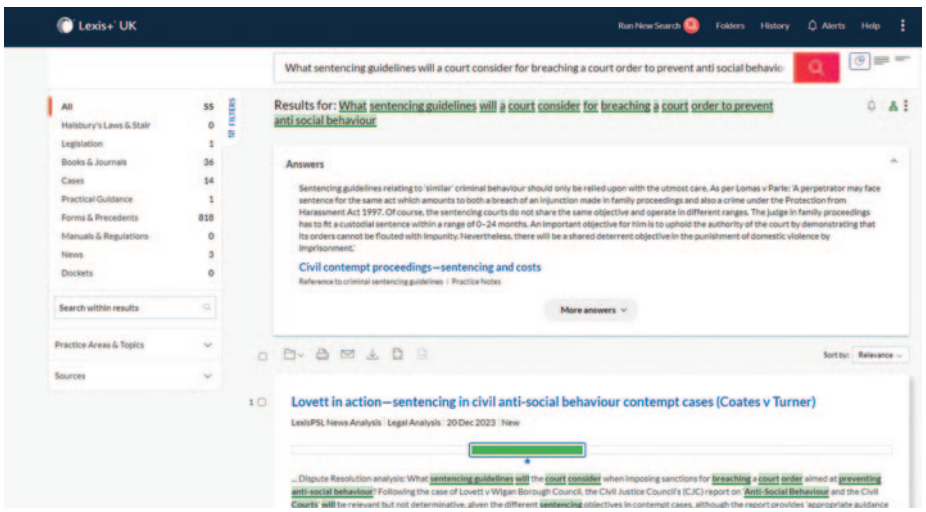


FIGURE 1: Lexis+ results from a natural language search asking the question 'What sentencing guidelines will a court consider for breaching a court order to prevent anti-social behaviour?'

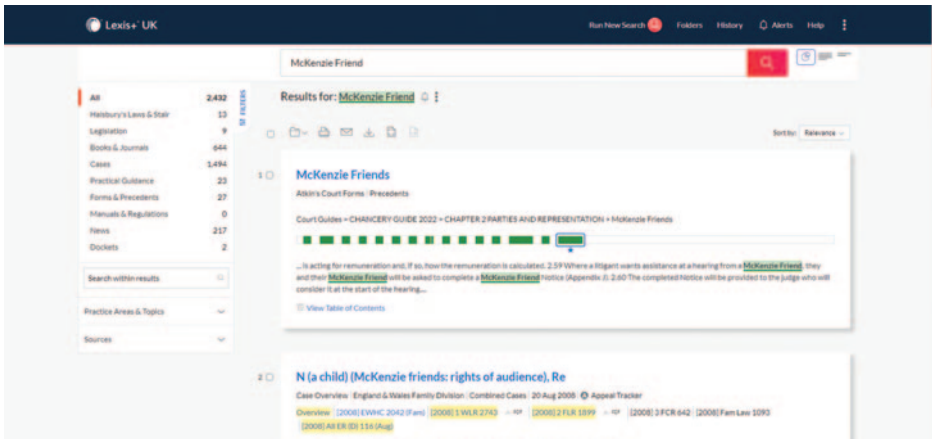


FIGURE 2: Lexis+ results for the phrase 'mckenzie friend'.

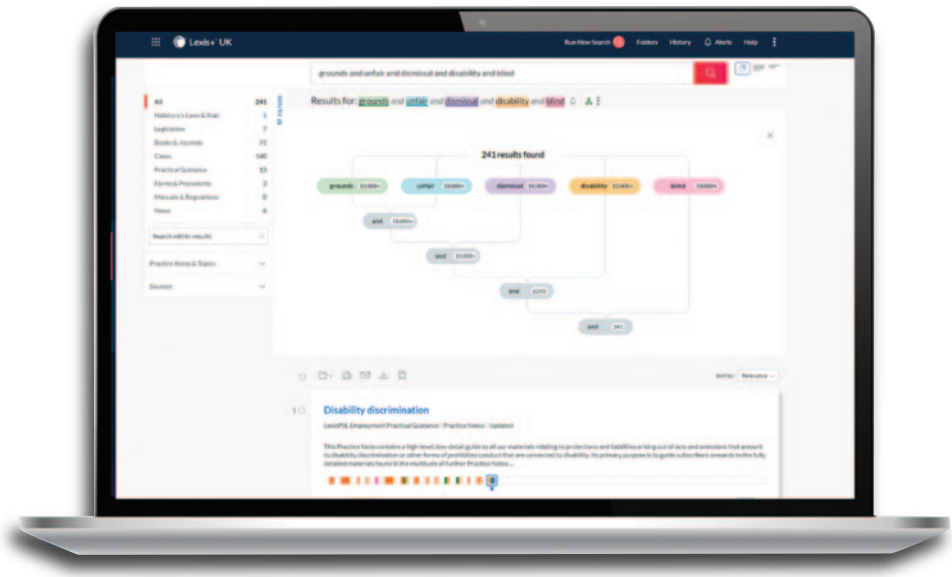


FIGURE 3: Colour-coded Search Term Maps allow users to identify and pinpoint key content.

Each module provides a source overview; for example, Case Overview states that it is "a daily updated comprehensive database of over 300,000 case records, dating from 1502, which provides procedural history, annotations, keywords, summaries and links to all subscribed versions of a case". A traffic light system takes into account both the procedural history and the subsequent judicial consideration of a case. Citations to a wide range of law reports are included, with hyperlinks to LexisNexis cases that include the *Irish Reports*. The other modules have similar source information provided.

Powerful searching on Lexis+

Lexis+ provides access to its entire database through one search. It is possible to search across all resources, or alternatively to carry out more focused searching, for example by resource or jurisdiction.

In both cases, you can use plain language searches, which are similar to using an Internet search engine such as Google, or Boolean searches, where the terms are entered with Boolean connectors.

When the search is entered, Lexis+ will determine to run the search as a natural language search using AI-powered technology or search using terms and connectors (Boolean), depending on how the search was structured.

Natural language searching – Lexis+ Answer Cards

The results of a natural language search asking the question 'What sentencing guidelines will a court consider for breaching a court order to prevent anti-social behaviour?' are shown in **Figure 1.** Lexis+ uses AI-powered technology to analyse natural language questions and offer immediate answers.

It returns a result specific to that query using advanced machine learning, cognitive computing, and natural language processing technologies to deliver the most authoritative answer to the natural language question, together with precise search results. Lexis+ understands the intent of the question and delivers a precise answer in the form of an Answer Card.

The Answer Card provides the answer as well as links to the specific text within the document that is the source of the answer, and suggests related topics and concepts to help expand the search. This feature allows interrogation of the system for nuanced legal questions to receive targeted answers.

Lexis+ Answer Cards

The results for the phrase 'mckenzie friend' – the more usual way of interrogating a legal database – can be seen in **Figure 2.** Searches are retained in the search history and may be repeated and compared with similar searches.

Search Term Maps

Another search feature from Lexis+ is the visualisation software used to colour code results, known as Search Term Maps. Search terms are colour coded and these appear in the results, allowing a quick scan of the results to identify and pinpoint key sections of content, cases and documents **(Figure 3).**

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LEGAL
UPDATE
VOLUME 29 / NUMBER 1 / FEBRUARY 2024

A directory of legislation, articles and acquisitions received in the Law Library from November 10, 2023, to January 12, 2024
Judgment information supplied by Vlex Justis Ltd.
Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.

AGRICULTURE

Statutory instruments

Agricultural and Food Supply Chain Act 2023 (Commencement) Order 2023 – SI 623/2023

Agricultural and Food Supply Chain Act 2023 (Establishment Day) Order 2023 – SI 624/2023

Agricultural and Food Supply Chain (Unfair Trading) Regulations 2023 – SI 625/2023

ANIMALS

Statutory instruments

Horse and Greyhound Racing Fund Regulations 2023 – SI 642/2023

ASSOCIATIONS

Acts

The Royal Hibernian Academy (Amendment of Charter) Act 2023 – Act 1 (Private)/2023 –
Signed on December 20, 2023

BANKING

Mortgage deed – Fraudulent instrument – Damages – Appellants appealing from a decision of the Circuit Court – Whether the respondent signed a mortgage deed – 19/12/2023 – [2023] IEHC 736

Madigan v Promontoria [Oyster] Designated Activity Company and another

Possession order – Extension of time – Delay – Second defendant seeking extension of time – Whether unexplained delay mitigated against discretion being exercised in favour of extending time – 12/12/2023 – [2023] IHEC 738

Start Mortgages Ltd v Ryan and another

Statutory instruments

Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) (Amendment) Regulations 2023 – SI 565/2023

Central Bank Reform Act 2010 (Sections 20 and 22) (Amendment) Regulations 2023 – SI 663/2023

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BUILDING LAW

Articles

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CHILDREN

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COMMUNICATIONS

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Wireless Telegraphy (Fixed Radio Link Licence) Regulations 2023 – SI 593/2023

Wireless Telegraphy (Liberalised Use and Related Licences in the 700 MHz Duplex, 2.1 GHz, 2.3 GHz and 2.6 GHz Bands) (Amendment No. 2) Regulations 2023 – SI 594/2023

Broadcasting Act 2009 (Section 21) Levy Order 2023 – SI 657/2023

COMPANY LAW

Stay – Jurisdiction – Companies Act 2014 Part 10A – Stay sought pursuant to s. 558N of the Companies Act 2014 – Whether High Court was appropriate jurisdiction in which to commence proceedings – 17/11/2023 – [2023] IEHC 641

Bio Marine Ingredients Ireland Ltd v Companies Act 2014

Register of Companies – Restoration – Costs – Appellants appealing the decision to restore a company to the Register of Companies – Whether the statutory requirements for restoration had been met – 12/12/2023 – [2023] IECA 308

O'Donoghue v Everyday Finance DAC

Articles

Carey, Á. Aligning theory and reality – theories of the company and piercing the corporate veil in Irish law. *Irish Law Times* 2023; 41 (16): 231-236

Statutory instruments

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Industrial and Provident Societies Act 1893 (Section 14A(1)) (Covid-19) Order 2023 – SI 647/2023

CONSTITUTIONAL LAW

Constitutionality – Judicial eligibility – Article 26.2.1° of the Constitution – President referring sections of the Judicial Appointments Commission Bill 2022 pursuant to Article 26.2.1° of the Constitution – Whether sections of the Judicial Appointments Commission Bill 2022 were repugnant to the Constitution – 08/12/2023 – [2023] IESC 34

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CONTRACT

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Davey v Ulster Bank Ireland Ltd

Breach of contract – Frivolous and vexatious proceedings – Bound to fail – First defendant seeking an order striking out the proceedings as against it – Whether the proceedings were frivolous or vexatious and/or were bound to fail – 08/12/2023 – [2023] IEHC 694

Gawley v Start Mortgages Designated Activity Company

Articles

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COSTS

Review of taxation – Jurisdiction – Exclusion of evidence – Appellant seeking a review of a taxation conducted by the respondent – Whether the respondent was entitled to proceed to tax additional bills – 24/11/2023 – [2023] IECA 288

Buckley v O'Neill (Taxing Master)

Specific performance – Contract for sale – Prima facie case – Appellant seeking costs – Whether a stay ought to be granted to the respondents in respect of an order for costs being made against them in favour of the appellant – 21/12/2023 – [2023] IEHC 319

Keena v Promontoria (Aran Ltd) and others

Costs – Mootness – Injunctive relief – Plaintiff seeking costs – Whether the decision of the defendant's managing director on appeal was something that resulted from the bringing of the application for injunctive relief – 10/11/2023 – [2023] IEHC 619

Nesbitt v Kefron Ltd

Costs – Application to come off record – Legal Services Regulation Act 2015 s. 169 – Parties seeking costs – Whether costs should follow the event – 14/11/2023 – [2023] IECA 270

Scotchstone Capital Fund Ltd and another v Ireland and another

Costs – Application to come off record – Legal Services Regulation Act 2015 s. 169 – Parties seeking costs – Whether costs should follow the event - 14/11/2023 - [2023] IECA 279

Scotchstone Capital Fund Ltd and another v Ireland and another

Costs – Frivolous and vexatious proceedings – Legal Services Regulation Act 2015 s. 169 – Parties seeking costs – Whether costs should follow the event – 14/11/2023 – [2023] IECA 280

Scotchstone Capital Fund Ltd and another v Ireland and another

Judicial review – Mootness – Costs – Respondent seeking costs – Whether the proceedings were rendered moot – 19/12/2023 – [2023] IEHC 693

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COURTS

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Rules of the Superior Courts (Orders 36 and 52) 2023 – SI 606/2023

CREDIT UNION

Acts

Credit Union (Amendment) Act 2023 – Act 34/2023 – Signed on December 13, 2023

Statutory instruments

Credit Union Fund (Stabilisation) Levy Regulations 2023 – SI 616/2023

CRIMINAL LAW

Judicial review – Criminal prosecution – Blameworthy prosecutorial delay – Applicant seeking to restrain a criminal prosecution – Whether there had been blameworthy prosecutorial delay – 21/12/2023 – [2023] IEHC 726

Brady v DPP

Conviction – Sexual assault – Directed verdict – Appellant seeking to appeal against conviction – Whether there should have been a directed verdict of not guilty – 13/11/2023 – [2023] IECA 302

DPP v P.B.

Library acquisitions

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Acts

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Statutory instruments

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Criminal Evidence Act 1992 (Sections 13 and 16) (Commencement) Order 2023 – SI 589/2023

Criminal Justice (Terrorist Offences) Act 2005 (Section 42) (Restrictive Measures concerning Certain Persons and Entities Associated with the ISIL (Da'esh) and Al-Qaeda Organisations) (No.8) Regulations 2023 – SI 621/2023

Criminal Justice (Terrorist Offences) Act 2005 (Section 42) (Restrictive Measures concerning Certain Persons and Entities with a view to Combating Terrorism) (No. 3) Regulations 2023 – SI 659/2023

Domestic, Sexual and Gender-Based Violence Agency Act 2023 (Commencement) Order 2023 – SI 667/2023

Domestic, Sexual and Gender-Based Violence Agency Act 2023 (Establishment Day) Order 2023 – SI 668/2023

Criminal Justice (Legal Aid) (Amendment) Regulations 2023 – SI 702/2023

DAMAGES

Picketing – Prohibitory orders – Industrial Relations Act 1990 – Plaintiffs seeking prohibitory orders to prevent the defendant from carrying out unlawful picketing at their premises – Whether there was a serious issue to be tried – 23/11/2023 – [2023] IEHC 705

Carey Glass U.C. and another v Unite the Union

Breach of duty – Damages – *Henderson v Henderson* – Respondent seeking damages for breach of duty – Whether the proceedings offended the rule in *Henderson v Henderson* (1843) 3 Hare 100 – 29/11/2023 – [2023] IESC 29

Munnelly v Hassett, Cremin and City Learning Ltd

DISABILITY

Statutory instruments

Disability (Assessment of Needs, Service Statements and Redress) (Amendment) Regulations 2023 – SI 601/2023

Disabled Drivers and Disabled Passengers Fuel Grant (Amendment) Regulations 2023 – SI 665/2023

DISCOVERY

Discovery – Relevance – Damages – Plaintiff seeking discovery – Whether the discovery sought was relevant, necessary and proportionate – 10/11/2023 – [2023] IEHC 618

Browne v Minister for Justice

Discovery – Misfeasance of public office – Abuse of process – Plaintiff seeking an order requiring the fourth and fifth defendants to make further and better discovery – Whether the plaintiff had shown that there were documents which the fourth and fifth defendants were required to discover but had not discovered – 11/12/2023 [2023] IEHC 711

McKillen v The National Asset Management Agency and others

EDUCATION

Statutory instruments

Student Grant (Amendment) (No.3) Scheme 2023 – SI 613/2023

Education Act 1998 (Composition of National Council for Curriculum and Assessment) Order 2023 – SI 622/2023

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ELECTORAL

Acts

Electoral (Amendment) Act 2023 – Act 40/2023 – Signed on December 19, 2023

EMPLOYMENT LAW

Racial harassment – Irrationality – Obligation to provide reasons – Appellant seeking the relief of setting aside a decision of the Labour Court concluding that the appellant's appeal before the Labour Court failed – Whether the Labour Court's decision was irrational – 08/12/2023 – [2023] IEHC 697

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Employment Permits (Amendment) (No. 3) Regulations 2023 – SI 680/2023

ENERGY

Acts

Electricity Costs (Emergency Measures) Domestic Accounts Act 2023 – Act 29/2023 – Signed on November 10, 2023

Energy (Windfall Gains in the Energy Sector) (Cap on Market Revenues) Act 2023 – Act 30/2023 – Signed on November 17, 2023

Statutory instruments

Electricity Costs (Emergency Measures) Domestic Accounts Act 2023 (Commencement) Order 2023 – SI 559/2023

Electricity Costs Emergency Benefit Scheme III Regulations 2023 – SI 568/2023

Submeter Support Scheme Regulations 2023 – SI 569/2023

Energy (Windfall Gains in the Energy Sector) (Cap on Market Revenues) Act 2023 (Commencement) Order 2023 – SI 590/2023

Electricity Regulation Act 1999 (Petroleum Safety) Levy Order 2023 – SI 596/2023

Electricity Regulation Act, 1999 (Water) Levy Order, 2023 – SI 597/2023

Electricity Regulation Act, 1999 (LPG Safety Licence) Levy Order, 2023 – SI 598/2023

Electricity Regulation Act 1999 (Electricity) Levy Order 2023 – SI 599/2023

Electricity Regulation Act 1999 (Gas) Levy Order 2023 – SI 600/2023

National Oil Reserves Agency Act 2007 (Advanced Biofuel Obligation Rate) (Revocation) Order 2023 – SI 692/2023

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EUROPEAN UNION

Library acquisitions

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Statutory instruments

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European Union (Marine Equipment) (Amendment) Regulations 2023 – SI 560/2023

European Union (Restrictive Measures concerning Libya) (No.4) Regulations 2023 – SI 581/2023

European Union (Restrictive Measures concerning Türkiye) Regulations 2023 – SI 582/2023

European Union (Electronic Communications Code) (Public Warning System) Regulations 2023 – SI 583/2023

Legal Metrology (European Conformity Assessment of Measuring Instruments) (Amendment) Regulations 2023 – SI 591/2023

European Union (Restrictive Measures concerning Lebanon) Regulations 2023 – SI 603/2023

European Union (Restrictive Measures in respect of Myanmar/Burma) (No.5) Regulations 2023 – SI 604/2023

European Union (Restrictive Measures against Cyber-attacks threatening the Union or its Member States) (No.2) Regulations 2023 – SI 605/2023

European Union (CAP Strategic Plan, Information Sharing) Regulations 2023 – SI 628/2023

European Union (Undertakings for Collective Investment in Transferable Securities) (Amendment) Regulations 2023 – SI 629/2023

European Union (Alternative Investment Fund Managers) (Amendment) Regulations 2023 – SI 630/2023

European Union (Accessibility Requirements of Products and Services) Regulations 2023 – SI 636/2023

European Union (Motor Insurance) Regulations 2023 – SI 643/2023

European Communities (Reception Conditions) (Amendment) Regulations 2023 – SI 649/2023

European Union (Value-Added Tax) Regulations 2023 – SI 650/2023

European Union (Value-Added Tax) (No. 2) Regulations 2023 – SI 651/2023

European Union (Motor Insurance) (Exclusion of Certain Contributions to the Insurance Compensation Fund and the Motor Insurers Insolvency Compensation Fund) Regulations 2023 – SI 658/2023

European Union (Restrictive Measures in respect of Myanmar/Burma) (No.6) Regulations 2023 – SI 660/2023

European Union (Restrictive Measures concerning Mali) (No.4) Regulations 2023 – SI 661/2023

European Union (Restrictive Measures concerning Ukraine) (No.15) Regulations 2023 – SI 662/2023

European Union (National Research Ethics Committees for Performance Studies of In Vitro Diagnostic Medical Devices) (Amendment) Regulations 2023 – SI 670/2023

European Union (National Research Ethics Committees for Clinical Investigations of Medical Devices) Regulations 2023 – SI 671/2023

European Union (Household Food Waste and Bio-waste) (Amendment) Regulations 2023 – SI 679/2023

European Union (Financial and

Compliance Checks) Regulations 2023 – SI 681/2023
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EVIDENCE

Articles

Heffernan, L. Expert evidence in civil proceedings: the independence of the witness and the reliability of their evidence. *Irish Law Times* 2023; 41 (14): 193-197

FAMILY LAW

Adoption – Family life rights – Adoption Act 2010–2017 s. 30(5) – Applicant seeking an order approving the making of an order for the adoption of a child without consulting the natural father – Whether family life rights pursuant to Article 8 of the European Convention of Human Rights were engaged on the facts of the case – 14/12/2023 – [2023] IEHC 721
A (A minor), In re Judicial review – Marriage of convenience – Oral hearing – Applicant seeking to quash that part of the respondent's decision to the effect that the applicant's marriage was one of convenience – Whether fair procedures were employed by reason of absence of an oral hearing – 16/11/2023 – [2023] IEHC 642
S.M.A. v Minister for Justice

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FINANCIAL SERVICES

Articles

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Statutory instruments

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Finance Act 2022 (Section 9) (Commencement) Order 2023 – SI 635/2023
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Acts

Finance (No. 2) Act 2023 – Act 39/2023 – Signed on December 18, 2023

FISHERIES

Statutory instruments

Wild Salmon and Sea Trout Tagging Scheme (Amendment) Regulations 2023 – SI 672/2023

GARDA SÍOCHÁNA

Statutory instruments

Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2023 – SI 611/2023

GOVERNMENT

Statutory instruments

Specialist Community-Based Disability Services (Transfer of Departmental Administration and Ministerial Functions) Order 2023 – SI 595/2023
National Archives Act 1986 (Section 8(1A)) (Transfer of Departmental Records) Order 2023 – SI 607/2023
National Archives Act 1986 (Section 8(1A)) (Transfer of Departmental Records) (No. 2) Order 2023 – SI 608/2023
National Archives Act 1986 (Section 8(1A)) (Transfer of Departmental Records) (No. 3) Order 2023 – SI 609/2023
National Archives Act 1986 (Section 8(1A)) (Transfer of Departmental Records) (No. 4) Order 2023 – SI 610/2023
Housing, Local Government and Heritage (Delegation of Ministerial Functions) (No. 2) Order 2023 – SI 615/2023
Justice (Delegation of Ministerial Functions) (No. 2) Order 2023 – SI 620/2023
Appointment of Special Advisers (Minister for Justice) Order 2023 – SI 631/2023
Appointment of Special Advisers (Minister of State at the Department of Justice) Order 2023 – SI 632/2023
Appointment of Special Adviser (Minister of State at the Department of Transport) (No. 2) Order 2023 – SI 641/2023
Special Adviser (Minister for Agriculture, Food and the Marine) (No. 2) Order 2023 – SI 699/2023
Children, Equality, Disability, Integration and Youth (Delegation of Ministerial Functions) Order 2023 – SI 701/2023
Appointment of Special Adviser (Minister of State at the Department of Children, Equality, Disability, Integration and Youth) Order 2023 – SI 704/2023

HEALTH

Consultative case stated – Assessment of need – Disability Act 2005 s. 8 – Circuit judge formulating a consultative case stated referring a question of law for determination – Whether an assessment of need carried out pursuant to s. 8 of the Disability Act 2005 can be regarded as complete in the absence of a diagnostic assessment of the child's disability – 10/11/2023 – [2023] IECA 275
A.B. v HSE and ors

Acts

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Health Products Regulatory Authority (Fees) Regulations 2023 – SI 697/2023

HERITAGE

Statutory instruments

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Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023 (Commencement) (No. 4) Order 2023 – SI 653/2023

HOUSING

Statutory instruments

Housing (Domestic Waste Water Treatment Systems Grant under the National Inspection Plan) Regulations 2023 – SI 562/2023
Housing (Domestic Waste Water Treatment Systems Grant for Prioritised Areas for Action) Regulations 2023 – SI 563/2023
Housing (Domestic Waste Water Treatment Systems Grant for High Status Objective Catchment Areas) Regulations 2023 – SI 564/2023
Rent Pressure Zone (Local Electoral Area of Shannon) Order 2023 – SI 578/2023
Rent Pressure Zone (Administrative Area of Westmeath County Council) Order 2023 – SI 579/2023
Housing (Sale of Local Authority Houses) (Amendment) Regulations 2023 – SI 619/2023
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A. (Albania) v Minister for Justice and Equality

Visa application – Extension of time – Order of certiorari – Applicants seeking an order of certiorari quashing the decision of the respondent to refuse the applicants' application for an extension of time within which to appeal a refusal decision of the respondent – Whether the respondent had exercised her discretion to extend the time within which an appeal may be lodged in a rigid and inflexible manner – 13/11/2023 – [2023] IHEC 629

S.F. and another v Minister for Justice and Equality

Residence card – Renewal – Marriage of convenience – Appellants seeking renewal of a residence card – Whether the first appellant's marriage to the second appellant was one of convenience – 12/12/2023 – [2023] IECA 309

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Injunctive relief – Trespass – Occupation – Plaintiff seeking an injunction restraining the defendants from trespassing on or otherwise occupying the mortgaged property – Whether the defendants' defences and counterclaims ought to be struck out – 30/11/2023 – [2023] IEHC 677

Ulster Bank Ireland DAC v O'Rourke and others

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Personal insolvency arrangement – *Locus standi* – Personal Insolvency Act 2012 s. 98(2)(b) – Appellant seeking an order refusing the coming into effect of a personal insolvency arrangement – Whether a creditor who has failed to prove their debt pursuant to the provisions of the Personal Insolvency Act 2012 has *locus standi* to object to the coming into effect of a personal insolvency arrangement – 30/11/2023 – [2023] IESC 32

O'Flynn v O'Driscoll and others

Insolvency – Personal insolvency arrangement – Personal Insolvency Act 2012 s. 115A – Appellant appealing from the order of the High Court approving the coming into operation of a personal insolvency arrangement – Whether the High Court properly assessed the personal insolvency arrangement in the performance of its statutory role under s. 115A of the Personal Insolvency Act 2012 – 30/11/2023 – [2023] IESC 31

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JUDICIAL REVIEW

International protection – Judicial review – Extension of time – Applicant seeking judicial review – Whether an injustice had been done that was incapable of being remedied on appeal – 06/12/2023 – [2023] IEHC 695

A.E. v The Chief International Protection Officer and others

Judicial review – Leave to apply – Arguable grounds – Applicant seeking leave to apply for judicial review – Whether there were arguable grounds – 15/11/2023 – [2023] IEHC 727

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Personal injuries – Damages – Quantum – Plaintiff seeking damages – Whether the plaintiff's back injury fits at the lower end of the Book of Quantum severe and permanent back injury – 10/11/2023 – [2023] IEHC 622

Corless v HSE

Personal injuries – Damages – Assessment – Plaintiff seeking damages – Whether the plaintiff's shoulder injury should be categorised at the upper end of the scale – 17/11/2023 – [2023] IEHC 639

Coughlan v CGR Construction Ltd and another

Personal injuries – Statute barred – Costs – Plaintiff seeking a stay on the execution of a costs order – Whether the plaintiff would suffer prejudice in the event of no stay being placed on the costs order – 20/12/2023 – [2023] IEHC 737

Murphy v Foley

Statutory instruments

Personal Injuries Assessment Board Rules, 2023 (No. 2) – SI 617/2023

Personal Injuries Resolution Board Act 2022 (Commencement of Certain Provisions) (No. 3) Order 2023 – SI 626/2023

Personal Injuries Resolution Board Act 2022 (Change of Name of Board) Order 2023 – SI 627/2023

PLANNING AND ENVIRONMENTAL LAW

Appointment of expert – Modality of instruction – Costs – Defendant seeking the appointment of an independent expert – Whether the expert's brief should be wide – 18/12/2023 – [2023] IEHC 712

Brownfield Restoration Ireland Ltd v Wicklow County Council

Planning permission – Leave to appeal – Costs – Applicant seeking leave to appeal – Whether the public interest test militated against a further appeal – 18/12/2023 – [2023] IEHC 713

Eco Advocacy CLG v An Bord Pleanála

Planning and development – Development plan – Inadequate reasons – Appellant challenging the validity of a decision of the respondent – Whether inadequate reasons had been given by the respondent in respect of the decision – 21/12/2023 – [2023] IESC 39

Killegland Estates Ltd v Meath County Council

Particulars – Judicial review – Planning permission – Applicant seeking particulars of the grounds, which the first respondent alleged were inadequately particularised – Whether the first respondent had an obligation to give particulars – 15/12/2023 – [2023] IEHC 691

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Derogation licence – Reference – Article 16(1) of Directive 92/43 – Referring court seeking a preliminary ruling concerning the interpretation of Article 16(1) of Directive 92/43 – Whether the questions to be referred to the CJEU for a preliminary ruling were relevant – 21/12/2023 – [2023] IEHC 715

O'Donnell and others v An Bord Pleanála and others

Foreshore licence – Reference – Article 6(3) of Council Directive 92/43/EEC – Referring court seeking a preliminary ruling concerning the interpretation of Article 6(3) of Council Directive 92/43/EEC – Whether the questions to be referred to the CJEU for a preliminary ruling were relevant – 21/12/2023 – [2023] IEHC 716

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European Communities (Birds Declarations) Regulations 2023 – SI 576/2023

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European Union Habitats (Lough Oughter and Associated Loughs Special Area of Conservation 000007) Regulations 2023 – SI 638/2023

European Union Habitats (Lough Carra/Mask Complex Special Area of Conservation 001774) Regulations 2023 – SI 639/2023

European Union Habitats (Blackwater River (Kerry) Special Area of Conservation 002173) Regulations 2023 – SI 640/2023

Planning and Development, Maritime and Valuation (Amendment) Act 2022 (Commencement of Certain Provisions) (No. 2) Order 2023 – SI 645/2023

Planning and Development (Amendment) (No.4) Regulations 2023 – SI 648/2023

Circular Economy (Waste Recovery Levy) Regulations 2023 – SI 652/2023

Planning and Development (Fees for Certain Applications) Regulations 2023 – SI 654/2023

Planning and Development (Amendment) (No. 3) Regulations 2023 – SI 655/2023

Circular Economy (Environmental Levy) (Plastic Bag) (No. 2) Regulations 2023 – SI 698/2023

PRACTICE AND PROCEDURE

Set aside service – Want of jurisdiction – O. 12, r. 26 of the Rules of the Superior Courts – Appellant appealing against the judgment and order refusing a motion for an order setting aside the service of notice of the

plenary summons for want of jurisdiction – Whether the appellant could identify any analytical error in the judgment – 06/12/2023 – [2023] IECA 291

Carlyle Aviation Management Ltd and another v Lloyd's Insurance Company S.A. and others

Disability – Services – Errors of law – Appellant appealing on a point of law from a decision of the respondent – Whether the reasoning of the respondent was deficient or unclear – 14/12/2023 – [2023] IEHC 709

E.L. v The Office of the Disability Appeals Officer

Summary judgment – Remittal – Plenary hearing – Plaintiff seeking summary judgment – Whether the matter should be remitted to plenary hearing – 10/11/2023 – [2023] IEHC 628

Howley v Moorehouse

Set aside service – O. 12, r. 26 of the Rules of the Superior Courts – Renewal – Appellant appealing against the judgment acceding to an application brought by the defendant to set aside service of notice of the plenary summons – Whether the application was improperly brought under O. 12, r. 26 of the Rules of the Superior Courts – 11/12/2023 – [2023] IECA 297

Kearns v Evenson and another

Summary judgment – Fair procedures – Public policy – Plaintiff seeking to enforce a judgment it obtained against the defendant – Whether the judgment was obtained in circumstances that lacked fair procedures – 30/11/2023 – [2023] IEHC 658

MGG California LLC v Safra

Extension of time – Delay – Consent – Appellant seeking an extension of time – Whether the first respondent wrongfully failed to disclose documents and evidence to the appellant – 12/12/2023 – [2023] IECA 310

Murphy v The Law Society of Ireland and another

Extension of time – Arguable grounds – Balance of justice – Appellant seeking extension of time – Whether the appellant had arguable grounds of appeal – 12/12/2023 – [2023] IECA 312

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Executors – Grant of probate – Succession Act 1965 s. 27(4) – Applicant seeking to have an independent person appointed to extract a grant of letters of administration with will annexed in place of the respondents as executrices – Whether there were "special circumstances" within the meaning of s. 27(4) of the Succession Act 1965 that would justify overriding the deceased's wishes as to who his personal representatives should be – 10/11/2023 – [2023] IEHC 643

The estate of the late Bernard Casey, deceased, late of Threadneedle Road, Salthill, Galway, and the Succession Act, 1965, and Sections 27(4) of the Succession Act and an application by John Casey, Bramley, Oranmore, County Galway between John Casey and Yvonne Casey and Michelle Casey

PROPERTY

Adverse possession – Breach of covenants – Damages – Plaintiff seeking damages in relation to its purchase from the first defendant of certain lands – Whether the first defendant was the owner of all of the lands included in the sale – 10/11/2023 – [2023] IEHC 608

Atlantis Developments Ltd (in receivership) v Considine and another

Adverse possession – Trespass – Nuisance – Respondent seeking injunctions restraining trespass/nuisance – Whether the trial judge was entitled to reject the defence of adverse possession – 15/12/2023 – [2023] IECA 313

Ryan v Flattery and others

Lis pendens – Unreasonable delay – Bona fide prosecution – First defendant seeking to vacate *lis pendens* – Whether the proceedings were being prosecuted bona fide – 18/12/2023 – [2023] IEHC 681

Sanchez v Santiago Capital DAC and others

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PUBLIC EXPENDITURE

Acts

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ROAD TRAFFIC

Road traffic accident – Liability – Quantum – Plaintiff seeking damages – Whether the defendant was liable – 07/12/2023 – [2023] IEHC 704

Hogan v McLoughlin

Statutory instruments

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Roads Act 1993 (Prescribed Zero to Low Emission Vehicles) Regulations 2023 – SI 656/2023

SOCIAL WELFARE

Acts

Social Welfare (Miscellaneous Provisions) Act 2023 – Act 37/2023 – Signed on December 14, 2023

Statutory instruments

Social Welfare (Temporary Provisions – Living Alone Allowance) Regulations 2023 – SI 570/2023

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Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No. 3) (Diet Supplement) Regulations 2023 – SI 686/2023

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STATISTICS

Statutory instruments

Statistics (Monthly Services Inquiry) (No. 2) Order 2023 – SI 580/2023

STATUTORY INTERPRETATION

Declaratory relief – Statutory interpretation – Water Services (No. 2) Act 2013 s. 21(6)(a) – Applicant seeking declaratory relief – Whether units constituting student accommodation constituted dwellings within the meaning of s. 21(6)(a) of the Water Services (No. 2) Act 2013 – 27/11/2023 – [2023] IEHC 660

University of Limerick and another v Irish Water

TAXATION

Case stated – Notice of assessment of income tax – Deduction – Appellant appealing by way of a case stated against a determination of the Tax Appeals Commissioner – Whether the Tax Appeals Commissioner erred in law in disallowing a deduction on the basis that the sum deducted was not wholly and exclusively laid out or expended for the purpose of the trade or profession – 14/12/2023 – [2023] IEHC 710

Fahy v The Revenue Commissioners

Statutory instruments

Mineral Oil Tax (Prescribed Markers) (Amendment) Regulations 2023 – SI 592/2023

Mandatory Automatic Exchange of Information (Platform Operators) in the Field of Taxation (Amendment) Regulations 2023 – SI 673/2023
Return of certain information by Reporting Platform Operators Regulations 2023 – SI 674/2023
Taxes Consolidation Act 1997 (Section 111B(3)) Order 2023 – SI 675/2023
Universal Social Charge Regulations 2023 – SI 700/2023
Income Tax (Employments) Regulations 2024 – SI 1/2024

TRADE UNIONS

Picketing – Prohibitory orders – Industrial Relations Act 1990 – Plaintiffs seeking prohibitory orders to prevent the defendant from carrying out unlawful picketing at their premises – Whether there was a serious issue to be tried – 23/11/2023 – [2023] IEHC 705
Carey Glass U.C. and another v Unite the Union

TRANSPORT

Judicial review – Termination of appointment – Civil Service Regulation Act 1956 s. 7 – Applicant seeking judicial review – Whether the respondent's decision to terminate the applicant's appointment and to revert him to his previous grade was unlawful – 10/11/2023 – [2023] IEHC 586
Whelan v Minister for Transport

Statutory instruments

European Union (Hired Vehicles Without Drivers for the Carriage of Goods by Road) Regulations 2023 – SI 566/2023
European Union (Hired Vehicles Without Drivers for the Carriage of Goods by Road) Regulations 2023 – SI 567/2023
National Oil Reserves Agency Act 2007 (Renewable Transport Fuel Obligation Rate) (Revocation) Order 2023 – SI 691/2023

Bills initiated in Dáil Éireann during the period November 10, 2023, to January 12, 2024

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

Appropriation Bill 2023 – Bill 90/2023
Capital Supply Service and Purpose Report Bill 2023 – Bill 84/2023 [pmb] – Deputy Matt Shanahan
Charities (Amendment) Bill 2023 – Bill 98 of 2023
Children (Amendment) Bill 2023 – Bill 87/2023 [pmb] – Deputy Patrick Costello
Criminal Justice (Promotion of Restorative Justice) (Amendment) Bill 2023 – Bill 93/2023 [pmb] – Deputy Pa Daly, Deputy Maurice Quinlivan and Deputy Patricia Ryan
Digital Services Bill 2023 – Bill 89/2023
Financial Services and Pensions Ombudsman (Amendment) Bill 2023 – Bill 97/2023
Fortieth Amendment of the Constitution (Care) Bill 2023 – Bill 92/2023
Gender Recognition (Amendment) (Prisons) Bill 2023 – Bill 95/2023 [pmb] – Deputy Peadar Tóibín, Deputy Seán Canney, Deputy Noel Grealish, Deputy Willie O'Dea, Deputy Carol Nolan, Deputy Mattie McGrath, Deputy Michael Healy-Rae, Deputy Danny Healy-Rae, Deputy Richard O'Donoghue and Deputy Michael Collins
Health Insurance (Amendment) Bill 2023 – Bill 79/2023
Mental Health (Amendment) Bill 2023 – Bill 83/2023 [pmb] – Deputy Mark Ward and Deputy David Cullinane
Planning and Development Bill 2023 – Bill 81/2023
Research and Innovation Bill 2023 – Bill 1/2024
Residential Tenancies (Deferment of Termination Dates of Certain Tenancies) (No. 2) Bill 2023 – Bill 86/2023 [pmb] – Deputy Eoin Ó Broin
Social Welfare (Liable Relatives and Child Maintenance) Bill 2023 – Bill 96/2023
Social Welfare (Miscellaneous Provisions) Bill 2023 – Bill 82/2023
Thirty-ninth Amendment of the Constitution (The Family) Bill 2023 – Bill 91/2023

Bills initiated in Seanad Éireann during the period November 10, 2023, to January 12, 2024

Civil Legal Aid (Neighbours' Dispute Mediation Services) Bill 2023 – Bill 80/2023 [pmb] – Deputy Micheál Carrigy
Misuse of Drugs (Amendment) (Control of Nitrous Oxide) Bill 2023 – Bill 88/2023 [pmb] – Senator Regina Doherty, Senator John Cummins, Senator Aisling Dolan, Senator Tim Lombard, Senator Mary Seery Kearney, Senator Paddy Burke, Senator Micheál Carrigy, Senator Seán Kyne, Senator Garret Ahearn, Senator Maria Byrne, Senator Martin Conway, Senator Joe O'Reilly, Senator John McGahon, Senator Emer Currie and Senator Barry Ward
Special Measures in the Public Interest (Derrybrien Wind Farm) Bill 2023 – Bill 94/2023 [pmb] – Senator Michael McDowell, Senator Victor Boyhan, Senator Sharon Keogan, Senator Gerard P. Craughwell, Senator Tom Clonan and Senator Rónán Mullen
The Royal Hibernian Academy (Amendment of Charter) Bill 2023 – Bill 85/2023

Progress of Bill and Bills amended in Dáil Éireann during the period November 10, 2023, to January 12, 2024

Court Proceedings (Delays) Bill 2023 – Bill 17/2023 – Committee Stage
Credit Union (Amendment) Bill 2022 – Bill 112/2022 – Report Stage – Passed by Dáil Éireann
Criminal Justice (Engagement of Children in Criminal Activity) Bill 2023 – Bill 4/2023 – Committee Stage
Criminal Law (Sexual Offences and Human Trafficking) Bill 2023 – Bill 62/2023 – Committee Stage – Report Stage
Electoral (Amendment) Bill 2023 – Bill 77/2023 – Committee Stage – Report Stage – Passed by Dáil Éireann
Finance (No. 2) Bill 2023 – Bill 70/2023 – Committee Stage – Report Stage – Passed by Dáil Éireann
Gas (Amendment) Bill 2023 – Bill 64/2023 – Committee Stage
Health Insurance (Amendment) Bill 2023 – Bill 79/2023 – Committee Stage
Health (Termination of Pregnancy Services) (Safe Access Zones) Bill 2023 – Bill 54/2023 – Report Stage – Passed by Dail Éireann
Local Government (Mayor of Limerick) Bill 2023 – Bill 63/2023 – Committee Stage – Passed by Dáil Éireann
Public Health (Tobacco Products and Nicotine Inhaling Products) Bill 2023 – Bill 48/2023 – Report Stage
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Committee Stage – Report Stage
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FULL CIRCLE

Ms Justice Marie Baker talks to *The Bar Review* about her career in law, and her new role as Chair of the Electoral Commission.

Ann-Marie Hardiman,
Managing Editor, Think Media

Ms Justice Marie Baker had what she describes as a "long journey to law", from a background that is far from typical among the profession. Born in Bray, Co. Wicklow, where her mother was from, the family moved to Cork when she was very young. Neither of her parents completed secondary education, but she says that they were hugely supportive of their five children's aspirations in that regard, in particular their daughters in a time when such opportunities for girls were limited: "They both were highly intelligent people who took a great interest in the education of their children. My father, who was from the West Kerry Gaeltacht, was a postmaster, and we moved house a number of times when I was small, always with an eye to where was the best secondary school for girls".

That school was St Mary's High School in Midleton, which she says was a formative experience: "I had superb teachers who interested me in lots of things that I suppose you wouldn't have expected. We read Camus in French class. My geography teacher was one of the founder members of the Irish Anti-Apartheid Movement, Charlie Hayes. That was a big opening to the world when I was young and impressionable, and living in a very small town". Challenges remained, however, and despite her love of maths, the lack of

> "I was discouraged, most definitely discouraged. It was virtually impossible for a woman without contacts to make a go of it at the Bar, or so it was presented. But I did and … I never regretted it."

honours maths and science subjects (as was the case in many girls' schools) scuppered her initial ambition to be an engineer or a met officer ("I am still interested in weather"). She went to UCC to study maths and history, but discovered philosophy and came to love it, focusing her degree on that subject.

After graduation, and with no real idea what she wanted to do, she went to live in Spain, which was another formative experience, as she was there when Franco died: "I lived in the Basque Country. It was fascinating because of the opening of the political discourse. That was particularly interesting for me because we had a different kind of political discourse in Ireland at the time. I don't remember in college or in school discussing the meaning of democracy or the meaning of a republic and of federalism, and the kind of arguments that were being made by Basque nationalists and separatists at the time".

The time came to make a decision on a career, however, so she returned to UCC and took a master's in Aristotle's philosophy of law, which led to a law degree. This led in turn to the King's Inns, and she was called to the Bar in 1984. This too was not without obstacles: "I was discouraged, most definitely discouraged. This was in the late '70s. Really, it was virtually impossible for a woman without contacts to make a go of it at the Bar, or so it was presented. But I did, and so did my colleague Lorraine O'Sullivan, who was in the same year. We both decided we wanted to do the Bar and we did it, and we both had successful careers. I never regretted it. I absolutely loved being a barrister".

On Circuit

That successful career was spent on the Cork and Munster Circuits, where Ms Justice Baker's lifelong interest in maths fed into her work: "My practice was mostly on the Chancery side with quite a lot of land law opinion work and family law. Family law came to me even though I hadn't intended doing it, because I started a practice in Cork more or less when the judicial separation legislation started. I understood companies, trusts, pensions. I understood accounts, and that's what was needed: the skillset of a good Circuit Court barrister who did family law was mostly that of somebody who understood money".

It was a very varied career, but some cases stand out in her memory, and one in particular: "The case that I got most out of was a brief I got on my very first week out of devilling. Mary Laffoy took silk, and she walked across the Library floor and handed me a landlord and tenant case from Carrickmacross, Co. Monaghan. The solicitor had asked that papers be drafted for a new 35-year lease. I looked at it, and by some extraordinary fluke, I knew the Ground Rent Acts, and I said: 'This is not a 35-year lease. This is an application for a fee simple'. I went to Carrickmacross and met the client, and it turned out that there was a whole street of properties, which were held under similar leases. We ran two test cases in the county registrar and the Circuit Court and the High Court, and we won the whole way. And the landlord brought a constitutional challenge and lost. So the Carrickmacross ground rents were all bought out under the Act, and the tenants got to buy their freeholds for nominal value. That was a huge thing, where knowing something peculiar like that changed the commercial dynamic of a town".

From the Bar to the bench

Ms Justice Baker was appointed to the High Court in 2014 and while she says she missed the social element of the Bar, with characteristic enthusiasm she says she has loved her time on the bench: "Intellectually and personally, I loved the job. I loved the challenge. I liked the variety of cases that you do in the High Court, in particular. I was fascinated at the ingenuity of counsel. I saw the value of advocacy, the value of a good Bar, the value of allowing somebody to argue a point and to try and change your mind, or try and change the profile of a case. I enjoyed it enormously".

Her work in the High Court focused on non-jury judicial review, and on the probate list, which she found fascinating: "In a sense, that's where you see all kinds of lives, all kinds of joy in the way in which people make wills, and the sadness of it, the loneliness of people who made wills on their own without discussing them with anybody. It was a very interesting list, always with intellectual challenges, because there hadn't been a lot of judgments for many years, so I took it upon myself to write judgments in some of the areas".

She was also the first judge to deal with applications under the then newly enacted personal insolvency legislation, which once again brought her interest in numbers to the fore: "It was a whole other way of looking at the resolution of debt. And it was, interestingly enough, the application of equitable principles, balancing interests and rights, and that understanding of accounts, of values and property rights. It brought all of my skills in. Plus, I was the first person to do it, so it was for me to ascertain what way the Act was to be

Challenging misinformation

One aspect of the Electoral Commission's powers has yet to be enacted, but is particularly relevant, and indeed ground breaking. Sections 4 and 5 of the Act, once enacted, will give the Commission powers to regulate election advertising, including to direct the variation or removal of an online advertisement it deems to contain false or misleading information, up to and including recourse to the High Court. Ms Justice Baker views this in both a national and a global context: "There's a lot of elections coming up in the world this year, and the view is that there is likely to be interference in all elections. And although we're a very small country, we believe that we are likely to be a target, in some cases by countries or persons who simply want to be troublesome, but in other cases for strategic reasons. We all know now how easy it is to create a video that looks real. We also know that the Irish Constitution recognises freedom of speech as of high value, so there is a balance to be struck".

She makes the point that knowledge of who is funding advertising is also very important in this context: "I think there is a concern that there are malevolent actors from outside the jurisdiction who will fund misinformation campaigns. And while it mightn't always be easy to identify what aspect of a campaign or what aspect of a story is true or false, it might be influential for people choosing which way to vote to know how a particular advertising campaign is funded, particularly if it's funded from outside the jurisdiction".

Commencement of these sections has been delayed due to ongoing discussions with the EU Commission, which Ms Justice Baker hopes will be completed soon.

interpreted. Was it a remedial statute? Were you to give the benefit of the doubt to the debtor or the creditor? How were you to balance it? How strict were you to be on proofs? All of those questions fell for consideration in the first few years and I enjoyed it hugely".

Having been enacted partly as a result of Ireland's bailout by the International Monetary Fund (IMF), it was also quite a unique piece of legislation, with no equivalent in Europe, which brought Ms Justice Baker to Cyprus when the IMF recommended a similar approach to that country's economic woes: "I went twice to Cyprus to do some training with the judges. I saw nothing of the sunshine because I worked all day, but it was a very interesting place to go because of its history and its current politics. It was interesting also to see how you brought Irish legislation into a completely different legal system. They still open our judgments, and I am still in contact with one or two of the judges".

Ms Justice Baker was appointed to the Court of Appeal in 2018 and to the Supreme Court in 2019. She is due to retire from the bench in April, but last year she took on a new challenge, when she was appointed as Chair of the Electoral Commission (An Coimisiún Toghcháin).

Upholding democracy

Established in February 2023 by the Electoral Reform Act 2022, the Commission is an impartial body responsible for election events generally in Ireland, but its potential remit is wide, from information on referendums (it takes over the role of the Referendum Commission), to carrying out research and public education, and challenging online misinformation (see panel). Its first major project, a review of constituency boundaries, was published last August, but this year will see the Commission coming to much greater

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prominence, with local and European elections in June, and two referendums also planned (in March and likely also in June).

Interestingly, the legislation dictates that the Commission Chair must be a judge, either a sitting or retired judge of the Supreme Court or, if that is not possible, a judge of the High Court or Court of Appeal. Ms Justice Baker agrees with the principle that the chair of a body tasked with upholding electoral integrity should have legal knowledge, and a degree of stature, and there's another reason why she believes that she is well suited to the role: "I've never been a member of a political party and I have no known allegiances with any political party or politicians, so I wasn't a difficult choice. One of my former colleagues did say to me, 'I can't think of anybody who knows less about politics than you', and I said, that's the point, because it would be wrong if I was associated, even in some people's minds, with a political party or a particular political view".

It's a more public-facing role than might normally be the case for the chair of a statutory body, so this political neutrality is all the more important, especially in a time when it's fair to say that trust in official entities is at an all-time low

> "Another part of our role has to be to reach out and encourage people to engage with the debate and to register to vote."

among some sections of the population. She's not daunted, and is looking forward to the experience, which, in many ways, brings her full circle from both her days as a student of philosophy, and her time in Spain: "I have already found myself looking back at people like Hobbes and saying, well, what is there to learn about democracy from Hobbes and Hume and Rousseau? And is that thinking to be part of how I now think about the job?".

First up this year are the referendums in March on the role of women in the home, the family and on care. The Commission has launched an information campaign to explain the wording in each case, while work has already begun on the broader elements of its education function: "We are involved with the local authorities in an assessment of the integrity of the Register and the updating of the Register. Another part of our role has to be to reach out and encourage people to engage with the debate and to register to vote. I will be going to local halls, to colleges, to meeting centres. I expect I'll be on a tour of the country at some level or another for the next few weeks".

The Commission's role, of course, is not to persuade people to vote in a particular way, but rather to enable voters to make the most informed decision possible by explaining the proposed amendments, and how they might differ from the current provisions. She feels that the upcoming referendums will pose interesting challenges in this regard: "It's tricky technically, because you're not replacing something with something else. You're replacing a provision and adding something, and then that means you have to make an amendment to another provision, and it's all within Article 41. Each standing on their own, possibly, will allow for relatively clear explanations, but when you put the two together, it may be more complicated".

With public advocacy groups and some politicians already questioning the proposed wording, or indeed whether a referendum is necessary at all, the discussion widens to encompass what a constitution is, and what we expect it to do: "It's not attempting to put legislation in place that gives rights to people who are carers. It's attempting to express, first of all, what our values are, and what the common good is perceived to be, and then what obligations there are on the State in the light of those. So it'll influence the way legislation is read. This will be an expression by the people. It's for the Government to decide what way it'll play out".

Keeping busy

Ms Justice Marie Baker was born in Co. Wicklow but lived for most of her childhood in Co. Cork. She was called to the Bar in 1984 and to the Inner Bar in 2004, practising in the Cork and Munster Circuits. Her primary practice areas included land law and conveyancing, general chancery, family law and commercial law.

In 2014 she was appointed a judge of the High Court and was assigned to the non-jury and judicial review lists. She was the judge in charge of the personal insolvency list and the non-contentious probate list from 2014 until her appointment to the Court of Appeal in 2018. She was appointed a judge of the Supreme Court in 2019, and as Chair of the Electoral Commission in November 2022.

Ms Justice Baker lives in Inchicore in Dublin, and enjoys gardening and hillwalking. Due to retire from the Supreme Court in April, she says she will travel, "but everybody says that, and my day to day is best, really, if I have a job to do, books to read, and fun to be had".

She's looking forward to the challenge: "I expect I'll find it challenging and I expect that examples will come up that may not be that easy to answer. But again, the advocacy groups are the groups that must, in a sense, throw the questions at us. They'll have to present the questions and we will do our best to give clear answers".

Information gap

Another of the Commission's functions is around research. Ms Justice Baker points out that, amazingly, there is virtually no research in Ireland into elections, and that's a gap they are eager to fill: "We don't, for example, have any statistics in Ireland about why people vote, why they don't, why they vote one way rather than the other, whether they like referendums".

The Commission has published its research strategy, and invited submissions from interested parties, from which it will commence its research programme. One mooted project is on election posters, but the Commission has also been very clear that it wants to hear about less orthodox ideas, 'blue sky' research that will inform how we think about elections and politics in Ireland: "I hope we get some good ideas. We will. I think the academics are very interested. The academics really want us to do this research because it could be the basis on which they will write the political science".

There's no doubt that we are currently living in 'interesting times', where geopolitical tensions can so easily feed into the national political and social landscape. It's easy to be pessimistic about the ability of democracy to withstand threats from misinformation, or even the far right, but Ms Justice Baker remains positive in her outlook, and hopeful that bodies such as the Electoral Commission will ultimately play a crucial role in countering these threats: "I have a healthy concern, but I'm not a worrier. I don't get despondent. I look at American politics, I suppose, and I worry in a general way, but it doesn't bring me down. I think democracy is still reasonably strong here, and in parts of the EU it is too. I think people, ultimately, are not fools".

IMPACT OF THE CRIMINAL PROCEDURE ACT 2021

The Criminal Procedure Act 2021 has improved the running of criminal trials, but in the absence of extensive case law its full effect has yet to be felt.

Amy Heffron BL

The Act has made a number of significant changes to criminal trials, including the introduction of preliminary trial hearings.

The Criminal Procedure Act 2021 (the Act) was commenced on February 28, 2022.[1] The Act has made a number of significant procedural changes to criminal trials, including the introduction of preliminary trial hearings (PTHs) and the wider provision of documentation to juries to assist them in their deliberations. Prior to the Act, issues concerning the admissibility of evidence were dealt with in the course of a trial.[2] This meant that a jury was required to be empanelled in a trial in advance of a trial judge embarking on a *voir dire* (held in the jury's absence) to determine whether or not certain evidence might be admitted before the jury. Various stakeholders argued that this longstanding system disrupted the trial process, led to significant delays in trials, and resulted in a situation whereby some juries were sworn in and then not required as part of the trial for significant periods of time, sometimes weeks. This article considers the impact of the changes made by the Act since its commencement nearly two years ago.

Procedure

The Act's procedure applies where an accused has been sent forward for trial to the Circuit or Central Criminal Court. Prior to the trial, the Court may hold a PTH. The Court may do so of its own motion or upon the application of either party.[3] This has the effect that legal rulings that otherwise might previously have been sought in a *voir dire* during the trial may now be determined in a hearing prior to a jury being sworn in, thus reducing the length of a trial before the jury. The rulings that may be made are expansive, and may concern the procedural conduct of a trial, matters of law, and the admissibility of evidence.

> In practice, many PTHs are now being heard immediately prior to the commencement of a trial, with the jury being sworn in at the conclusion of the PTH.

It is worthy of note that, while the Act details how the PTH may be heard, it is not an entirely mandatory procedure. Unless ordered by a judge, the application for a PTH must be made by one of the parties. In practice, it appears that there are no adverse consequences for not applying to have a PTH prior to the commencement of a trial, and rulings may still be sought under the traditional *voir dire* procedure during the trial. However, failure to avail of the PTH may, and has on occasion, attracted criticism from the trial judge.

Section 11 of the Act permits the enactment of rules of court, and rules have been prescribed for the Circuit and Central Criminal Courts (the Rules).[4] The Rules prescribe the procedure to be followed when applying for a PTH in the courts. The Rules are largely identical. They prescribe the notice that the moving party must complete (the PTH Notice) and serve on the other party and the court. The Rules provide that a PTH Notice shall be served at least two months prior to the trial where it is practicable to do so. In practice, it does not appear that this time limit is strictly applied. The other party must then serve replying particulars (the PTH Reply). The PTH Reply must specify whether there is agreement that a PTH should be held, and whether any orders sought by the moving party are being consented to or opposed.

The Act suggests that the court is at liberty to set a date for a PTH, and may direct that the PTH be held as close in time to the date for which the case is listed for trial as the court considers appropriate and just in the circumstances.[5] In practice, many PTHs are now being heard immediately prior to the commencement of a trial, with the jury being sworn in at the conclusion of the PTH. This has obvious advantages for both parties and the trial court. Because the legal issues have been dealt with prior to the trial, there is greater certainty when apprising the jury of the likely duration of a trial. It also assists the task of scheduling the attendance of witnesses at the trial.

Presiding judge

In general terms, the judge who presides over a PTH is not generally required to preside over the trial itself, or indeed any additional PTH that may be held in respect of the same matter.[6] Despite this, the court, if it is satisfied that it is in the interests of justice to do so, may direct that any subsequent PTH(s) or the trial itself shall be presided over by the same judge as determined the initial PTH.[7] However, the position is otherwise if a "relevant order" is made at a PTH. Under the Act, a "relevant order" is defined as an order as to the admissibility of evidence. Subject to some exceptions, where a "relevant order" is made in a PTH, the judge who made the order is required to preside over further PTHs and the trial itself, subject to some exceptions. The exceptions included in the Act are: (a) the presiding judge is unavailable to preside; or, (b) there is other good reason. There is no definition or guidance given by the legislation as to what is meant by these exceptions and hence the issue will likely be determined on a case-by-case basis.

Offences

The Act applies to relevant offences and offences that are not relevant offences (non-relevant offences). Section 5 defines a relevant offence as an offence whereby a person may be sentenced to life imprisonment or a maximum term of imprisonment of at least 10 years. It also includes an offence of aiding, abetting, counselling or procuring the commission of a relevant offence, or an offence of conspiring to commit, or inciting the commission of, a relevant offence. The Act also empowers the Minister for Justice to deem a particular offence a "relevant offence".[8]

The distinction between "relevant offence" and "non-relevant offence" is significant. Section 6(2) provides that where a PTH Notice is served in relation to a case involving a relevant offence, the Court must hold a PTH.[9]

For non-relevant offences, the Court has a discretion as to whether or not to hold a PTH. If a PTH Notice is served for a non-relevant offence, the court must be satisfied that:

(a) it would be conducive to the expeditious and efficient conduct of the proceedings; and,
(b) it is not contrary to the interests of justice for the hearing to be held.[10]

Orders

Sections 6(7) and 6(8) list the various orders or rulings that may be sought in a PTH. Section 6(7) is concerned with the procedural conduct of a trial, including matters such as the availability of witnesses and any outstanding disclosure issues. Section 6(8) lists all the non-procedural orders that can be made at a PTH, and the legislation under which such rulings may be sought. The orders listed are in relation to matters of law and the admissibility of evidence. Notably, the Act suggests that any application that can be made in the absence of a jury may be made under this procedure. In this regard, s.6(8)(d) states that as well as the aforementioned list of orders, a court can also make "any other order that could be made by the court in the absence of the jury".[11] The Act also gives the court the power to make any other order relating to the conduct of the trial as appears necessary to the court to ensure that due process and the interests of justice are observed.[12]

Despite this wording of s.6, it appears that certain applications do not fall within the remit of a PTH. For example, it appears not to encompass an unfairness of process argument on the basis of lapse of time. A consideration of the jurisprudence in the area suggests that this is not an issue that might be determined by way of a PTH. Previously, offences alleged to have occurred at a considerable distance in time from the trial were frequently dealt with by way of judicial review applications for prohibition of such trials on grounds of lapse of time or culpable delay. The position has evolved and, subject to exception, it is now well established that the trial court must determine any such application. In *DPP v CC* [2019] IESC 94, the Supreme Court held at para 11:

"The position now has been reached, however, where it is generally accepted that in most cases it is preferable that delay be addressed by a so-called 'P.O'C. application' made at the close of the prosecution case, or by the evidence generally, if the accused adduces any evidence. The reasons for preferring that the matter be ventilated in the course of the trial have been set out in some detail in the judgment of the Chief Justice, and now appear settled".

This remains an aspect of criminal trials that will have to be argued in a *voir dire* during the currency of the trial, after the court has heard all the relevant evidence.

Appeals

The Act affords the prosecution certain rights of appeal against the making of a relevant order. If a judge in a PTH orders that certain evidence shall not be admitted at a trial, the prosecution may appeal the order on a question of law to the Court of Appeal (and in some circumstances to the Supreme Court). The appeal must be made on notice to the accused within 28 days.

Section 7(2) of the Act provides that there can only be an appeal where the order concerns erroneously excluded evidence that is:

(a) reliable;
(b) of significant probative value; and,
(c) such that when taken together with the relevant evidence proposed to be adduced in the proceedings a jury, or in the case of an offence being tried before a Special Criminal Court, that court might reasonably be satisfied beyond a reasonable doubt of the accused's guilt in respect of the offence concerned.[13]

Where the prosecution brings a s.7 appeal, the trial concerned shall not proceed until the appeal is determined or withdrawn. This in itself can cause a long delay for trials given the length of time required for an appeal. This is of significance in a case where an accused is in custody awaiting trial. An appeal against the making of a relevant order was brought by the prosecution in the trial *The People (DPP) v Cervi*. The appeal was subsequently withdrawn and the trial proceeded more expeditiously than obviously would have been the case if the appeal had been determined by the Court of Appeal.

> An application for the use of an intermediary in respect of a witness or the accused, as well as a ground rules hearing, can be sought well in advance of the trial.

From a defence perspective, no right of appeal exists until after the trial has concluded. Any order made at a PTH is binding as though it were made during the trial. However, a trial judge may vary or discharge an order made in a PTH where there has been a "material change of circumstances" and the court is satisfied that it is in the interests of justice to do so.[14] The Act specifies that the trial court can vary or discharge an order upon the application of either party, or of its own motion. The Act does not specify what constitutes such a material change in circumstances. The change in circumstances must be relevant to the order, so it might be argued that the service of additional evidence, or the receipt of relevant disclosure material after the order was made in the PTH, constitutes such a change.

Provision of information to juries

As well as the introduction of the PTH, the other significant change to criminal procedure was made by s.12 of the Act. This deals with the provision of documentation to juries to assist their deliberations. The section applies to any offence being tried on indictment, with some exceptions.[15] The exceptions concern certain legislation that already expressly provides for giving specified information to juries. For example, s.57 of the Criminal Justice (Theft and Fraud Offences) Act 2001 allows a trial judge to order that copies of documents such as transcripts, charts and diagrams used in the trial be furnished to the jury. Section 12 of the Act makes similar provision for trials on indictment.

Section 12 is very wide reaching as it also gives discretion to the trial judge to direct that the jury be given any other document that the court believes would be of assistance in its deliberations. In practical terms, this means that where a jury requests to re-hear certain parts of the evidence, a trial judge may now direct that they be given a transcript of the evidence rather than the trial judge having to read the full extracts to the jury. This may reduce the length of trials.

Impact

The Act's introduction clearly impacts on the potential length of criminal trials, largely due to the fact that issues concerning the admissibility of evidence may be determined in advance of the swearing in of a jury and the commencement of the trial itself. It is also significant for trials involving vulnerable or juvenile witnesses. For example, an application for the use of an intermediary in respect of a witness[16] or the accused, as well as a ground rules hearing, can be sought well in advance of the trial. This provides an opportunity for the intermediary to suggest the special measures most likely to achieve 'best evidence' from the witness.

Further, the prosecution may obtain an advance ruling on the admissibility of a video recording of the statement(s) made by certain witnesses (most usually a child) when interviewed by An Garda Síochána.[17] This can provide certainty for parties and the particular witness as to how the trial will run and may be achieved by the prosecution securing a PTH on the issue of the admissibility of the video recording.

In addition, there are two particular issues in which a complainant in a sexual offence case may be entitled to separate legal representation. Section 19A of the Criminal Evidence Act 1992[18] prescribes a procedure for dealing with the issue of disclosure of counselling records where a complainant does not consent to the records being disclosed to the defence. Section 3 of the Criminal Law (Rape) Act 1981, as amended, states that a complainant's sexual experience (other than that to which the trial relates) can only be raised by the defence with the leave of the court. Where either issue arises, the complainant is put on notice and advised of their entitlement to be separately legally represented. Prior to the Act, this could delay a trial because once the issue arose, the right to separate legal representation arose. These applications can now be made in advance of the trial. However, the reality is that many of the applications to cross-examine on other sexual experience are still being heard in the currency of a trial.

One published judgment of relevance is that of the Court of Appeal in *People (DPP) v Ahmed*.[19] The appellant entered a guilty plea on some counts prior to the conclusion of a three-day PTH that had been sought on his behalf. There were a number of grounds of appeal, one being "that the learned trial judge erred in law and in principle in failing to afford adequate weight to the plea of guilty entered by the appellant prior to the commencement of any trial and prior to the empanelling of a jury". The respondent submitted that the degree of credit to be afforded to an accused in similar circumstances had yet to be explored by the Court of Appeal. In looking at the weight to be afforded in such circumstances, the Court held:

"… The plea was not a particularly early plea. The pleas to the first two offences were only entered on the third day of a preliminary hearing, and the remaining pleas were only entered on the day of the sentencing hearing. The appellant was certainly entitled to some credit for his pleas but they were not the most valuable pleas, as he had little choice but to plead guilty in circumstances where

there was very strong evidence against him. Further, given the lateness of the pleas the prosecution would have been spared little in terms of the preparatory work that needed to be undertaken in anticipation of a trial".[20]

Therefore, the Court has indicated that, given the amount of preparation required for a PTH, a guilty plea during its currency will not necessarily be treated as an early plea.

Conclusion

It seems to be accepted that the introduction of the Act has improved the running of criminal trials. If it is used in the intended manner, it provides a very useful procedure to ensure the expeditious running of trials. However, the use of the legislation is still in its early days and neither party is compelled to seek advance rulings by means of a PTH, although the court may direct a PTH in the circumstances set out above. Because the legislation is still in its infancy, there is little case law dealing with any appeals against rulings made in a PTH. Thus, its full effect and true ramifications have yet to be felt.

As the outcomes of prosecution appeals against orders made in PTHs (or indeed of convictions in which evidence was deemed admissible in PTHs) make their way through the system, whether or not the Act has achieved that which was intended will become clearer.

References

1. Criminal Procedure Act 2021 (Commencement) Order 2022 (S.I. No. 79 of 2022), art. 2.
2 It is worth noting that other applications, not dealing with the admissibility of evidence, could be brought in advance of a trial prior to the introduction of the 2021 Act. Firstly, since the abolition of the preliminary examination system in the District Court, an accused who is sent forward for trial to the Circuit or Central Criminal Court may (in advance of their trial) apply to the trial court to dismiss one or more of the charges against them. The trial court is obliged to dismiss the charge to which the application relates if it appears that "there is not a sufficient case" to put the accused on trial. This form of pre-trial application was introduced by the insertion of s.4E into the Criminal Procedure Act 1967 (by s.9 of the Criminal Justice Act 1999) and became operative in 2001. Prior to the Supreme Court decision in *People (DPP) v J.C.* [2017] 1 IR 417, s.4E was a relatively popular means by which an accused might challenge the admissibility of evidence seized on foot of a search warrant and asserted to have been unconstitutionally obtained. Given the dilution of the exclusionary rule in *J.C.*, use of s.4E has become less fashionable and probably futile in the context of such challenges (see also *People (DPP) v Jagutis* [2013] 2 I.R. 250). The fact that the Supreme Court has confirmed that the principle in *J.C.* is not confined to search warrants (*People (DPP) v Quirke* [2023] IESC 20, para. 32) means that s.4E is likely to fall into further disuse (in favour of only challenging the admissibility of evidence in a PTH) and likely only used where the defence submission is that there is insufficient evidence. Obviously, however, if evidence is deemed inadmissible in a PTH (e.g., evidence obtained on foot of a search warrant), then (if the DPP does not appeal against the relevant order excluding the evidence or the DPP brings an appeal but is unsuccessful), the accused may bring a s.4E application thereafter (s.4E(1A) as inserted by s.14 of the 2021 Act). Secondly, s.6 of the Criminal Justice (Administration) Act 1924 allowed for orders for amendment of an indictment, for separate trials, and for postponement of a trial to be sought in advance of, or during, a trial.
3. Section 6(1) of the Criminal Procedure Act 2021.
4 Circuit Court Rules (Criminal Procedure Act 2021) 2022 (S.I. No. 453 of 2022); Rules of The Superior Courts (Criminal Procedure Act 2021) 2022 (S.I. No. 122 of 2022).
5 Section 6(5) of the Criminal Procedure Act 2021.
6. Section 6(10) of the Criminal Procedure Act 2021.
7. Section 6(11) of the Criminal Procedure Act 2021.
8. Section 5(2) of the Criminal Procedure Act 2021.
9. Section 6(2) of the Criminal Procedure Act 2021.
10. Section 6(1) of the Criminal Procedure Act 2021.
11. In the case of proceedings before the Circuit Court or the Central Criminal Court; see also s.6(8)(e) for the case of proceedings before a Special Criminal Court.
12. Section 6(8)(f) of the Criminal Procedure Act 2021.
13 Section 7(2) of the Criminal Procedure Act 2021.
14. Sections 6(15) and (16) of the Criminal Procedure Act 2021.
15. For a full list of offences, see s.12(1)(a) to (e) of the Criminal Procedure Act 2021.
16. Section 14 of the Criminal Evidence Act 1992.
17. Section 16 of the Criminal Evidence Act 1992, as amended.
18. As amended by s.39 of the Criminal Law (Sexual Offences) Act 2017 and s.30 of the 2017 Act.
19. [2023] IECA 107.
20. See *People (DPP) v Ahmed* [2023] IECA 107 Para 57.

LESSONS FROM MEDIATING THE GOOD FRIDAY AGREEMENT

The extraordinary work of Senator George Mitchell in mediating the negotiations that led to the Good Friday Agreement contain important lessons for all types of dispute resolution.

Turlough O'Donnell SC

> "At a time when the world was in danger of complete destruction (as it still is), the negotiation method was no better than the haggling at Ballinasloe Horse Fair over the sale of a pony."

The Harvard Programme on Negotiation (PON) has been going now for 50 years, and is a major resource for negotiators and mediators. It has a fundamental principle: never bargain over positions. This principle is illustrated by the experience in 1961 when talks under President Kennedy for a comprehensive ban on nuclear testing came to a critical point. How many on-site inspections per year should the Soviet Union and the United States be permitted to make within the other's territory to investigate suspicious seismic events? The Soviet Union finally agreed to three inspections. The United States insisted on no less than ten.

And there the talks broke down – over positions – despite the fact that no one understood whether "an inspection" would involve one person looking around for a day, or a hundred people prying indiscriminately for a month. The parties had made little attempt to design an inspection procedure that would reconcile the United States' interest in verification with the desire of both countries for minimal intrusion.[1]

And there you have it: at a time when the world was in danger of complete destruction (as it still is), the negotiation method was no better than the haggling at Ballinasloe Horse Fair over the sale of a pony. Bargaining over positions is a primitive way of negotiating.

A better approach

Harvard PON developed a better method, which has stood the test of time. Principled negotiation, which Harvard PON promotes, involves this fourfold method:

1. Separate people from the problem.
2. Focus on interests, not positions.
3. Invent options for mutual gain.
4. Insist on using objective criteria.[2]

It seems to me that running through all the negotiations mediated by Senator George Mitchell in respect of the Northern Ireland peace process is the application of this principled method – the slow movement away from positions to a focus on needs and interests.

> "In the end we do need to know not only your political position but also whether you are kind-hearted, whether you can tell the truth, and whether you can keep your word."

Positions are important and must be understood. Classic statements like "I am a Unionist," "I am a Republican," "I am a Nationalist," "I am a loyalist," "I am none of those things," or "my flag is the Tricolour" or "my flag is the Union Flag" must be respected, but such statements have the drawback of all positions and all labelling – they say very little about the abundance of humanity, and all the capacities in you yourself and the person sitting opposite you.

In the end we do need to know not only your political position but also whether you are kind-hearted, whether you can tell the truth, and whether you can keep your word.

The work of Senator Mitchell and the ten parties and two Governments resulted in the Good Friday Agreement, which was greeted with joy and relief across the island of Ireland. The agreement dealt with the problem of positions by acknowledging such positions and the right to hold them. The participants therefore recognised "the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland".[3]

Following this statement of positions and right throughout the Good Friday Agreement, we see the triumph of principled negotiation resulting in the meticulous treatment of needs and interests, including: democratic institutions; human rights; reconciliation; decommissioning; policing; north/south and east/west relationships; democratic institutions; and, prisoners.[4]

We see very strong positional thinking in civil disputes. Pleadings and the correspondence are nearly always strongly positional and, worse, they are often the lawyer's interpretation of what the dispute is all about. Worse still, some of the lawyer's own projection might be going on. Many will recognise the situation: perhaps it may have been an inheritance dispute, where brothers and sisters are transformed into "my client" and "your client", allegations are made (at the highest) and that preliminary letter which lands so badly and causes hurt and estrangement.

And you must never attack a position because that only strengthens it.

What good mediators do with positions is to listen carefully and with respect, and then ask: what are your interests? Then the mediator seeks to see if the interests of the parties align. Without doubt the common interests identified among the parties to the peace process were the needs for partnership, equality, and mutual respect,[5] the need to reject violence, and the interest in ensuring that all children would live happy and fulfilled lives so that nobody would have to go through anything like the Troubles again. These were common interests and needs whatever your flag was.

The lesson for mediators is not quite to ignore positions but to perceive them as of little use in resolving the conflict. A better approach is to focus on the needs of the parties.

Master mediator

In 2015, Senator Mitchell gave an interview to the *Harvard Business Review*.[6] He had previously said that he used the same methods to resolve any dispute and made several points about this, which I have set out below. I am going to use the interview point by point to see if we can find useful lessons for mediators. I will put the Senator's words or my precis of them in italics and will put my comments in ordinary type.

- *First, there has to be a certain level of knowledge of the history and nature of the conflict. The Senator explained that he tried to fully inform himself by reading dozens of books on the conflict in Northern Ireland and in the Middle East (where he had also worked).*

- Knowledge of the past and what went into the formation of the positions is essential. Our adversarial litigation system leads to this: looking at the past with a view to finding blame. That is not a good place to be; people can become obsessive and easily stuck. Having looked very carefully at the past, the mediator can invite people to leave it there and focus on shaping their own future. Encourage the parties to look forward and not back during the mediation process, thus giving space and time to make that significant psychological shift. The past is a difficult place for many in conflict, so full of pain as it often is. This is why, I believe, it has been difficult to negotiate the reconciliation envisaged by the Good Friday Agreement.[7] In civil litigation it is easier to negotiate the future than the past (the past might involve an apology or an acknowledgement). That is why it is better to start with discussions about the future (compensation issues and future arrangements for example) and then to track back to the past (apologies and acknowledgements, for example) when future gains have been agreed.

- *Secondly, he says a recognition is needed that the people involved must own the resolution because they are the ones who will live with the consequences. On the first day of formal negotiations in Northern Ireland the Senator told the delegates that he had not come there with an American Plan or a Clinton Plan or a Mitchell Plan. He said "Any agreement you are able to reach must be your own". When he drafted the document that became the Good Friday Agreement, he was determined that every word in it be spoken or written by the delegates.*

- The parties to the mediation must own the solution and indeed they must own the process. They are empowered. All conflict resolution involves horizontal decision-making. It is not hierarchical. It is not command and control. It is more like a *meitheal*[8] of ideas. It is not ordering anyone around, it is 'neighbouring'.[9] The mediator certainly does not order anyone around and in our system must not even make proposals for settlement unless asked by the parties to do so. And the words of the final agreement should be those of the participants if at all possible.

- *Senator Mitchell said that you need deep reservoirs of patience and perseverance. He spent five years working on the peace process in Northern Ireland. You can't take the first or the second or the tenth no as a final answer. You just have to keep at it.*

- Every mediator needs those reserves of patience and perseverance, and will recognise certainly that the first word and the second and other words are often an obsessive repetition of the position that is so ingrained and so hard to move away from.

- *Explaining his decision to establish a firm deadline for the talks and (it was a close call), that it was about timing, circumstance, and the attitude of the parties*.

- This is a judgement call all mediators have to make when satisfied that the dialogue is complete and the conversation starting to move in circles. It was a close call for Senator Mitchell and it was a matter of judgement. And remember the difficulty for the Senator was that he had ten parties and two Governments at the negotiation.

- *At one stage of the interview, the Senator was asked a very important question: "With warring factions, how do you start a dialogue?" He replied that: "The challenge is not to get them to talk, because everyone will talk, but to get them to listen. This is true of humans everywhere: the receptors in our brain for information consistent with our prior beliefs are large and wide open, but the receptors for information that's contrary to them are much narrower. So, we don't listen well to people we dislike or with whom we have a disagreement. It requires effort and discipline to get people to consider what the other side has to say. That's why these things take so long".*

- Here I think he is talking about active listening. Not listening so you can jump in with a point or a question, but listening with your whole attention, listening to the facial expressions and the body language, listening to what is being said and the tone of voice, listening to what is not being said and, if at all possible, listening with empathy – with the whole heart. The talking he is referring to is probably the continued statement of positions that won't change until the listening occurs. Mediators need to do far more listening than talking and the parties need to be guided to active listening. Active listening is a mark of profound respect for another human being and when it is being done it is also, I believe, paradoxically, a form of speaking.

- *He was also asked how he got people to listen to him? What authority you have is derived largely from the respect and trust you're able to generate, he explained.*

- This is a statement of considerable humility because Senator Mitchell arrived among us as a very distinguished man. What he says is true for mediators. It's true for everyone; you must earn authority, it does not come from status or title. And if it goes, your rank or status will not save you – all that will be left is the insolence of office. The mediator can generate trust in small ways; for example, if you say you will be back in the room in 15 minutes then be back in 15 minutes or less. Often you will be asked how the other room reacted to a proposal or what their thinking is. If you do not have clear authority to disclose this, say that clearly and firmly: "I can't disclose their secrets without authority just as I cannot disclose yours". Watch for spending more time in one room than the other and, if it is necessary to do so, then explain that carefully. Trust is built slowly and by small steps.

- *Senator Mitchell explained that he had to come up with a document about which each leader could say "This is good for us, for our specific constituency" but at the same time there had to be a broader vision of society in which everyone was treated equally, irrespective of background or religion – a society of tolerance and prosperity.*

- This is the negotiation using objective criteria that is described in Fisher and Ury's *Getting to Yes*. In the peace process there would have been no success without standards of equality and tolerance, and the desire for

> "The task of the mediator is to end separation by bringing people together in a safe space and then to hold that space with integrity."

prosperity for all. In major conflict resolution it is unthinkable that people would negotiate to an unfair result. The same is broadly true in civil disputes. It is very difficult to persuade people to accept an unfair result. But sometimes a final offer will be made on the basis that: "This is all we will do for you whether you regard it as fair or unfair, so take it or leave it". What is a mediator to do then? First, the mediator must recognise that this is not a negotiation – it is its opposite. Second, the mediator must be aware that a future relationship may not survive this and may indeed now be over. And finally, reality check this message before delivering it. In major conflict resolution where the future of relationships is vital, there is no place for such a message and the message should not be permitted at a late stage in civil disputes, after a lot of principled negotiation – if at all.

- *He also said: "I also believe that there is no such thing as a conflict that can't be ended. Conflicts are created, conducted, and sustained by human beings. They can be ended by human beings".*[6]

- There is hope for us all here. Every mediator needs to believe this and the peace process is a proof of what the Senator says. I believe that the capacity to reconcile is deep within human nature and will return to this idea below.

Infusing grace and compassion

We owe Senator Mitchell and all the peacemakers, known and unknown, a huge debt of gratitude. In any conflict situation, an important thing to look out for is separation. Parties to a mediation or peace process want at some level to continue to remain separate and the first step is to bring everyone together. That proximity is itself part of the reconciliation process. The separation may have been the cause of the conflict or its escalation. I believe this is what Dr Martin Luther King meant when he said:

"All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I it" relationship for an "I thou" relationship and ends up relegating persons to the status of things. Hence segregation is not only politically, economically, and sociologically unsound, it is morally wrong and sinful. Paul Tillich has said that sin is separation. Is not segregation an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness".[10]

The task of the mediator is to end separation by bringing people together in a safe space and then to hold that space with integrity. I agree with Senator Mitchell when he says that conflicts can be ended by human beings. I think that negotiation, co-operation and conflict resolution are part of our very make-up, and as natural as or more natural than conflict. How else did humanity survive this far? And how else are we going to survive the huge challenges of war, nuclear weapons, and man-made climate change?

During the Port Elizabeth case[11] Justice Albie Sachs, himself a victim of violence, said in the context of a famous case on mediation, that the Act being considered: "requires the court to infuse elements of grace and compassion into the formal structures of the law". And this is what mediation does for the law. I believe it allows for the infusion of grace and compassion into our procedures (but of course it is not the only method of such infusion) just as major conflict resolution allows for the infusion of generosity, truth, grace and compassion into the conflict situation.

Senator Maurice Hayes was a great man who worked for reconciliation. I heard him explain once to a group of American visitors that a lesson in peacebuilding was to recognise that groups of people with whom you are in conflict are made up of disparate people with disparate views. So, there may always be some in that group with whom you can enter dialogue. This is important for mediators with

large organisations. Yes, you should understand the 'party line', but also see whether beneath it are disparate needs and interests, which may need to be met and may even chime with those of the other side in the mediation.

The Women's Coalition made an outstanding contribution to the peace process. Their work is a reminder of the need to hear all the voices, if possible, and that positions can sometimes obscure underlying needs. The mediator must draw everyone into the mediation if possible – leave no one behind. The Good Friday Agreement protects the rights of all and asserts the "right of women to full and equal political participation".[12]

Where we are now

The dynamic for peace and reconciliation continues despite the failure to deal with the legacy issues. There may be silences, as in Ireland after the Civil War and in Spain after the end of the dictatorship. Silence is a way of coping and must be respected. But the dynamic also continues in the neighbouring of the extraordinary ordinary people, in the discussions of politicians and, I hope, in endless *meitheals* of hearing and listening. Poets, artists and historians may help us. Above all we must allow the voices of all the victims to be heard. Rev. Harold Good, again a major figure in the peace process who oversaw IRA decommissioning, described the peace process here as an "unfinished journey". The former President of the Methodist Church told UTV: ''I remember George Mitchell saying that the easy task was to come to an agreement. The challenge was to implement it and to take it forward".[13]

The idea that humanity is instinctively capable of and indeed adept at reconciliation is found in our own experiences and in concepts like the "concidentia oppositorum", explained by Nicholas of Cusa as "the coincidence of all paradoxes and opposites". The Christian Zen Master Willigis Jager saw a great underlying unanimity in the mystic traditions of all religions: in Buddhism it is Zen, in Hinduism it is Yoga, in Islam it is the way of the Sufis, in Judaism it is the Kabala and in Christianity it is the way of the Mystics.[14] And as we come to know more about *Uisneach* in ancient Ireland we may find that this was also a space where the oppositions were reconciled.

We are only at the beginning of our understanding or re-understanding of conflict resolution.

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ARE COSTS FOR WINNERS IN FAMILY LAW?

Recent case law pertaining to family law indicates that parties must be conscious of the possibility that they will face a costs order.

Ferga McGloughlin BL

There are no 'winners' in family law. So, how do we decide who pays the costs? We don't. "No order as to costs" is a familiar order in family law courts or in settlement of family law terms. Mr Justice Barrett pithily summarised the costs issue in a recent judgment:

"There was much discussion at the costs hearing of how costs typically follow the event in court proceedings, with the 'winner' (my term) taking all. For my part I do not conceive of family court proceedings as presenting the same win/lose scenario that is the hallmark of other proceedings. That is not what family law proceedings are about … I doubt there are many litigants who leave the family courts feeling they have 'won'."[1]

> "The case was protracted and elongated due to serious allegations of a criminal nature made by the wife."

However, it would appear that the tide is turning in circumstances where the conduct of one party has directly caused prolonged and protracted litigation. In the matter of *DK v PIK*,[2] following a lengthy hearing in the High Court, there was an order for costs. This was appealed to the Court of Appeal and the appeal was allowed; however, the costs of the appeal were then at issue. Whelan J. states that it is contended that the usual rule of "costs follow the event should apply" unless the Court should consider it appropriate to make a different order.[3]

In the recent decision of *BN v DO'H*,[4] the Court of Appeal examined the issue of costs in family law proceedings. The case was protracted and elongated due to serious allegations of a criminal nature made by the wife, which she refused to withdraw and also refused to litigate, and because of her refusal to withdraw, the husband was forced to defend himself. Consequently, these allegations caused the litigation to be significantly protracted.

Essentially, the High Court found that the untrue allegations of rape and sexual assault made by the wife added at least 66% to the costs of the case and, consequently, awarded the husband 60% of the costs.

"The additional time taken by these allegations was entirely the fault of the appellant because she made those very serious allegations of a criminal nature against the respondent. If the untrue allegations of rape and sexual assault did not exist, the case would have been considerably more straightforward. Indeed, one might well contend that it probably would not have troubled the court at all".[5]

The matter was appealed, and the conclusion of the Court of Appeal was:[6]

"The trial judge was correct to conclude that the allegations made by the appellant were in the proceedings because she made them. He was also correct to conclude that he had to adjudicate upon their veracity in order to address issues concerning the welfare of the children. He was entitled to conclude that the proceedings were elongated unnecessarily as a result of the allegations, and, having found that the appellant made the allegations that she did knowing them to be untrue, for ulterior purposes, that she had engaged in conduct that was gross and obvious".

Ultimately, the Court of Appeal found that the conduct of the wife (the appellant), caused the case to be elongated and particularly bitter. In conclusion for practitioners, it appears that the old "no order as to costs" is less likely to be used without examining the case and how it was conducted. Parties to family law proceedings – and importantly, their legal advisers – will have to be more conscious of these matters and that they could face a costs or partial costs order.

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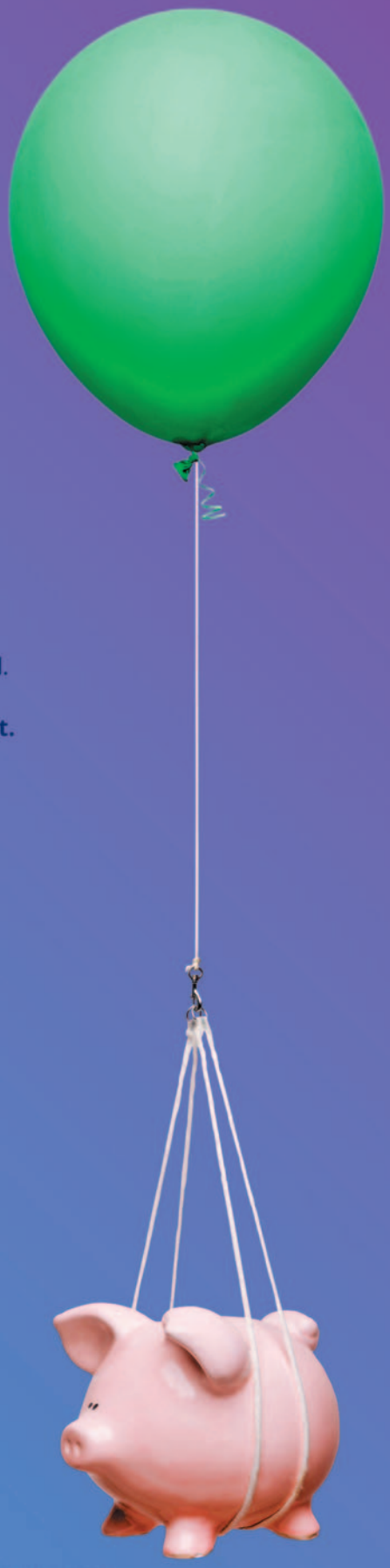

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