The Courts Bill 2013 and its implications

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INTRODUCTION

1. In March 2013 the Minister for Justice published the Courts Bill 2013 (the “Bill”). The main purposes of the Bill are stated to be twofold, namely (a) to increase the monetary jurisdiction limits of the District Court and the Circuit Court in personal injuries actions and other civil proceedings and (b) to amend the in camera rule in the context of family law and childcare proceedings.

2. It is intended in this paper to consider the main provisions of the proposed legislation and to consider some of the likely effects that the introduction of this important piece of legislation may have.

3. It should be noted that the draft legislation as published in March 2013 is not in its final form. At the Seanad Committee stage the Bill was re-named the Courts and Civil Law (Miscellaneous Provisions) Bill 2013 and a number of amendments to the original Bill were proposed. The substance of the Bill remains largely unchanged however and as such it is proposed to consider in the main the provisions of the Bill as published in March 2013.

KEY PROVISIONS

Long Title

4. The Bill is entitled as follows:

“An Act to amend the Civil Liability and Courts Act 2004 and the Child Care Act 1991 to allow bona fide representatives of the Press to attend court during proceedings heard otherwise than in public except in certain circumstances; and to provide for the prohibition or restriction of the publication and broadcasting of matters by such representatives in certain circumstances; to amend various enactments for the purpose of increasing the monetary limit of the jurisdiction of the Circuit Court in personal injuries actions and other civil matters; to amend various enactments for the purpose of increasing the monetary limit of the jurisdiction of the District Court in civil matters; to repeal certain provisions of the Courts and Court Officers Act 2002; and to provide for related matters.”

Monetary limits

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2 Published on the 26th June 2013, available at: http://www.oireachtas.ie/documents/bills28/bills/2013/3013/b3013s-scn.pdf. The Courts and Civil Law (Miscellaneous Provisions) Bill 2013 now contains provisions concerning inter alia (a) juries in lengthy trials, (b) legal advice and legal aid in relation to coroner’s inquests, (c) bankruptcy proceedings, (d) amendments to the Personal Insolvency Act 2012 and (e) a number of miscellaneous provisions (concerning Circuit Appeals and the designation of “appeal towns”).

Summary

5. In summary, the Bill provides that the District Court limit will increase from €6,348.69 to €15,000. The Circuit Court limit will increase from €38,092.14 to €60,000 in the case of personal injuries actions and to €75,000 in other civil proceedings. The Explanatory and Financial Memorandum to the Bill provides as follows:

   “Part 3 will change the monetary limits on the jurisdiction of the Circuit Court and District Court in civil proceedings to €75,000 and €15,000 respectively. However, in personal injury actions, the revised monetary jurisdiction limit of the Circuit Court will be €60,000.”

6. Part 3 of the Bill is entitled “Jurisdiction of District Court and Circuit Court” and contains the various legislative amendments, deletions and substitutions. In relation to the District Court, Part 2 of the Schedule to the Bill corresponds with s.12 of the Bill. Part 2 of the Schedule lists a series of enactments and s.12 provides that the figure of €15,000 should be substituted for the lower figures of £5,000, €6,348.69 and €6,350 respectively. Similarly, in relation to the Circuit Court, s.11 corresponds with Part 1 of the Schedule to the Act.

7. Sections 13 to 18 set about amending various sections of primary legislation and these can be seen as the core enactments from which the monetary jurisdictions of the District Court and the Circuit Court are derived. These amendments concern the revised monetary limits and the following enactments are amended:

   - Part III of the Courts of Justice Act 1936;
   - Section 33 of, and the Third Schedule to, the Courts (Supplemental Provisions Act) 1961;
   - Section 10 of the Hotel Proprietors Act 1963;
   - Section 17 of the Courts Act 1981;
   - Section 15(2) of the Courts Act 1991; and
   - Sections 51(3) and 140 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

Personal injuries

8. In personal injuries actions to be heard in the Circuit Court, a “special” revised monetary limit of €60,000 applies. As can be seen in Part 3 of the Bill, and as contained in the proposed amendments, the term “personal injuries action” is given the same meaning as it is given in s.2 of the Civil Liability and Courts Act 2004, namely an action for the recovery of damages in respect of a wrong for (a) personal injuries, (b) for both personal injuries and damage to property (but only where both have been caused by the same wrong) and (c) a “fatal injuries” claim within the

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4 FN 1, at page 3.
5 It should be noted that s.1(3) of the Bill provides that the provisions of Part 3 of the Bill shall not apply to proceedings commenced prior to the commencement of Part 3 i.e. no retrospective effect. This provision has been carried over to the Courts and Civil Law (Miscellaneous Provisions) Bill 2013.
meaning of s.48 of the Civil Liability Act 1961.

**New monetary limits**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Old monetary limit</th>
<th>New monetary limit</th>
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<tbody>
<tr>
<td>District Court</td>
<td>€6,348.69</td>
<td>€15,000</td>
</tr>
<tr>
<td>Circuit Court</td>
<td>€38,092.14</td>
<td>€60,000 (personal injuries)</td>
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<tr>
<td></td>
<td></td>
<td>€75,000 (other civil proceedings)</td>
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**Costs**

9. Section 16 of the Bill is of particular importance and seeks to amend s.17 of the Courts Act 1981 (as substituted by s.14 of the Courts Act 1991). Section 17 imposes a cap on costs that may be recovered by a plaintiff where an order is made in his or her favour but where the court is not the lowest court in which the case could have been heard.7

**In camera proceedings**

10. Part 2 of the Bill modifies the *in camera* rule which currently prevents the public and members of the press from being present in court during family law and childcare proceedings. Section 5 of the Bill provides for the amendment of the *in camera* rule, contained in a number of enactments relating to family law, so as to allow *bona fide*8 members of the press to be present in court during proceedings under those enactments. Under s.5 the court may make an order excluding members of the press from court or restricting their attendance. Such an order may be made in certain circumstances, namely (a) where it is necessary to do so to preserve the anonymity of a party to the proceedings or any child to whom the proceedings relate, (b) by reason of the nature and circumstances of the case and / or (c) as is otherwise necessary in the interests of justice.

11. Section 5 of the Bill inserts a new s.40(3A) into the Civil Liability and Courts Act 2004 and the new section provides that no relevant provision should act to prohibit “bona fide representatives of the Press from attending proceedings to which the relevant enactment relates.” Section 5 goes on to prescribe a number of detailed savers and exceptions and sets out the criteria to be taken into account when a court seeks to make a determination regarding the presence of members of the press in court during family law or childcare proceedings.

12. In determining whether to make an order prohibiting or restricting access, the court

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6 With regard to proceedings brought under the Defamation Act 2009, it appears to be the case that the Bill proposes an increase in the monetary limit from €50,000 to €75,000. Section 17 of the Bill proposes an amendment to the Third Schedule to the Courts (Supplemental Provisions) Act 1961. Reference number 7A of the Third Schedule, as inserted by s.41(b) of the Defamation Act 2009, will be deleted *i.e.* reference to €50,000 will be replaced by reference to €75,000.


8 The term used in the *Explanatory and Financial Memorandum*. See FN 1 above.
must have regard to the desirability of promoting public confidence in the administration of justice.9 The court must also have regard to any other matter that may appear relevant,10 to include in particular:

i. The best interests of any child to whom the proceedings relate;

ii. Whether information given or likely to be given in evidence is sensitive personal information11;

iii. The extent to which the attendance of representatives of the Press might inhibit or cause undue distress to a party to the proceedings or a child to whom the proceedings relate by reason of the person’s emotional condition, medical condition, physical impairment or intellectual disability;

iv. The need to protect a party to the proceedings or a child to whom the proceedings relate against coercion, intimidation or harassment;

v. Whether information given or likely to be given in evidence might be prejudicial to a criminal investigation or criminal proceedings;

vi. Whether information given or likely to be given in evidence is commercially sensitive information12; and

vii. Whether certain information (sensitive personal information, information relating to criminal proceedings and commercially sensitive information) could cause members of the public to identify a party to the proceedings or a child to whom the proceedings relate.

13. Section 6 of the Bill inserts a new s.40A which is entitled “Prohibition on publication or broadcast of certain matters” into the Civil Liability and Courts Act 2004 and which effectively amounts to a blanket ban on the publication or broadcast of any information about a matter that would be likely to lead members of the public to identify the parties to family law proceedings or children to whom the proceedings relate. The Bill provides that it shall be an offence to act in contravention of s.6 and the penalties are set out under s.6.

14. Section 8 of the Bill amends s.29 (Hearing of proceedings) of the Child Care Act 1991 so as to allow bona fide representatives of the Press to be present in court during child care proceedings. The provisions of this section mirror those of s.5 in relation to the attendance of representatives of the Press at family law proceedings.

CONTEXT

Introduction

15. The publication of the Bill was accompanied by the publication of a Regulatory Impact Analysis13 ("RIA") which, in turn, considered a number of other reports and

9 As per s.5 of the Bill i.e. the new s.40(3A)(c) of the Civil Liability and Courts Act 2004.
10 As per s.5 of the Bill i.e. the new s.40(3A)(c) of the Civil Liability and Courts Act 2004.
11 As defined in the new s.40(3A)(c).
12 As defined in the new s.40(3A)(c).
13 Available at:
submissions. A consideration of the RIA and the related documentation may allow for a better understanding of the motivations behind the introduction of the legislation and the practical impact the legislation is likely to have when enacted.

Monetary limits

16. As can be seen from the RIA, the drafters believe that by revising the monetary limits to reflect changes in the value of money since 1991\footnote{The last time the monetary jurisdictions were increased was in 1991 with the enactment of the Courts Act 1991.} certain benefits will accrue. As per the RIA, it is hoped to achieve through the enactment of this legislation:

“[A] more efficient distribution of cases between the courts resulting in lower legal costs for parties to civil proceedings. [The revised monetary limits will] provide for awards to be made which have similar purchasing power, in real terms, to the monetary limits introduced in 1991.”\footnote{FN 10 at pages 2 – 3.}

17. Under the heading of “impacts” the RIA refers to a positive impact on the management of civil proceedings “in terms of time and legal costs generally for parties to litigation.”\footnote{Ibid. at page 2.} Interestingly, the RIA also identifies a reduction in the impact that litigation may have on insurance costs:

“Possible impact on insurance costs reduced by specifying a monetary jurisdiction limit of €60,000 for Circuit Court personal injuries actions.”\footnote{Ibid. at pages 2 – 3.}

18. It is noteworthy that the commencement of ss.13 – 18 of the Court and Court Officers Act 2002, which provided for monetary jurisdiction limits of €20,000 in the District Court and €100,000 in the Circuit Court was also considered and ultimately rejected. The RIA cites a possible impact on insurance costs arising from a “significant increase” in the Circuit Court jurisdiction in personal injuries actions.\footnote{In his article Jurisdiction Game Changer, Law Society Gazette, May 2013, Richard Lee considers the €60,000 “cap” and Minister’s attempt to ensure against the inflation of awards: “To my mind, this is the questionable aspect of the bill. Effectively, it is proposing to put a specific cap on Circuit Court judges in terms of what they can award for personal injury claims, which is not warranted. The existence of insurance should not affect how parties are treated before the courts. To my mind, it is not appropriate that a defendant represented by an insurance company should be treated differently to any other defendant. Given that High Court awards are falling, it would be preferred if the jurisdiction of the Circuit Court should be €60,000 for all civil actions, with no distinction made for personal injury actions.”} The RIA also cites concerns regarding resource impacts on the Courts Service:

“While the Courts and Court Officers Act 2002 provided for increases in these limits to €20,000 and €100,000 respectively, the increased limits were not brought into effect at the time due to concerns about resource impacts on the Courts Service and the potential impact on the levels of awards which could, among other things, lead to consequential increases in insurance costs. The increased jurisdiction limits provided for in the 2002 Act have not been brought into operation.”
19. The RIA also makes reference to the Report of the Legal Costs Working Group published in November 2005 which concluded that existing monetary limits led to cases being heard unnecessarily in higher courts which in turn led to increased legal costs. Interestingly, the Working Group concluded that while the jurisdiction of the courts should be increased in line with inflation, it found that in relation to personal injuries cases the status quo should be maintained “until a more complete understanding of the dynamic of the Government’s insurance reform programme is available”. Similarly, the Report of the Legal Costs Implementation Advisory Group also concluded that the provisions of the Courts and Court Officers Act 2002 should be implemented, save in relation to personal injuries.

20. In terms of case loads, the RIA also makes reference to the fact that the increase in monetary limits should facilitate the earlier determination of cases and reduce the number of cases heard in the High Court. This will obviously have a knock-on effect in terms of the amount of Supreme Court appeals commenced each year.

21. The RIA also makes reference to the fact that the last time the monetary limits were increased was in 1991 with the enactment of the Courts Act 1991. The Legal Costs Working Group stated as follows in its November 2005 report:

“The Group believes that the failure to increase the civil jurisdictional limits since 1991 has led to a situation where more and more cases are unnecessarily heard in the higher courts with attendant increased legal costs. At this stage, a relatively modest claim must now be heard in the High Court. This is wasteful of court resources, incurs unnecessarily high legal bills and, if the trend is left unchecked, will make the District Court and, in time, the Circuit Court redundant in relation to certain classes of civil proceedings.”

In camera proceedings

22. The RIA describes how the in camera rule has given rise to concerns that family law courts are “overly secretive” and that there is an absence of reliable information on the operation of the law in relation to family law and child care proceedings. The RIA also refers to an “absence of written judgments” in family law and childcare proceedings.

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20 Paragraph 2.19 of the Executive Summary to the Report of the Legal Costs Working Group provides as follows: “The Group is very concerned with the impact of inflation on the jurisdictional limits of the various courts and believes that this leads to costs escalating as actions are inadvertently being driven into higher courts. For the reasons set out in the Report, the Group recommends that the jurisdictional limits of personal injuries cases be maintained until a more complete understanding of the dynamic of the Government’s insurance reform programme is available. It recommends that for all other areas the jurisdictional limits be adjusted to take account of inflation and that such limits be adjusted regularly thereafter (5.41)”.
21 Ibid.
23 FN 10 at page 7.
24 See speech entitled Unsustainable delivered by The Hon. Mrs. Justice Susan Denham, Chief Justice of Ireland, Law Society Seminar on the Establishment of a Court of Appeal, 2nd March 2013. Chief Justice Denham refers to an approximate waiting time of four and a half years and to a 21.2% increase in the number of appeals commenced in 2012 (605) when compared to 2011.
26 FN 10 at pages 7 – 8.
27 Ibid.
23. The RIA describes how Part 2 of the Bill seeks to “strike a balance” between

“…the need to protect the identity and privacy of parties in family law cases, including children, while meeting the need for public understanding and information about the operation of the family courts. No costs will arise from this change. The benefits will be that confidentiality surrounding the parties to a family law or child care case can be preserved and the public need for a greater access to information on the operation of family law and child care proceedings will be met without having open access to the court hearings. The presence of bona fide members of the media, including print, electronic and broadcast media, who would be subject to certain restrictions and prohibitions, including a strict prohibition on the publication of any material which would lead to the identification of the parties or children involved, achieves the necessary balance. The impact of this proposal will be to improve public understanding of these particularly sensitive categories of litigation.”28

IMPLICATIONS

24. Until such time as the draft legislation is published in its final form it will not be possible to say with any real certainty how and to what extent the provisions contained in the Bill will impact on practice. However, it is reasonable to conclude that the substance of the Bill will remain largely unchanged and that the monetary jurisdictions will increase in the near future. The proposed changes will undoubtedly have certain implications:

i. Civil actions with a value between €38,000 and €75,000 and personal injuries actions with a value between €38,000 and €60,000 will no longer be commenced in the High Court. The workload of the High Court will therefore be reduced over time and the number of cases heard in the Circuit Court will increase;

ii. The number of cases commenced in the Circuit Court will increase, perhaps significantly. While cases with a value of between €6,300 and €15,000 will now be commenced in the District Court, thereby reducing the workload of the Circuit Court to a certain extent, the likelihood is that the overall effect will be to increase the amount of cases commenced in the Circuit Court jurisdiction;

iii. That said, the workload of the District Court will also increase significantly;

iv. There will be a more even distribution of cases between the three jurisdictions and this should, in theory, lead to earlier hearing dates;

v. With regard to family law and childcare proceedings, there is likely to be an increase in reports in the mainstream media. However, it should be noted that the any such reporting will be subject to certain restrictions, the main restriction concerning the identification of parties to the proceedings;

vi. Increased public awareness and interest may result in an increase in the amount of reported judgments concerning family law and childcare law.

28 Ibid. at page 8.
CONCERNS

Administrative burden and “resource impacts”

25. It appears to be the case that the efficacy of a number of the key provisions of the Bill is dependent on the Courts Service being able to cope with a significant increase in the workloads of the Circuit Court and the District Court. The increase in the number of cases is likely to result in a significant administrative burden. It remains to be seen whether steps have been and will be taken to allow for a smooth transition. Where the “resource impacts on the Courts Service” identified in the RIA have not been addressed, there is a risk that significant “bottle-necks” will arise and that waiting times will increase.

Disclosure

26. An anomaly arises with regard to disclosure requirements in personal injuries cases. The Rules of the Superior Courts were amended with the enactment of Statutory Instrument 391 of 1998 (Disclosure of Reports and Statements). The obligations that arise under SI 391 currently apply to all High Court personal injuries actions – SI 391 does not apply in the Circuit Court. Where the monetary jurisdictions are increased, arguably, the disclosure obligations under SI 391 will no longer apply to those cases with a value between €38,000 and €60,000.

Costs and retaining Counsel

27. In his article Jurisdiction Game Changer solicitor Richard Lee considers a number of the practical implications in the context of representation by junior and senior counsel before the District Court and the Circuit Court:

“It is normal for solicitors to run cases in the District Court without counsel, to retain counsel in the Circuit Court, and retain both senior and junior counsel in the High Court. It may be prudent to review this practice, particularly at the upper limits of the proposed jurisdictions. For example, in a District Court case with a value in excess of €10,000, it may be in a client’s interest to engage counsel. Similarly, for a Circuit Court case with a value in excess of €50,000, it may be beneficial to engage senior counsel.”

28. Issues arise with regard to costs, fees and taxation. In the District Court, costs are awarded in accordance with a scale of costs set out in the rules of court. The scale that currently applies is set out in Statutory Instrument 93 of 1997 and this provides for solicitors’ costs of a maximum of £750 in a defended claim for damages (tort, breach of contract etc.). With regard to counsel’s fees, the scale allows a maximum amount in a defended claim for damages of £150 and SI 93 of 1997 also provides that:

“No additional fee shall be allowed…as between party and party for any other work, including preliminary advice, consultation or advice on proofs.”

29 FN 15.
29. Further, Order 52, rule 1(2) of the District Court Rules provides as follows:

“In the award of costs in any other proceedings in the Court a fee for counsel may not be included unless the Court certifies that, in its opinion, the employment of such counsel was necessary for the attainment of justice or for enforcing or defending the rights of the party concerned.”

30. Under the proposed new regime, it is likely to be the case that counsel will increasingly be retained in District Court actions. Taking the example of a personal injuries case with a value of approximately €12,000, counsel may be retained to draft proceedings, to advise on quantum and liability, to advise with regard to discovery, to prepare an advice on proofs. Counsel may also attend a consultation with the client. It remains to be seen whether, under the new regime, fees will be recoverable on a party and party basis. Where the scale costs continue to apply, fees will be capped at the euro equivalent of £150 (although in reality District Court judges will often certify counsel for a greater amount).

CONCLUSION

31. The Bill proposes very significant changes and practitioners will be required to adapt quickly. The old reference points will be replaced over-night. Practitioners would be well advised to familiarise themselves with the legislation as published now and as ultimately enacted. It may also be prudent at this stage to begin to discuss the provisions of the Bill with briefing solicitors and with senior and junior colleagues.