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THE BAR REVIEW

VOLUME 28 / NUMBER 1 / FEBRUARY 2023

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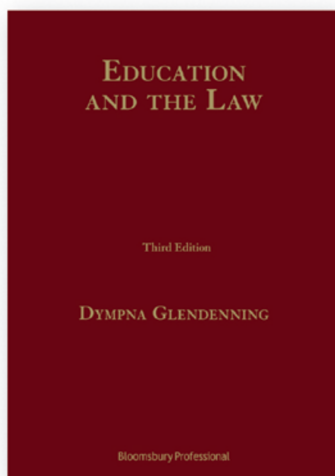

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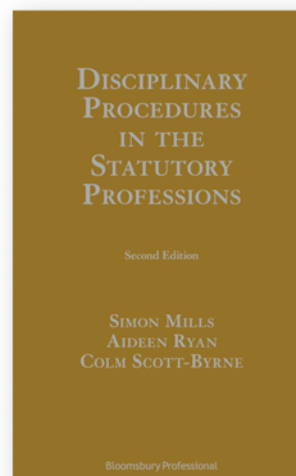

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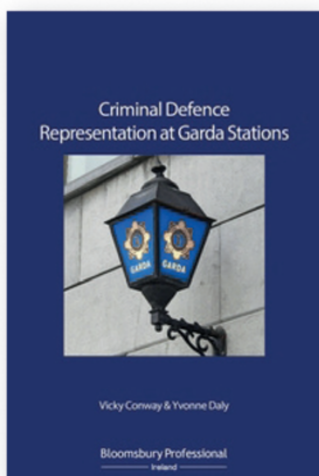

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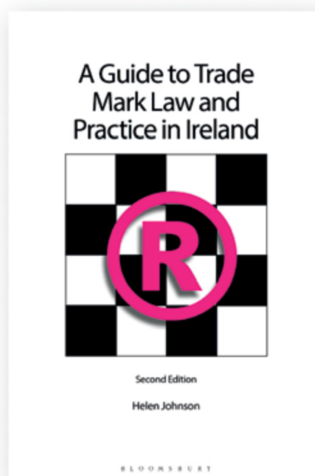

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BUILDING A TRULY REPRESENTATIVE BAR

The soon-to-be-launched Equitable Briefing Policy is part of a wider effort at The Bar of Ireland to ensure that membership of the Law Library is truly representative of society as a whole.

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

One could not escape the references in the media over the Christmas break to the fact that January 1, 2023, marked the 50th anniversary of Ireland becoming a member of the then EEC (now the EU). While opinion may be divided on our joining the EEC, it cannot be gainsaid that membership has had a major impact on almost every aspect of Irish life over the past 50 years.

Our membership of the EU has certainly enhanced our social progress, particularly in the areas of employment and equality law, while EU law has also shaped our domestic legislation and the jurisprudence of our national courts regularly intersects with that of the Court of Justice of the EU. Indeed, since the departure of the UK from the EU, Ireland (as one of only two common law jurisdictions remaining in the EU, with Cyprus being the other), has a substantially enhanced role in ensuring that common law principles are secured in the development of EU law. This role was shared with the UK in the past, but now the onus to scrutinise the formulation and enactment of EU legislation and the development of EU jurisprudence by the courts of the EU lies with us. Thankfully, The Bar of Ireland has a significant presence in the EU space, including our very active EU Bar Association, and our membership of the CCBE and the International Bar Association. We must be ever vigilant to protect our common law principles in the EU legal architecture, and the State has an important role in this regard.

Social progress and the Bar

Returning to social progress and the impact of the EU on employment and equality law, the oft referred to 'marriage bar' might have remained long past 1973 had accession to the EEC not been contemplated, and gender has become but one of many grounds upon which discrimination is now prohibited. In an inclusive and democratic society, a person's ability to achieve their potential should not be limited by prejudice or discrimination, and diversity within that society should be welcomed and valued. The Bar of Ireland is no different.

In the early 1970s (based on data from 1975), membership of the Law Library comprised 12 women and 280 men. No female silks figured then. As of November 2022, these statistics were thankfully not so stark, and of a total membership of 786 women and 1,373 men, women comprised 40% of junior counsel and 20% of senior counsel. However, we must not become complacent and work remains to be done as is evidenced, for example, by the Women at the Bar survey (February 2016), the Balance at the Bar survey (May and June 2019) and the year-on-year reports of the Law & Women Mentoring programme.

With that in mind, our Equitable Briefing Policy will be launched on March 2. What the Policy asks is that those who brief counsel and 'sign up' to the policy (e.g., solicitor firms and in-house counsel) ensure that both men and women, with the requisite seniority and expertise, are included on briefing panels and in recommendations to clients, and that in recommending colleagues for work and handovers, barristers who sign up to the policy also consider male and female colleagues. Of course, the Bar also has a role in marketing and promotion of our members to firms, as well as professional development for members in this area, and members should also consider updating/expanding their profiles on the Law Library website to further promote themselves and to facilitate searches by law firms by, for example, 'area of practice' and 'specialisation'. For colleagues who have any queries or concerns about the Policy, member information sessions will be held during February and will be advertised through *In Brief*.

More to be done

Moving beyond gender equality, membership data is not available regarding, for example, race, sexual orientation, disability and social background, and it is clear that much work remains to be done to ensure that membership of the Law Library is representative of society as a whole. This is where our Equality Action Plan (launched in June 2022) comes into play and where the concept of allyship comes into its own. While the concept of allyship may originate from the 1800s, I can safely say that the word only entered my consciousness in the last few years and in that short period of time I have come to understand and appreciate the power of allyship in promoting diversity, equality, and inclusion, both in society in general and closer to home, in the Law Library.

In my first Chair's message (October 2022), I focused on our independence in terms of making ourselves relevant to our clients, but if we are to remain relevant to the society that we serve, we must also be representative of that society and to be representative we must support, promote, and advance change for all underrepresented groups. Let that, and embracing allyship, be our challenge for 2023 and beyond.

ESSENTIAL READING

From analysis of proposals to reform discovery, to the law around AI, this edition of *The Bar Review* has something for everyone.

Helen Murray BL
Editor
The Bar Review

The first *Bar Review* of 2023 highlights the ongoing challenges faced by Afghan lawyers who have sought sanctuary abroad. Gavin Rothwell BL gives us an insight into the lives of the lawyers and their families who have come to Ireland in this month's Closing Argument.

How we welcome those who come to our shores seeking asylum was also a topic of conversation during the interview with Hilkka Becker, Chair of the International Protection Appeals Tribunal, who discussed the Tribunal's work, and the impact of the refugee crisis in Ireland and Europe.

Artificial Intelligence, or AI as it is more commonly referred to, is the subject for a Law in Practice article by John Byrne BL. Dismiss the 'Rise of the Machine' if you dare, but do not ignore the burgeoning law on the subject. Roddy Bourke of McCann Fitzgerald and Emile Burke Murphy BL examine the proposed reforms to discovery in High Court civil litigation following on from the Review of the Administration of Civil Justice that was chaired by the former President of the High Court, Mr Justice Peter Kelly.

Michael Hourican SC provides a comprehensive round-up of the latest developments in probate case law; his presentation is essential reading for practitioners.

And finally, *The Bar Review* is looking for submissions. If you would like to write an article for Law in Practice, or have a suggestion for subject matter, send your proposal to me at: helenmurray@lawlibrary.ie.

Specialist Bar Association news

Construction Bar Association

On December 7, 2022, Brian Kennedy SC delivered a Construction Bar Association (CBA) Tech Talk on 'Practical Issues in Arbitration'. James Burke BL chaired the session. The CBA challenged six leading members of the inner and outer bars to succinctly summarise Irish construction law and dispute resolution in 15-minute parcels on January 19, 2023. Entitled 'Construction Law and Dispute Resolution at a Sprint', speakers included John Trainor SC, Jarlath Fitzsimons SC, Gerard Meehan SC, Patricia Hill BL, Lydia Bunni BL, and Alexandra Cowzer-Byrne BL.

Climate Bar Association

The Climate Bar Association, in conjunction with the Southern Law Association, held the Environmental Law Conference: Litigation and Environmental Challenges on January 27, 2023. Expert speakers included Mr Justice Maurice Collins, Judge of the Supreme Court, and Clíona Kimber SC. Lorna Madden BL discussed 'Challenging Water Pollution', and Donnchadh Woulfe BL questioned 'Using Environmental Information Requests to Your Benefit'. The conference finished with a panel discussion on 'Derelict Buildings – The Legal Framework and Proposals for Change', in which Daniel Cronin SC, Joe Noonan, Noonan Linehan Carroll Coffey Solicitors, and Jude Sherry, Director, Anois Agency, Cork, contributed.

EU Bar Association

The EU Bar Association (EUBA) held a joint event with the European Circuit on December 5, 2022. The event brought together an eminent panel to discuss effective advocacy techniques and strategies before the Court of Justice, the General Court and the European Court of Human Rights, at both the written and oral stages. Chaired by Catherine Donnelly SC, speakers included: Amanda Weston KC, Garden Court Chambers; Michael M. Collins SC; and, Mario Siragusa, Cleary Gottlieb Steen & Hamilton LLP.

Employment Bar Association

The 2022 Employment Bar Association (EBA) Annual Conference took place on December 15. Panel chairs included Danny McCoy of IBEC and Ms Justice Marguerite Bolger. Speakers and topics included: Mairéad McKenna SC on 'The live feed of social media problems in employment law'; Mark Connaughton SC on 'Reform and amendment of the law on protected disclosures: the Protected Disclosures (Amendment) Act, 2022'; Oisín Quinn SC on 'I used to work here – the future of the workplace in a post-pandemic world'; Cathy Smith SC on 'From cooking a fry to delivering a pie: Denny, Domino's and the status of the worker in Irish law'; Barra Faughnan BL on 'Beyond belief – religion and the workplace'; Lorna Madden BL on 'Mind the gap – regulating the gender pay differential'; and, Kiwana Ennis BL on 'Sorry we can't help you – the impact of illegality on the employment contract in Ireland'.

Niamh McGowan BL (standing) kicked off the first in-person EBA Employment Law Conference since 2019. Panel (from left): Kiwana Ennis BL; Barra Faughnan BL; Lorna Madden BL; Mairéad McKenna SC; and, Danny McCoy, IBEC.

Corporate & Insolvency Bar Association

Cian McGoldrick BL delivered a Corporate & Insolvency Bar Association (CIBA) Breakfast Briefing on January 18, 2023, which outlined the Small Company Administrative Rescue Process (SCARP), a new insolvency process for small companies that was introduced under the Companies (Rescue Process for Small and Micro Companies) Act 2021. The presentation explained the impact of specific statutory provisions and the distinction between the process and the well-established examinership regime.

Financial Services Bar Association

Eileen Barrington SC and Elizabeth Corcoran BL gave an overview of the Financial Services and Pensions Ombudsman (FSPO) at the Financial Services Bar Association (FSBA) event on December 6, 2022. The event, chaired by John Breslin SC, explored the broad jurisdiction enjoyed by the FSPO, the limit of the powers of that office, and the benefit that it provides to customers. It also addressed what is required to successfully appeal an FSPO decision.

Planning, Environmental and Local Government Bar Association

On November 29, 2022, Sonja O'Connor BL outlined the recent decisions in Section 160 planning injunctions, including the *Krikke v Barranafaddock Sustainability Electricity Ltd* decision. The event was chaired by Stephen Dodd SC.

Probate Bar Association

The inaugural Probate Bar Association (PBA) conference, entitled 'The Essential Update for the Probate Practitioner', took place on December 9, 2022. The event was chaired by Catherine Duggan BL, with opening remarks by Ms Justice Butler. Speakers included: Prof. Rónán Collins, Director of Stroke Services and Consultant Physician in Tallaght Hospital, who spoke on capacity and older persons; Susan O'Connell, solicitor, O'Connell Brennan, who presented on 'Practical Capacity Issues in a Private Client Setting'; Áine Flynn, Director, Decision Support Services (DSS), on the role of the DSS in the context of the Assisted Decision-Making (Capacity) Act 2015 and the support service; and, Michael Hourican SC on recent case law in the areas of probate and succession. Niall Fahy BL examined 'Costs in Probate Proceedings' by giving an analysis of the Supreme Court Decision of *In Bonis Morelli; Vella v Morelli* [1968] IR 11, at the probate Breakfast Briefing, chaired by Catherine Duggan BL, on January 24.

Panel 1 from the inaugural Probate Bar Association Conference, which was sponsored by Finders International (from left): Susan O'Connell, solicitor, O'Connell Brennan; Michael Hourican SC; Ms Justice Nuala Butler; and, Catherine Duggan BL, Chair, Probate Bar Association.

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Probate Bar Essay Competition

The winner of the Probate Bar Association Essay Competition is Niall Fahy BL. Niall delivered his article 'Costs in Probate Proceedings: Caesar's Will must be above suspicion – An analysis of The Supreme Court decision of *In Bonis Morelli; Vella V Morelli* [1968] IR 11' at a recent breakfast briefing.

Probate Bar Association Essay Competition winner Niall Fahy BL with Catherine Duggan BL, Chair, Probate Bar Association.

The Bar of Ireland will launch its Equitable Briefing Policy on March 2, 2023. The Policy – approved by Council in June 2022 – reflects the work of our counterparts in Australia, New Zealand, and England and Wales. The initiative invites briefing entities to consider gender when formulating panels, once skill, experience and seniority have been satisfied.

This initiative comes at a time when briefing entities are already considering initiatives that arise from their own environmental, social and governance goals, and the increasing focus of clients on such matters.

How the Policy will work

While respecting that the ultimate decision rests with the client, the Equitable Briefing Policy simply asks that all reasonable efforts are made to include female counsel with the requisite seniority, expertise, and experience in the relevant practice area, in discussions with clients.

Once adopted by firms and legal departments, they will receive ongoing support from The Bar of Ireland. In addition, participating entities are invited to take part in an annual anonymised data collection process to track their progress and identify future supports that may be required.

Barristers, too, are invited to commit to the policy and to consider gender in their recommendations and handovers.

How the Bar is supporting signatories

The Bar of Ireland recognises its role in ensuring the success of this Policy through continuous monitoring, expanded member profiles, and improved search functionality on www.lawlibrary.ie. It will ensure that solicitors can locate suitably qualified counsel across all areas and jurisdictions of practice. The hosting of joint events and CPDs with firms will also help to maximise exposure to the expertise available at the Bar, and provide counsel and solicitors with networking opportunities.

In addition, our Professional Development Programme will continue to deliver supports in respect of mentoring and practice development skills in 2022/2023.

In advance of the official launch, a number of member-specific briefings will be held and notified through *In Brief*.

The Policy will be officially launched at 5.00pm on March 2 at The Bar of Ireland in the Distillery Building, Dublin 7. Firms, in-house counsel and barristers are invited to attend.

- Register your attendance at https://ti.to/BarofIreland/equitable-briefing-policy-launch or scan the QR code:

- Read about the Policy at www.lawlibrary.ie/equitable-briefing.

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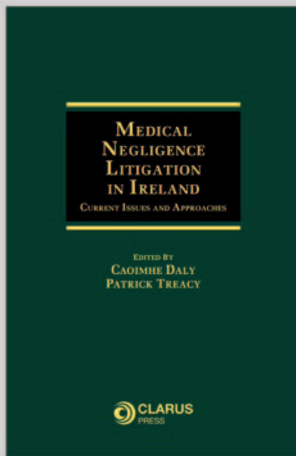

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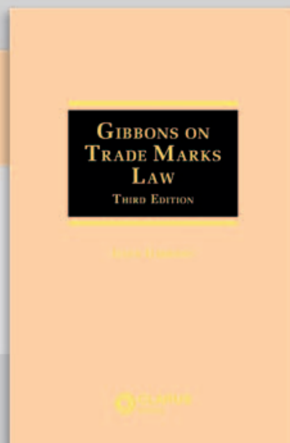

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IACBA Bursary

The Immigration, Asylum and Citizenship Bar Association (IACBA) is delighted to award the 2022 IACBA Bursary for the Advanced Diploma in Immigration and Asylum Law at King's Inns to Arlene Walsh-Wallace BL and Keivon Sotoodeh BL.

From left: IACBA Chair Michael Conlon SC; Bursary recipient Arlene Walsh-Wallace BL; and, Bursary recipient Keivon Sotoodeh BL.

Time to move employee pensions

The Bar of Ireland Pension Trust provides a home for members' pensions. However, Clinch Wealth Management (Clinch) says that there are new options for pensions for employees of barristers through the PRSA system.

Up to July 2022, a barrister funding a pension for an employee would use an executive pension. Then the Pensions Authority announced that new European pensions legislation would be strictly applied to executive pensions with immediate effect, which stopped the issuing of new pensions of this kind. All existing executive pensions must be moved within three years, states Clinch. The recent Finance Act introduced a new tax relief regime for Personal Retirement Savings Accounts (PRSAs) that has several attractive features, according to Clinch:

- an annual or lifetime funding limit of €2m (€2.15m in practice);
- the employee does not need a high salary or long service to fund a €2m pension;
- employer contributions are fully allowable against income tax, PRSI and USC for the barrister;
- the employee can have multiple PRSAs and retire them gradually;
- on death, the full PRSA value is payable as a tax-free lump sum to a spouse;
- a PRSA can be continued to age 75; and,
- a PRSA offers the widest range of investment options.

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REGULATING AI

Dr John P. Byrne BL

The European Commission is proposing to legislate for the regulation of artificial intelligence, but there are a number of possible pitfalls in this complex area.

Many will be familiar with the story: an Earth in crisis in 2029 sends two artificial intelligence (AI) machines back in time – one to kill the future leader of the resistance to a world dominated by Skynet, and the other to save him. It's the plot of a Hollywood blockbuster from 1991, and mentioning it at the start of this article helps point to one particular problem in this field; it is a subject matter that is often ridiculed. That problem isn't helped by the headlines that surrounded the much-publicised, and tragic, passing of Wanda Holbrook, a robotics repair technician, in 2015, which included "robot goes rogue and kills woman" and "what happens when robots kill". The victim had been working on a bumper repair at a trailer hitch factory in Grand Rapids, Michigan, when a robotic factory arm malfunctioned and struck her fatally in the head.[1] The sensationalist press reaction that followed further heightened the connection in the public consciousness between regulation of AI or, more specifically, regulation of what is called artificial general intelligence (AGI), and a scene from the pages of a sci-fi novel. By the way, while AI is concerned with describing a machine programmed to carry out a task as capably as the equivalent human (a self-driving car for instance), AGI refers to a machine that is at least as intelligent as a human – a Terminator, for example.

European Union developments

There have been some positive developments in this space recently. The European Commission has proposed an Artificial Intelligence Act,[2] which creates, *inter alia*, a risk classification framework that groups AI systems into four categories: unacceptable; high risk; limited risk; and, low risk.[3] In evaluating the system, the EU is instructed to consider "the intended purpose of the AI system".[4] The difficulty with this approach is that it doesn't necessarily catch so-called general purpose AI systems (GPAIS), as these may lack an intended purpose, and are exactly the type of systems the EU needs to ensure fall into its classification net.

> The European Commission has proposed an Artificial Intelligence Act, which creates a risk classification framework of four categories: unacceptable; high risk; limited risk; and, low risk.

GPAIS lack a standardised definition in the literature. The Future of Life Institute (an independent non-profit organisation, which has Board members such as Jaan Tallin, co-founder of Skype), in a recent working paper,[5] refers to the problem presented by the EU approach and says that the term GPAIS is a "definitional morass".[6] It states:

"The AI Act has generated a need for an actionable definition of GPAIS where none currently exists. Prior to its adoption by the EU, scant literature identifies AI systems as GPAIS. When it does, it describes a range of technologies with vastly different levels of competency".[7]

While accepting that the EU "can espouse an approach consistent with different options as most appropriate for their constituency and regulatory objectives", the Future of Life Institute considers that the EU should take the opportunity to prevent what it describes as a "regulatory gap", which could surface due to the EU's emphasis on a system's "intended purpose". The Future of Life Institute states that a failure to do this "may catalyse important long-term risks that the region and rest of the world should proactively avoid" – something it appears the European Council is prepared to countenance with one of its own contributions to this debate.[8]

In October 2022, ten civil society organisations called for the European Parliament to adopt obligations in the AI Act on the providers of GPAIS on the grounds, *inter alia*, that "these systems come with great potential for harm".[9] One such organisation says that such harm is already taking place, citing systems that are propagating extremist content, encouraging self-harm, exhibiting anti-Muslim bias, and inadvertently revealing personal data.[10]

In October 2022, the European Council published a compromise text, which provides an exemption from the obligation to register in the EU's proposed database for high-risk AI systems in the areas of law enforcement, migration, asylum and border control management, and critical infrastructure.[11]
The Future of Life Institute – which disagrees and wants to see these systems caught by the regulations – proposes the following definition:[12]

"An AI system that can accomplish or be adapted to accomplish a range of distinct tasks, including some for which it was not intentionally and specifically trained".[13]

It was reported by EURACTIV, a pan-European media network specialising in EU affairs,[14] that the Czech Presidency of the EU Council in 2022 proposed that the European Commission should tailor the obligations of the AI regulation to the specificities of general purpose AI at a later stage via an implementing act. This was not, however, a position countenanced by the USA, which indicated instead that "placing risk-management obligations on these providers could prove 'very burdensome, technically difficult and in some cases impossible'".[15] The compromise text, sent in November 2022 by the European Council to the Committee of the Permanent Representatives of the Governments of the Member States to the European Union, defines GPAIS[16] and places the responsibility for regulation of systems of this kind on the European Commission following an investigative process to be completed within 18 months of enactment of the AI Act.[17] The Committee of the Permanent Representatives has since responded (November 2022) and outlined in more detail the plan for the implementing act. It states:

"The compromise text specifies in Article 4b(1) that certain requirements for high-risk systems would also apply to general purpose AI systems. However, instead of direct application of these requirements, an implementing act would specify how they should be applied in relation to general purpose AI systems, based on a consultation and detailed impact assessment, and taking into account specific characteristics of these systems and related value chain, technical feasibility and marker technological developments. The use of an implementing act will ensure that the member states will be properly involved and will keep the final say on how the requirements will be applied in this context".[18]

Furthermore, any such enabling act will not catch the situation where a general purpose AI provider has "explicitly excluded all high-risk uses in the instructions of use or information accompanying the general purpose AI system".[19] William Fry solicitors, in a note, explain what is meant by this:

"This means if a GPAI was intended to be used to create pictures of cute cats but could also be used to programme drones to kill all cats in the world, provided that the GPAI's instructions of use say 'this AI system is not to be used to bring about the extinction of cats', then [the relevant article] does not apply to that system".[20]

> Today, as robots start to enter into shared spaces … it is especially important to resist the idea that the robots themselves are responsible, rather than the people behind them.

While disagreeing over the inclusion of any type of exemption for general purpose AI systems, the Future of Life Institute sees EU intervention in this space as "ground-breaking", describes the EU as a pioneer in AI law,[21] and calls for regulators to pursue a regulatory framework that ensures the safety of GPAIS design, development, and deployment.[22]

The year 2040

If we expect the European Union's AI Act to be enacted in the next two years,[23] the question arises of what sort of lead-in time this will afford the regulators in advance of expected deployment of AGI. Several commentators have settled on the year 2040 as the year they expect machine intelligence to equal that of humans – in other words, the year they expect adoption of AGI, citing sources including *Forbes* and *The Economist*.[24]
Current developments in the market tend to back this up. In September, Reuters published news that the United States of America is restricting the importation into China of certain targeted chips – including those used for AI – a move that has been viewed as intended to hamper progress of AI development in that country,[25] although some commentators doubt whether the move will have the desired impact.[26] The BBC quoted an undersecretary at the US Commerce Department, who said his intention was to "ensure the US was doing everything it could to prevent 'sensitive technologies with military applications' from being acquired by China".[27] The message is crystal clear: not only is AI getting closer but, crucially, it may be seen as a tool of military application, meaning that countries already have an interest in its responsible development or, at the very least, in being the first to oversee its deployment.

The law and AGI

In terms of the law, aside from overarching regulation of the area (already discussed), there are other aspects of this burgeoning technology that will require consideration, including the question of assigning responsibility for

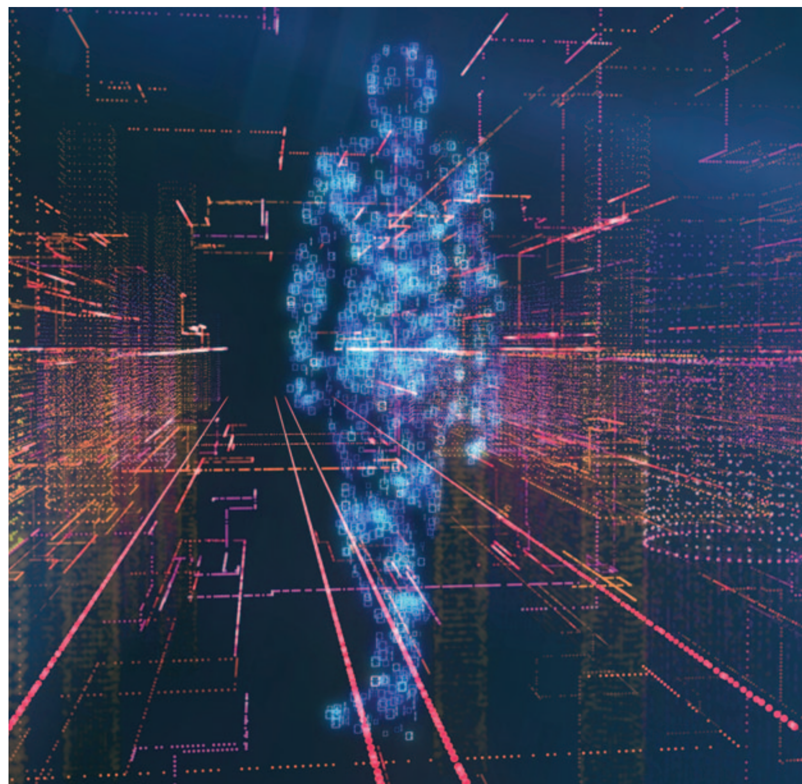
autonomous decisions. On this issue; the assignment of legal responsibility – we are effectively looking at the issue of liability for a deployed robot. In other words, is the robot itself liable for its own actions or is someone else liable for those actions?

In 2016 a report by the European Parliament's Committee on Legal Affairs went as far as suggesting the adoption of a separate status of "electronic personhood" to accommodate legal responsibility of AI. This was much criticised at the time; many saw it as a move towards assigning legal responsibility to the robot.[28] While a defence of sorts on the finer details of the point was ultimately published in 2020, the proposal was not adopted.[29]

Kate Darling, in her succinct overview of this area in *The New Breed*,[30] makes the important point that we may not need to re-invent the rules for AI, or AGI, at all – the matter can be dealt with under existing legal structures, citing product liability rules, and the equivalent treatment of animals in the law under the scienter principle. That rule denotes the occasion when the keeper of an animal is liable for any damage caused by that animal if the animal is either a "wild animal" (*fera natura*) or if, being a "tame animal" (*mansueta natura*), it has a vicious propensity known to the keeper.[31] The author states:

"Today, as robots start to enter into shared spaces … it is especially important to resist the idea that the robots themselves are responsible, rather than the people behind them. I'm not suggesting that there are more ways to think about the problem than trying to make the machines into moral agents. Trying on the animal analogy reveals that this is perhaps not as historic a moment as we thought, and the precedents in our rich history of assigning responsibility for unanticipated animal behaviour could, at the very least, inspire us to think more creatively about responsibility in robotics".[32]

This is a very valid point and should be carefully considered by policymakers, whoever they are, when AGI is imminent.



What is a Foom? – and friendly AI

There are also risks that need to be weighed. One of these is what has been coined as a 'Foom' event – a significant initial spike in the intelligence of an AI such that it becomes greatly more intelligent than a human: the subject of Nick Bostrom's seminal 2014 book *Superintelligence*. This event is not a certainty: while one commentator put the risk at greater than 10%, another put the equivalent risk at less than 1%.[33] The creation of what Eliezer Yudkowsky coined in 2001 as "friendly AI", which has since become known as AI "alignment", is a real and critical issue.[34] Some commentators bemoan the endless possibilities open to an AGI connected to the internet, including access to critical infrastructure, and a host of other potentially hostile developments.

Ultimately, as governments tend to regulate much closer to an object becoming reality – or oftentimes after industry has already manufactured a product of interest – we're probably a long way from seeing concrete proposals for how we can regulate and, if necessary, restrict the manufacture of an AGI to prevent the creation of superintelligence. Mention should be made of the views expressed by a professor of physics at MIT, Max Tegmark, in his book *Life 3.0,* that while the road ahead will be difficult, he sees grounds for "mindful optimism":

"What had triggered my London tears was a feeling of inevitability: that a disturbing future may be coming and there was nothing we could do about it. But the next three years dissolved my fatalistic gloom. If even a ragtag bunch of unpaid volunteers could make a positive difference for what's arguably the most important conversation of our time, then imagine what we can all do if we work together!"[3]

Not everyone agrees with this perspective though, and at least one reviewer has coined the phrase "AI fatalism" to describe "the belief, sadly common in tech circles, that AI is part of an inevitable future whose course we are powerless to change".[36]

In any event, whether we engage in AI fatalism or not, we now await the final move from the European Union on its proposed adoption of the Artificial Intelligence Act. One prediction has estimated that we may have to wait longer than Q1 2024.[37] All things considered, this might be time well spent if it means that we reduce the risk of a Terminator-type scenario: 2040 is not that far away, after all.

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LEGAL

UPDATE

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A directory of legislation, articles and acquisitions received in the Law Library from November 11, 2022, to January 13, 2023
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[pmb]: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.
Agricultural and food supply chain bill 2022 – Bill 120/2022
Appropriation bill 2022 – Bill 116/2022
Credit guarantee (amendment) bill 2022 – Bill 103/2022
Development (emergency electricity generation) bill 2022 – Bill 99/2022
Finance bill 2022 – Bill 101/2022
Gambling regulation bill 2022 – Bill 114/2022
Health insurance (amendment) bill 2022 – Bill 109/2022
Human tissue (transplantation, post-mortem, anatomical examination and public display) bill 2022 – Bill 121/2022
Local government (maternity protection and other measures for members of local authorities) bill 2022 – Bill 110/2022
Misuse of drugs (cannabis regulation) bill 2022 – Bill 111/2022 [pmb] – Deputy Gino Kenny, Deputy Mick Barry, Deputy Bríd Smith, Deputy Richard Boyd Barrett, and Deputy Paul Murphy
Residential tenancies (deferment of termination dates of certain tenancies) bill 2022 – Bill 100/2022
Social welfare bill 2022 – Bill 107/2022
Ukraine solidarity bill 2022 – Bill 115/2022 [pmb] – Deputy Jim O'Callaghan

Bills initiated in Seanad Éireann during the period November 11, 2022, to January 13, 2023

Credit union (amendment) bill 2022 – Bill 112/2022
Education (relationships and sexuality education) (amendment) bill 2022 – Bill 108/2022 [pmb] – Senator Fiona O'Loughlin and Senator Malcolm Byrne
Family courts bill 2022 – Bill 113/2022
Finance Bill 2022 – Bill 101 of 2022

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Central Bank (individual accountability framework) bill 2022 – Bill 75/2022 – Committee Stage
Courts and civil law (miscellaneous provisions) bill 2022 – Bill 84/2022 – Committee Stage
Credit guarantee (amendment) bill 2022 – Bill 103/2022 – Committee Stage
Employment permits bill 2022 – Bill 91/2022 – Committee Stage
Finance bill 2022 – Bill 101/2022 – Committee Stage – Report Stage – Passed by Dáil Éireann
Health insurance (amendment) bill 2022 – Bill 109/2022 – Committee Stage
Mother and baby institutions payment scheme bill 2022 – Bill 97/2022 – Committee Stage
Online safety and media regulation bill 2022 – Bill 6/2022 – Report Stage – Passed by Dáil Éireann
Patient safety (notifiable patient safety incidents) bill 2019 – Bill 100/2019 – Passed by Dáil Éireann
Personal Injuries Resolution Board bill 2022 – Bill 78/2022 – Passed by Dáil Éireann
Planning and Development and Foreshore (Amendment) Bill 2022 – Bill 115/2022 – Committee Stage – Passed by Dáil Éireann
Regulation of lobbying (amendment) bill 2022 – Bill 85/2022 – Committee Stage – Social welfare bill 2022 – Bill 107/2022 – Committee Stage
Tailte Éireann bill 2022 – Bill 82/2022 – Report Stage – Passed by Dáil Éireann
Water environment (abstractions and associated impoundments) bill 2022 – Bill 87/2022 – Committee Stage
Work life balance and miscellaneous provisions bill 2022 – Bill 92/2022 – Committee Stage – Report Stage – Passed by Dáil Éireann

Progress of Bill and Bills amended in Seanad Éireann during the period November 11, 2022, to January 13, 2023

Assisted decision-making (capacity) (amendment) bill 2022 – Bill 59/2022 – Report Stage
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Tailte Éireann bill 2022 – Bill 82/2022 – Committee Stage
Water environment (abstractions and associated impoundments) bill 2022 – Bill 87/2022 – Committee Stage
Water services (amendment) (no. 2) bill 2022 – Bill 81/2022 – Committee Stage

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

Bills and legislation:
http://www.oireachtas.ie/parliament/
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For up-to-date information, please check the courts website:

https://www.courts.ie/determinations

SERVING JUSTICE

Hilkka Becker, Chair of the International Protection Appeals Tribunal, talks about her career, the differences between the German and Irish legal systems, and the Tribunal's work.

Ann-Marie Hardiman
Managing Editor, Think Media

> "The Tribunal is a quasi-judicial body, not a court, but it fulfils a role that would be equivalent to an administrative court from an EU law perspective when it comes to its decision-making."

When Hilkka Becker came to Ireland from Germany in 1994 as a young law graduate with an interest in immigration/refugee/asylum law, these topics were not prominent features of the Irish legal landscape. In a sense, it could be said that Hilkka's career reflects the evolution of this area in Irish and EU law, and of the agencies that have developed to support those who come here seeking protection.

Hilkka's own interest stems, she says, from growing up in Germany, and learning about the Nazi regime and the Holocaust, which left her with "a deep-seated feeling, not of guilt, but of responsibility". She does not have lawyers in her family, and was in fact the first member of her family to complete a university degree, but law seemed to her the best way to achieve her desire "to serve and achieve justice, which is really at the core of who I am". An undergraduate placement with a lawyer in Hamburg who did asylum and immigration law cemented her interest in assisting and protecting those at risk of persecution. After completing the first stage of her undergraduate degree in 1993, Hilkka faced a two-year waiting period to complete her training in Germany (see panel). She decided to travel, and came to Ireland, volunteering with the Irish Council for Civil Liberties: "Then I got a phone call one day from the Refugee Council. 'We were told about you. You have worked with asylum seekers before. We are recruiting a legal officer. Would you be interested in applying?' I applied, got the job, and was one of the first people working in the area of refugee law in Ireland".

This was a period before specific legislation in this area in Ireland, and indeed Hilkka says there were fewer than 100 asylum applications that year, although numbers began to increase incrementally. It was a fascinating time: "I was right in the thick of it from the very beginning". Hilkka returned to Germany at the end of 1995 to complete the second stage of her training as a *Volljuristin* ('full juror'), which included several stages of practical training, including in the German judiciary, and a period of training in an Irish law firm, Garrett Sheehan and Company. Once fully qualified in Germany, she was back in Dublin by October 1998, working as a *Rechtsanwältin* (the German term for practising lawyer) with Stewart and Company Solicitors. She then also qualified in Ireland and was admitted to the roll of solicitors in 2003. Then came another phone call, this time from Sister Stanislaus Kennedy, who was setting up the Immigrant Council of Ireland: "She asked me would I be interested in working with her in setting it up and becoming the Council's legal advisor. At the time, it wasn't possible for NGOs to employ solicitors

NOT ENOUGH HOURS IN THE DAY

Hilkka lives in Dublin with her partner and two daughters, aged 11 and 16. In her spare time she enjoys running, yoga, "and just relaxing with friends, letting my hair down and watching a movie or going to the theatre". She reads when she has time, but says it's difficult to get the space to really immerse herself in a book. That may also be because she keeps very busy in other ways: "I'm always involved in lots of things nationally and internationally. I'm also doing an MA in International Relations – I always think there's more hours in the day than there are! I love learning. I would never stop looking for opportunities to increase my expertise and experience".

directly, so I worked with the Council as a consultant but remained employed with Stewart and Company. Together with lawyers in other NGOs, I was instrumental in setting up the Independent Law Centres Network, and we worked on achieving the introduction of legislation to allow registered law centres to employ solicitors".

This change in the law took until 2006, but in the meantime Hilkka felt a strong urge to return to the continent, and in 2004 she took a two-year role with the International Organization for Migration's regional office for the Western Balkans in Vienna, where she was a regional legal advisor leading an EU project that involved alignment of legislation in the Western Balkan nations with the view to their eventual accession to the EU. She then returned to Ireland, and after the legislative change in 2006, became the senior managing solicitor of the Immigrant Council of Ireland: "I was involved then very much in strategic litigation in the area of immigration and citizenship law, and left asylum law behind for a time".

A new Tribunal

In 2013, an expression of interest was sought for new members of the then Refugee Appeals Tribunal, and Hilkka was appointed as a part-time member. It was a very different role, but one that chimed with her core beliefs and professional ambitions: "That was the beginning of my career in the quasi-judicial field, returning really to something that was always where I wanted to be professionally, in a role where I could adjudicate cases, because I think that is at the core of serving justice. Ultimately, justice is done in the courts and delivered by the courts and quasi-judicial bodies, and this seemed to be the place for me".

At first, she continued her work with the Immigrant Council part-time, but in 2015 she left to devote herself more fully to her work with the Tribunal. At the time, new legislation was transforming the Tribunal into its current form as the International Protection Appeals Tribunal. Hilkka was appointed to the new body as one of two Deputy Chairpersons in late 2016. When Chairperson Barry Magee left in April 2017, she became interim Chair, an appointment that was confirmed in January 2018, following an open competition held by the Public Appointments Service. At the time of our interview, her term was coming to an end and she has since been appointed to serve a second five-year term.

The Tribunal holds hearings both in person at its Dublin offices, and online, where appropriate: "The Tribunal is a quasi-judicial body, not a court, but it fulfils a role that would be equivalent to an administrative court from an EU law perspective when it comes to its decision-making".

The Tribunal's work has an international dimension too: "We are also engaged at EU and international level in the EU Asylum Agency (EUAA) Court and Tribunal Network. Tribunal members can also access professional development workshops offered by the EUAA and many of our members act as judicial trainers in these workshops". The International Association of Refugee and Migration Judges (IARMJ), of which Hilkka is an active member, has developed judicial analyses covering all areas, effectively, of international protection law in Europe, and they form the basis for those trainings.

In addition to the Chair and two deputies, the Tribunal currently has just over 40 part-time and three whole-time members, with an ongoing competition to appoint additional part-time members: "There are some really fantastic members who have been with the Tribunal and its predecessor for many years, and are really dedicated to the work. I look forward to having new members coming to the Tribunal with 'fresh eyes' as well".

The Tribunal also has a Registrar, appointed by the Minister for Justice, who leads a team of 30-plus administration staff, accepting appeals, corresponding with applicants, copying files for members, hosting hearings, and administering the processing and issuing of decisions.

Hilkka's own role encompasses the administrational and training side, and also the core duties of deciding appeals herself and the co-ordination of that process for the Tribunal as a whole, ensuring compliance with national and EU law. She also works closely with the Department of Justice, and increasingly with other Government Departments as the Tribunal's remit has changed over time: "Engaging with the Department is a very big part of my role. We also engage with the Department's Legal Services Unit and the Chief State Solicitor's Office on judicial reviews that are being brought against Tribunal decisions. There's no appeal against our decisions, but there is the option to look for a judicial review. We are *functus officio* once a decision has been delivered, but we provide observations, if requested, in the context of litigation against Tribunal decisions".

A growing responsibility

Starting with quite a small number of appeals in 2017, by 2019 the Tribunal was

dealing with over 2,000. The range of issues that can be appealed has also expanded significantly: "The Tribunal got a number of new jurisdictions with the coming into force of the International Protection Act. We're dealing now with appeals against decisions that an application is inadmissible, and appeals against decisions not to allow a person to make a subsequent application. We also deal with appeals against transfer decisions under the Dublin system. Since 2018, we have responsibility for certain reception conditions appeals. The main appeals in that context are appeals against refusal of labour market access permission. We now also have jurisdiction to review some decisions of the Department of Children, Equality, Disability, Integration and Youth, and of the Department of Social Protection, although we haven't had any live appeals as yet in that context".

It's a potentially huge caseload of often very complex cases, but Hilkka says that the Tribunal is adequately resourced to meet the current demand: "We're equipped to deal with up to 3,200 appeals. We reduced our caseload in 2022 from close to 1,200 to less than 900 at the end of the year, which would be low – we would expect to have at least 1,000. In 2019, we achieved the highest number of decisions delivered in the history of the new Tribunal and then, of course, the pandemic hit, nobody was travelling, and public health restrictions meant that, at least initially, our hearings could not go ahead".

That has, of course, all changed, with an exponential rise in the number of applicants for international protection here, something in the region of 14,000 in the last year. Ordinarily, the Tribunal would expect 70-75% of those to eventually come before it if their applications are refused at first instance, so Hilkka and her team are working to prepare for this eventuality: "We are in constant dialogue with the Department of Justice, trying to do our best to forecast: what's coming and when is it coming? There's no point in giving us all the resources now, when we have just 850 appeals pending, but we need to be prepared so there are no undue delays as a result of underfunding".

Challenging times

This increase in international protection applications has of course coincided with the unprecedented influx of those seeking refuge from the war in Ukraine. While this group is obviously processed under a different system, it all adds to the pressure that Ireland, and indeed all of Europe, is facing: "When you look back at 2015, where we were all talking about the 'migration crisis', that was nothing in comparison to what's going on right now. That is something that all EU member states are faced with. I think Ireland benefits from its engagement at EU level, and we can certainly say that the fact that we are able to rely on EU law as implemented into Irish law, and have that wider body around us, that wider context where we can find comparators, assistance and share learning, certainly helps our work a great deal".

However, she feels that Ireland also has certain advantages: "Generally I think Ireland would be more flexible, more adaptable, faster reacting to developments sometimes than I think others are. And that is in part, I think, to do with the fact that we are a common law country. The Tribunal works in a common law system but applies EU law, which is more akin to a civil law system, so we are working effectively in both fields, which I find particularly interesting, because I'm trained and experienced in both systems. I think particularly in the courts, the fact that judges can react more flexibly to developments is advantageous, when compared to civil law systems". The larger challenges sometimes come, she says, once someone is granted protection, as Ireland deals with a housing system that was under immense strain before the current situation, and is now in crisis. This also creates barriers to integration, which Hilkka also believes is crucial: "In order to facilitate the longer-term working of the system, integration needs to happen as early as possible. Labour market access has the potential to help that. Integrating into the labour market is, I think, advantageous when it comes to eventual integration, rather than being long-term dependent on the State".

These are areas that are ultimately outside the scope of the Tribunal. Where the Tribunal stands, in Hilkka's view, is at a vital point in the process of achieving justice and upholding the rule of law in the area of international protection: "What I'm trying to achieve for the Tribunal is that it is a neutral arbiter. We apply human rights law in the form of the UN Convention as it's implemented into Irish law via EU law. It is ensuring that the legislation that is designed to protect those in need of protection is applied properly, but from a neutral standpoint. Another thing that I'm more and more conscious of is that the system also needs protection because if the system itself falls apart, the system can't provide protection to those in need".

A DIFFERENT SYSTEM

The German legal system differs significantly from that in Ireland, with no separation between training as a solicitor, barrister, or judge. Following the first stage of the undergraduate degree, students who wish to be lawyers apply to a State-funded placement scheme: "That can take two years, but once you're in you go through stations, as we call them: in court, being trained into the role of a judge; working in a legal unit of a Government department; and, working in private practice. You're a temporary civil servant and paid by the State to do your apprenticeship, effectively".

Lawyers train to be what's called a Volljuristin ('full jurist') and are then able to enter a career directly: "You can go into the judiciary as a junior judge, or into State administration or private practice".

In private practice there isn't the distinction between barrister and solicitor: "Initially I thought that the Irish system was weird because I was concerned that I would do a lot of the work as the solicitor and then somebody comes in and takes the case 'away from me'. Of course, I realise now how advantageous it is when you go to the superior courts in particular, to be a team of at least two, and that it is more a team effort, particularly in cases that have great importance".

DISCOVERY – WILL REFORM WORK?

It is to be hoped that the recommendations of the Review of the Administration of Civil Justice, when implemented, will finally solve the problem of costly and onerous discovery.

Roderick Bourke Emile Burke-Murphy BL

The Review Group observed that the current regime is "failing all parties involved in litigation" and that "wholesale cultural change" is required.

Winston Churchill's view of the "dreary steeples of Fermanagh and Tyrone" brings to mind discussion about discovery in civil litigation, as courts in common law countries, despite numerous reports and reforms, continue to struggle to make discovery less costly and drawn out. Discovery, particularly in large cases, "can present a barrier to access to justice either for plaintiffs, who may not be able to afford to bring a case, or for defendants, who may find it difficult to exercise their rights of defence because of the burden which discovery might place on them".[1] Case law and court rules in Ireland have sought to improve matters but "have had only limited practical impact".[2]

The report of the Review of the Administration of Civil Justice (the 'Review Group', chaired by the former President of the High Court, Mr Justice Peter Kelly), which was submitted to the Minister for Justice in October 2020, called for radical change:

"[T]he Review Group has come to the conclusion that [discovery] is an area where a radical change is necessary in order to dispose of a major obstruction to the administration of justice. The Review Group is of the opinion that legislation ought to be introduced to bring an end to the making of discovery of documents in the form in which it has been known since the 19th century".[3]

The Review Group observed that the current regime is "failing all parties involved in

litigation" and that "wholesale cultural change" is required, which can only be achieved if underpinned by an "entirely new scheme for discovery".[4]

The Minister for Justice has accepted the recommendations of the Review Group and, in May 2022, announced plans for legislation and new rules of court to implement them on a phased basis.[5] This article examines the likely effect of the proposed reforms in High Court litigation and concludes that, with some caveats (including about the definition of discoverability), there is a good prospect of success. The article also suggests some measures that could be applied or encouraged by the courts in the meantime, within the current rules, to cut delay and cost in discovery.

The challenge of ESI

Most 'documents' discovered in modern litigation are comprised of electronically stored information (ESI), including images and recordings, rather than paper. The expanding store of ESI presents a major challenge to the existing discovery system. Although ESI may contain highly relevant information, its proliferation has undeniably increased the cost and burden of discovery, particularly in complex litigation. Regulators and other agencies seeking ESI for investigations face similar challenges.

Efforts have been made to address this challenge. Changes to Order 31, rule 12 RSC in 1999 required parties to demonstrate the relevance and necessity of discovery by categories;[6] in 2009, further changes required discovery of ESI to be in searchable form.[7] The courts have also invoked proportionality, alternative means of proof and other factors to limit discovery.[8] Meanwhile, new technology, such as continuous active learning (CAL), has also helped by cutting the cost of reviewing ESI. However, the difficulties have persisted, if not worsened, over the years.

It should be noted, however, that discovery is not necessarily a problem in many smaller or straightforward cases. As pointed out by Clarke C.J. in *Tobin v Minister for Defence* [2019] IESC 57, [2020] 1 IR 211, at para 55, "[i]n many straightforward cases, there would be no conceivable basis for declining discovery of all relevant documents, for the imposition of an obligation to make such discovery may not be burdensome at all". Nonetheless, the narrowing of discoverability under the proposed reforms should enable the courts to limit or refuse discovery in those smaller cases where discovery costs may otherwise be disproportionately high.

Radical changes

The Review Group proposes that primary legislation be enacted to abolish the current entitlement to discovery under the existing rules of court, as well as the associated case law. It also recommends that the new regime to regulate the entitlement of parties to civil litigation to documents in advance of trial should be called "production of documents", to make clear the departure from the current regime.[9]

Under the proposals, after the statutory overriding of *Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company* (1882) 11 Q.B.D. 55 (*Peruvian Guano)* and other discovery case law and rules, "standard production of documents" would require litigants to produce all documents available to them on which they rely, including publicly available documents, within a defined time after delivering their claim or defence.[10] This rule would require parties to assess their documents and supportive documents that are in the public domain earlier.

The proposed early disclosure of documents would have advantages. Although it would frontload costs, it would help parties to assess demands for further document production. Parties often negotiate about categories of discovery having little or no knowledge of their documents. It could also encourage early mediation or settlement, as parties would know more about their good and bad documents sooner. Parties would also be in a better position to answer interrogatories, in lieu of further, more extensive, disclosure of documents.[11]

Notwithstanding these advantages, many parties under the proposed new regime may produce minimal early disclosure, reserving their position and saying it is premature to identify documents on which they rely. They may point to a risk of duplication of efforts if opponents' subsequent demands for disclosure require more searches and reviews. The success of this proposed reform depends on the courts insisting on compliance, in the absence of compelling reasons in individual cases to postpone early disclosure of documents.

The proposed reform could be enhanced by specifying or expanding the requirements of "standard production" in certain classes of action. For example, plaintiffs in personal injuries actions could be expressly required as part of "standard production" to disclose all relevant medical records for a period of three years pre accident.[12] The classes of action and the categories of documents subject to "enhanced" standard of production could be developed over time.

Narrow and specific categories

Under the proposed new rules, litigants may request from opponents such further documents or "narrow and specific" categories of documents that are reasonably believed to exist.[13] Critically, the requesting party must describe

Meanwhile, new technology, such as continuous active learning (CAL), has also helped by cutting the cost of reviewing ESI.

"how the documents requested are relevant and material to the outcome of the proceedings".[14] This will be a fundamental change to current practice, as discussed below.

The request may be refused, including on the court's own initiative, if the documents have insufficient relevance or materiality to the outcome of the case, or if the discovery would be an unreasonable burden, or for compelling reasons relating to procedural economy, proportionality, fairness or equality of the parties.[15]

A further proposal from the Review Group to limit the burden of discovery is to change the obligation to make discovery of documents within a party's "procurement" to a test based on the concept of a "reasonable search". In assessing what reasonable searches to carry out, the responding party may take into account, *inter alia*, the nature and complexity of the proceedings, the accessibility and likely location of documents, and the likelihood and cost of finding significant documents. Perhaps as a safeguard against parties taking an unduly narrow view of "reasonable search", the proposed rules will require them to disclose to their opponents the searches carried out and details of keyword and other electronic search methods used.

The Review Group also enjoins better co-operation between opponents and, in recommending improvements in pleadings, points to a correlation between broad and imprecise pleadings and overly burdensome discovery.[16]

Abolition of case law

In our view, the proposal to "abolish … the associated case law",[17] is an unnecessarily radical recommendation. To the extent that the "production of documents" rules will depart from existing discovery rules and principles, such case law (most notably the line of authority flowing from *Peruvian Guano*) will necessarily no longer apply. Yet the Review Group appears to recommend the abolition of all "associated case law".

In circumstances where a system of document disclosure is being retained, albeit much modified but with certain key principles such as proportionality surviving, the existing case law should not be swept away in its entirety. If all of the case law were to be statutorily disapplied or "abolished", the courts would be in the difficult (and arguably artificial) position of having to re-interpret certain principles or matters of "procedural economy" (e.g., the use of interrogatories) without reference to relevant judicial reasoning that has gone before.

Discoverability threshold

The proposed narrowing of the discoverability threshold is key to the success of reform to discovery. However, the specific proposal of the Review Group appears to be unduly restrictive in certain respects, which, unless modified, could deprive parties of access to essential documents.

Currently, the primary test of discoverability is that a document must be relevant to the issues in dispute. The longstanding definition of relevance is very broad, deriving from the judgment of Brett L.J. in *Peruvian Guano*, where it was held that a document is discoverable where it is reasonable to suppose that it contains information that may, either directly or indirectly, enable the other party either to advance his/her own case or to damage the case of his/her adversary, including documents that may fairly lead to a train of inquiry that may have either of those two consequences.

Most common law jurisdictions have long since adopted narrower tests for discoverability, and the Review Group has now recommended departure from *Peruvian Guano*, replacing it with a test that the documents requested be relevant and material to the outcome of the proceedings. The Review Group anticipates that this "substantial narrowing of the parameters of discoverability should have a significant impact on the scope and breadth of discovery requests raised and discovery orders made".[18]

This proposed reform addresses perhaps the principal shortcoming in the current system: the excessive breadth of the test of discoverability. However, it is necessary to register a note of caution with respect to the wording proposed by the Review Group. The proposed rule 6(2)(a) stipulates that a request to produce documents shall contain a description of how the documents requested *are* relevant and material to the outcome of the proceedings. Applied literally, the proposed test could lead to minimal or no production of documents sought, as in most cases it would be impossible to say, from consideration of pleadings and known facts alone, whether unseen documents, or narrow and specific categories of unseen documents, *are* relevant and material to the outcome of a case.[19]

It is unlikely that the Review Group intended such a result, given its detailed provisions about proportionality and other provisions intended to limit the volume and cost of producing documents to opponents, which would not be necessary if minimal production of opponents' documents was envisaged.[20] Indeed, the Review Group observed that if its recommendations are adopted

Key to the success of the reforms will be to make the process of seeking documents less combative.

the current system of "tangential discovery will be replaced with discovery of documents that could reasonably be said to have a bearing on the final determination of the issues".[21]

It is submitted that the proposed rule should be revised so that a party is required instead to show that documents sought are *likely to be* relevant and material to the outcome of the proceedings. This would still achieve a far narrower test for production than *Peruvian Guano*. Furthermore, other proposed rules enabling the courts to take greater account of factors such as unreasonable burden, proportionality and fairness should further limit production of documents, where justified.

Another difficulty is that the abolition of the *Peruvian Guano* test of discoverability in all cases could prevent litigants from seeking essential documents in cases of complex fraud, for example. The legislature should leave the courts with power, as in England and Wales,[22] to order broader requests for production of documents exceptionally where a litigant shows convincing reasons to suppose that production of narrow, specific types of "train of enquiry" documents may be necessary to identify relevant information material to the outcome of the case, subject to proportionality and other countervailing reasons.

Additional improvements

There are other means of improving discovery in addition to narrowing the range of responsive documents. The rules should, for example, require parties at the start of litigation to implement a "litigation hold" of documents likely to be relevant and material to the case. As well as guarding against document destruction, this would also speed up the collection of documents.

Other changes would not require new law or rules. A persistent cause of much delay is the time taken to produce documents after discovery has been ordered or agreed. The time allowed should be at most three months, unless the client explains on affidavit why that is too short. Allowing longer, without good reasons, may tempt parties to put the task on the long finger, and result in subsequent requests for even more time.

The use of redaction should also be restricted. It is currently overused, typically where clients unnecessarily seek redaction of large amounts of irrelevant data, and it is expensive and time-consuming. Redaction of irrelevant sensitive personal information may be necessary, but where there are large volumes of such information, consideration should be given to the use of a confidentiality ring, instead of redaction, where only lawyers see certain types of documents in a dispute.[23]

The biggest driver of cost and delay in discovery is the need for large-scale human review of documents. Technology assisted review (TAR), including in its latest form, CAL, can safely speed up the search and review of documents in larger cases, and save substantial costs, if supervised diligently by a senior lawyer conversant with the issues in dispute.[24] CAL also helps the early assessment of the client's case. In using this technology, lawyers select keywords and concepts and then identify responsive documents to provide feedback to the computer. The cost of this technology is falling, and it is provided online by service providers, and so can be used by law firms of different sizes without heavy investment in systems and hardware. The courts should encourage greater use of technology for document review in larger cases.

Culture shift

Key to the success of the reforms will be to make the process of seeking documents less combative. At present, rounds of lawyers' affidavits with many assertions and scant evidence are not uncommon. The hearing of discovery motions may last a day or more. Unreasonable behaviour may go unsanctioned, as costs on discovery motions are usually in the cause. Document imbalances can be a cause of contention where, for example, a plaintiff with little to disclose seeks very wide discovery from a business or Government department. In some instances, 'discovery warriors' may use discovery complaints to harry opponents unjustifiably.

The extent of the challenge is illustrated by the emphasis on co-operation in the proposed rules. Proposed rule 4 of the Draft Scheme of Rules is entitled "Co-operation between the parties" and provides that parties should exchange information about the categories of documents in their control, where documents are held, their document retention policies,

systems for searching and inspection, and the anticipated time and cost of providing documents. They should also seek to agree in advance search terms and what databases to search.

These desiderata are given teeth in the proposed rule 13 requiring a document production statement – which will replace the present affidavit of discovery – to disclose searches carried out and details of keyword and other electronic search methods used, as mentioned above. Parties are not obliged to do this under the current rules, and rarely do, for fear that opponents will demand more, or criticise what has been done. This new requirement is likely to give rise to many disputes, and exemplifies the challenge of implementing many of the proposed changes. The risk of costs awards may help but, in view of the fundamental nature of the change to current practice, more than that will be required.

The court's role

The court's role in discovery at present is mainly adjudicative. However, the proposed rules will, in effect, require courts to manage, as well as decide, substantial document disputes. Without this, it is questionable whether the changes will work. The additional time spent by judges managing such disputes would probably save subsequent court time, as efficient disclosure of documents should help to settle cases earlier and make trials more efficient. The means of judicial intervention could be relatively straightforward.

As in some other common law jurisdictions, in-person or virtual chambers-type hearings would encourage more informed and less adversarial exchanges between the parties in disputed cases. The hearings would be attended by counsel and the senior solicitor for each party. The court, having read the correspondence and affidavits made by clients with knowledge of their documents, could evaluate issues of proportionality, for example, by probing the likely usefulness of the documents sought in light of the disputed issues, and by seeking costs estimates. Important too would be the court's role in requiring disclosure of information to encourage the use of technology to reduce the need for human review. If necessary, the court could direct the parties to "meet and confer" – along with technical experts if appropriate – within seven or 14 days to discuss points at issue. The court would subsequently decide any remaining disputed issues.

After some years, when the proposed rules and principles and practices have adequately taken root, it may be possible that deputy masters would deal with some contentious document production disputes.[25]

Conclusion

The Irish courts' previous initiatives to curb the cost and disruption of discovery have had less success than deserved. However, with sufficient judicial management, particularly in substantial disputes, the proposed reforms and other measures discussed in this article should significantly cut cost and delay, and still allow parties to obtain pertinent ESI and other information for their claims or defences.

References

1. *Tweedswood Ltd v Power* [2019] IESC 93, para 5.4, *per* Clarke C.J.
2. *Ryan v Dengrove DAC* [2022] IECA 155, para 43, *per* Collins J. (commenting on the 1999 amendments to the discovery rules).
3. Review of the Administration of Civil Justice – Report, p. 188.
4. Review of the Administration of Civil Justice – Report, p. 406.
5. This plan envisages the publication of draft heads of legislation in the first half of 2023, the enactment of legislation in the first half of 2024, and the introduction of new rules of court in 2025.
6. SI No 233 of 1999.
7. SI No 93 of 2009.
8. See, e.g., *Framus v CRH plc* [2004] IESC 25, [2004] 2 IR 20 and, more recently, *Tobin v Minister for Defence* [2019] IESC 57, [2020] 1 IR 211.
9. Review of the Administration of Civil Justice – Report, p. 190.
10. Review of the Administration of Civil Justice – Report, Appendix 3 – Draft Scheme of Rules for the Production of Documents (p 453) (Draft Scheme of Rules). "Document" is very broadly defined at 1. in the Draft Scheme of Rules and includes all forms of ESI.
11. See observations of Clarke C.J. in *Tobin v Minister for Defence* at paragraph 9.4 about the cost of answering interrogatories without prior knowledge of relevant documents.
12. As suggested by Cross and Reynolds J.J. in submissions to the Review Group (see Review of the Administration of Civil Justice – Report, p. 174).
13. *Ibid*, rule 6(2)(b).
14. *Ibid*, rule 6(2)(c) (emphasis added).
15. *Ibid*, rule 11.
16. Review of the Administration of Civil Justice – Report, p. 187.
17. Review of the Administration of Civil Justice – Report, p. 190.
18. Review of the Administration of Civil Justice – Report, p. 189.
19. Proposed rule 18 would oblige parties to produce, not later than 28 days before trial or as otherwise ordered, any additional documents that they believe have become relevant and material as a consequence of issues raised in pleadings, statements, affidavits from witnesses or expert reports. At that stage, parties should be in a better position to judge whether a document is relevant and material than earlier in the proceedings. However, late production of this nature would post-date most steps in the litigation and, without sufficient earlier disclosure of documents sought, could unfairly disadvantage litigants and lead to delays before trial.
20. See also proposed rule 4(2), which provides that where the number or volume of documents to be searched is likely to be extensive, the parties should, where possible, seek to exchange preliminary production requests in draft form before standard production of documents in accordance with rule 5 takes place. This also appears inconsistent with an intention that there would be minimal or no production of documents requested by parties in litigation.
21. Review of the Administration of Civil Justice – Report, p. 189.
22. In England and Wales, the courts may order *Peruvian Guano* disclosure as one of the alternatives to standard disclosure – see Part 31.5 (7) (d) of the CPR Rules and Practice Directions.
23. See *AB v CHI* [2022] IECA 211.
24. See *IBRC v Quinn* [2015] IEHC 175 and *Triumph Controls UK Ltd v Primus International Holding Co* [2018] EWHC 176.
25. High Court Practice Direction 117, dated November 29, 2022, requires, with effect from December 5, 2022, that every application seeking an order for discovery or inspection of documents or of real or personal property or for the delivery of interrogatories shall be issued for a date returnable before the Deputy Master and not to the High Court Common Law Motion List. It is not apparent to what extent it is envisaged that the Deputy Master will manage and decide substantial discovery disputes under the current rules.

LAST WILL AND TESTAMENT

A look at recent probate and succession case law, drawn from a number of written judgments.

Michael Hourican SC

If a will traced to the possession of the deceased and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself.

There has been a significant volume of written judgments in the recent past in the areas of probate and succession, which I propose to address under separate headings according to the relevant subject matter.

Lost wills

***In re Mary Eastwood deceased* (2021) IEHC 387 (High Court, Allen J., June 4, 2021)**

Background

This was an application to the Probate Court to admit a lost will in terms of a copy. The will had been made in a solicitor's office and the original was retained by the solicitor. Sometime later the deceased wrote to the solicitor asking for a copy of all documents relating to her in his possession, and he replied, indicating that he was enclosing, *inter alia*, the original will. The applicant (the deceased's son and the executor named in the will) stated that he collected the deceased's post and that when he opened the envelope it contained a copy of the deceased's will, and that that was the copy of the will that he located following the death of the deceased.

Law

Allen J. asserted the principle that where a lost will is last traced to the testator's custody, an evidential presumption that he destroyed it with the intention of revoking it arises. He cited, in this regard, the following passage from the judgment of Parke B. in *Welch v Phillips*:[1]

"Now the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Court, is this: that if a will traced to the possession of the deceased and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to repel it.

The onus of proof of such circumstances is undoubtedly on the party propounding the will".[2]

Allen J.'s decision confirms that the absence of the original will and the question whether it was last in the testator's custody are separate ("dual and conjunctive") matters[3] and, therefore, that if it can be shown that the will, when last known to have been in existence, was not in the testator's possession, the presumption will not arise. Counsel propounding the will argued that the onus of proving that the will was last in the testator's possession rests with the party making that assertion, but Allen J. disagreed, noting that the authorities establish that the onus is always on the party propounding the will to show that it was not destroyed by the testator and, in effect, that means that the same party bears the onus of showing that it was not in fact last in the testator's possession (and, therefore, that the presumption does not arise).[4]

Decision

Allen J. concluded that the evidence concerning the question as to whether the will came into the physical custody of the testatrix was vague and inconclusive, and would have to be resolved by oral evidence. Specifically, unresolved evidential issues arose as to whether the solicitor had, as he asserted, posted the original will to the deceased, and as to whether the envelope had been opened by the deceased or her son.

The decision also contains useful guidelines with regard to the nature of the evidence that is required to be placed before the court on matters of relevance. In this regard, Allen J. noted that the solicitor who might or might not have posted the will to the testatrix had not indicated whether he had a wills safe or wills register or any record of posting,[5] and was critical of the vagueness with which he addressed the correspondence. Specifically, the letter under cover of which he said he sent the original will was sent in response to a request for copy documents only, and the solicitor's evidence did not address that incongruity.

***In re Thomas Delahunty deceased* (2021) IEHC 657 (High Court, Butler J., October 14, 2021)**

Background

This was an application to admit a lost will in terms of a carbon copy. The evidence indicated that the original will, made in 1980, had been stored in a safe that was stolen when the office of the solicitor who had prepared the will was broken into. The carbon copy will, which was located by the deceased's nephew among his papers after his death, did not bear a copy of the signatures but, rather, the printed names of the signatories in the place of the signatures. Both attesting witnesses, one of whom had been the solicitor who prepared the will, were since deceased, so no direct evidence of execution was available. Those opposing the application did so on the grounds that:

(a) there was no, or insufficient, evidence of due execution;

Allen J.'s decision confirms that the absence of the original will and the question whether it was last in the testator's custody are separate matters.

(b) there was no, or insufficient, evidence of knowledge and approval by the testator of the contents of the will; and,

(c) the deceased, having failed to respond to correspondence from the solicitor notifying him of the theft of the safe and inviting him to attend for the purpose of making a new will, thereby signified an intention to revoke the will such as to effect its revocation.

Decision

With regard to the first issue, Butler J. applied the presumption typically articulated by the Latin maxim *omnia praesumuntur rite esse acta* (although favouring the more accessible 'presumption of regularity'), and considered in some detail the law relating to its application. It is applied where an intention to commit a formal act is established but where direct evidence of the act is not available and, in that way "allows the court to close an evidential gap regarding the formalities of an act, which, on the available evidence, the court is otherwise satisfied was properly done".[6]

The presumption is applied according to the probabilities. Butler J. referred,[7] *inter alia*, to a passage from the decision of Lindley L.J. in *Harris v Knight*,[8] in which he held that "the maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid"[9] and to the decision of Davitt J. in *In the Goods of McLean*,[10] where he equated the presumption to the application of "the principle of the balance of probability".

Butler J. observed, in respect of the second condition, that the absence of direct evidence of the execution of the will did not "prove or even tend to prove that the will was not executed," since "an absence of evidence of something is not, of itself, evidence that the thing did not happen".[11]

Butler J. considered evidence of the habitual practice in the solicitor's office to the effect that in 1980, because the office had no photocopier, duplicate wills were created using carbon paper, and that when a will was executed, the names of the signatories would be printed on the carbon copy. There was also relevant documentary evidence that supported the application, namely an entry in the wills register indicating that the deceased had executed his will and that the

original was retained in the office, and the solicitor's note of the testator's instructions for his will, together with three draft wills bearing handwritten alterations, which showed an evolution towards the final version (of which the carbon copy was available). The fact that the document had been prepared by a solicitor was of assistance to the application and the inclusion of an attestation clause was also of some relevance.[12]

Noting the absence of contradicting evidence,[13] Butler J. concluded that there was ample evidence that the document before the court was a true copy of the executed will of the deceased[14] and that there was a proper basis for the application of the presumption.[15]

***In re Martin Healy deceased* (2022) IEHC 49 (High Court, Butler J., January 31, 2022)**

Background

This was an unsuccessful application to admit a lost will in terms of a copy. The will was made some 16 years before the date of death. It had not been made with the assistance of a solicitor and, although a *pro forma* affidavit of attesting witness was filed in support of the application, there was no evidence as to why or in what circumstances the photocopy was made or how it came into the applicant's possession, and no direct evidence as to whether the deceased ever held the original will.[16]

Decision

That last evidential gap (as to whether the deceased ever had custody of the original will) was significant, because Butler J. took the view that where a will is not made with professional assistance and there is a complete absence of evidence going to the issue, the greater likelihood is that the testator will retain the original.[17] This, in turn, brought into operation the presumption of destruction by revocation, the onus of rebutting which rests with the person seeking to propound the will (*Welch v Phillips*).[18,19] There being no evidence before the court going to the presumption of revocation, it stood unrebutted and the application was refused, even though it was moved largely on consent.

Dependent relative revocation

***In re John Coughlan deceased* (2022) IEHC 604 (High Court, Butler J., November 3, 2022)**

Background

The deceased had made a will in 2012 dividing his estate in four equal shares, followed by a will in 2015 (containing a full revocation clause) dividing the estate between five beneficiaries (including the four beneficiaries of the earlier will) in equal shares.

The evidence was that the deceased later fell out with the fifth beneficiary and re-attended with his solicitor to make a new will excluding her. His solicitor incorrectly advised him that the revocation of the 2015 will would revive the 2012 will (the contents of which reflected perfectly his intentions).

On that advice, he revoked his 2015 will by destruction, and following his death, probate of the 2012 will issued (the erroneous advice not having yet been identified as such). When the correct legal position became known, the executors (under both wills as it happened) applied to the probate judge for the recall, revocation and cancellation of the grant and for an order admitting the 2012 will to probate on application of the doctrine of dependent relative revocation.

No issue arose as to whether the 2012 will had been revoked by the 2015 will (it clearly had been) or as to whether the revocation of the 2015 will revived the 2012 will (it clearly did not).[20] The more difficult question was whether, in circumstances where the evidence showed that the deceased, when revoking his 2015 will, understood the effect of that act to be, or include, the revival of the 2012 will, had the result of nullifying its revocation. Otherwise, the deceased would have died intestate.

Butler J. carefully considered the law relating to doctrine of dependent relative revocation, which states, in essence, that a revocation made on a condition or with an intention that was not fulfilled, or an understanding that was incorrect, does not take effect. Butler J. cited Kenny J.'s following explanation of the doctrine in *In re the Goods of Irvine*:[21]

"If the act of revocation…be so connected with some other act or event that its efficacy is meant to be dependent on that other act or event, it will fail as a revocation. If that other act be efficacious, the revocation will operate; otherwise it will not. It is altogether a question of intention…"[22]

Decision

In the case before Butler J., it was accepted by the party opposing the application that the doctrine of dependent relative revocation applied, but counsel opposing the application raised an ingenious argument that the revocation of the 2012 will was partial only. Specifically, it was argued that since the deceased's intention had merely been to remove the fifth beneficiary from the 2015 will, his destruction of that will should only be regarded as effective to revoke that part of it (i.e., the inclusion of that beneficiary in the dispositive provision). This argument was advanced with reference to the wording of s. 85(2), which seems to envisage the possibility of a partial revocation by destruction.

Butler J. accepted that the evidence did indeed show that the testator's overall intention had been to procure the disposal of his estate in favour of the original four beneficiaries, but she drew a distinction between that intention, and the intention on the part of the testator in destroying his 2015 will. His intention when doing that was to revoke it in its entirety, because his solicitor had advised him that that would revive the 2012 will.

Butler J. drew a distinction between the deceased's testamentary intentions, which may only be conveyed in the provisions of his wills and codicils, and the legal principles that apply to his intentions underlying his destruction of a will. Having

> His intention in destroying the 2015 will, however, was to revoke it in its entirety.

observed that under *Rowe v Law*,[23] evidence extrinsic to a will of testamentary intention is inadmissible for the purpose of construing a will in the absence of some ambiguity it assists in resolving, she held that:

"As revocation can be achieved through methods which do not involve the making of a written record, there is greater latitude for the court to accept extrinsic evidence in order to establish a testator's intention – and indeed of the testator's actions in the case of destruction of a will…for the purposes of s. 85."[24]

Therefore, although the deceased's testamentary intentions were indeed the mere removal of a beneficiary, those testamentary intentions were not expressed in a duly executed testamentary document and so were not capable of dictating or affecting the administration of his estate. His intention in destroying the 2015 will, however, was to revoke it in its entirety. It followed that either it had been revoked in its entirety or, if the doctrine of dependent relative revocation were applied, that the revocation was entirely ineffective. That was the conclusion to which Butler J. came (notwithstanding that it was common case that the fifth beneficiary was not intended by the deceased to benefit) with the result that the grant of probate was recalled and cancelled and the 2015 will was admitted in terms of a copy (the original having of course been destroyed).

Butler J. noted, incidentally, that a difficulty would arise were the gift to the fifth beneficiary alone revoked, because under the terms of the 2015 will the remaining four beneficiaries would still only be entitled to a one-fifth share each, which would result in an intestacy with regard to the remaining fifth.[25]

***In the estate of Patrick John Mannion deceased* (2021) IEHC 117 (High Court, Allen J., February 21, 2021)**

Background

The facts of this case were singular. The deceased, an Irish Catholic priest, had made a five-page, valid will in Texas in 1997, a copy of which he left with the executrix's daughter (in Texas), and it remained in existence after his death.

He evidently brought his original will with him when, 10 years later, on his retirement, he moved back to Ireland, and in 2014 he handed to his nephew a sealed envelope marked 'Last will, Fr. J. J. Mannion'. Following his death, the envelope was opened and found to contain a document incorporating the original of the first attestation page of the will and a photocopy of the second attestation page, to which new pages had been stapled, apparently by way of intended replacement pages, appointing his nephew executor and disposing of the estate in a different manner from the 1997 will. The deceased had evidently "cobbled together" what he intended to be a new or altered will, without having it executed but relying instead on the execution of the 1997 will. The originals of the 'replaced' pages were missing and no evidence was available as to what had become of them.

It was clear that the 'replacement' pages were not entitled to probate, since they had never been executed. The missing pages of what had been the original will having last been traced to the deceased's custody, they were subject to the presumption of revocation by destruction, and there was no evidence to rebut the presumption. If anything, the deceased's attempt to replace those pages suggested an intention to revoke them.[26]

Decision

Allen J., having reviewed some authorities concerning the doctrine of dependent relative revocation, including two cases in which the court had refused to apply it in circumstances where the evidence fell short of establishing that the revocation was conditional,[27] concluded that the correct inference to draw from the state of the 2014 document was that the deceased appeared to believe that the 'replacement' pages would be entitled to probate and that the missing pages had been destroyed at the same time, or as part of the same act, as their replacement by the four new pages, and on that basis held that he was "entitled to infer that Fr Mannion's intention to revoke his will was dependent on the validity of what he intended would be its replacement",[28] and that the "condition of the validity of what was intended to replace (the 1997 will) was not fulfilled".[29]

He therefore granted probate to the copies of the missing original pages and the one original page. The executrix being elderly and residing in Texas, Allen J. acceded to her application pursuant to s. 27(4), Succession Act, giving liberty to the deceased's nephew to extract a grant of administration with the will/part copy will annexed, and observed that the deceased had, in a roundabout way, achieved that particular objective.

S. 117, Succession Act, 1965

***In the estate of T.N. deceased; G.S. v M.B.* (2022) IEHC 65 (High Court, Stack J., January 21, 2022)**

Background

The deceased died in 2015, with an estimated net estate, by the date of the hearing, of slightly under €800,000, the bulk of which consisted of a house and agricultural land. In her will she left the bulk of her estate to a nephew and niece, and made no provision for the plaintiff, her only child.

The plaintiff's mother was unmarried and he had been born (in 1955) in a mother and baby home, and given by his mother to another family (of modest means) who raised him. His mother had failed to welcome him into her family, to his lasting distress, had shown no interest in the birth of his son, and made no provision for him in her lifetime (on one occasion offering to sell him a site).

> The plaintiff was diagnosed with paranoid personality disorder, and had suffered episodes of depression and psychosis within the 10-year period before the hearing.

He sat his Leaving Certificate and attended a third-level civil engineering course, but failed an exam in his second year and could not afford to re-sit it.

An educational psychologist gave evidence that the plaintiff had a natural aptitude for civil engineering and that had he completed the course his career was likely to have had a different trajectory. As it happened, he had a number of skilled jobs, but he had taken early retirement in 2001. He had received a lump sum on his retirement but his income since retirement consisted of a relatively modest pension and some modest earnings from casual work.

He and his spouse held reasonably significant assets, however, including two unencumbered houses (their family home and an investment property) with a combined value of about €375,000, savings of about €246,000 and an Irish Life policy in credit in the sum of €200,000. Stack J. held that the assets of the plaintiff's spouse were relevant to her adjudication of his claim.[30]

The plaintiff was diagnosed with paranoid personality disorder, and had suffered episodes of depression and psychosis within the 10-year period before the hearing, and Stack J. was receptive to the possibility that his mother's treatment of him may have played a role in the development of his psychiatric difficulties.

The principal argument advanced in defence of the claim was that the plaintiff was unable to show a financial need for provision at the date of death and therefore could not establish a failure in moral duty. Reliance was principally placed in this regard on the dictum of Barron J. in *In the goods of J.H. deceased*[31] to the effect that "if no such need exists, even where no provision has been made by the testator whether by his will or otherwise, the court has no power to intervene".[32]

Decision

Stack J., having reviewed the authorities, observed that they did not establish that "merely because one is not in immediate financial need, one cannot meet the onus of demonstrating a failure of moral duty on the part of the parent"[33] and that although the plaintiff and his spouse were hard to describe as being "in need"; nevertheless, neither had any real earning capacity and they had a young son whom they would presumably wish to establish in life, which would probably compel them to have recourse to their savings. Stack J. also held that although s. 117 is primarily addressed to plaintiffs who are at an age where they might reasonably expect provision from their parents, they are not subject to any "age ceiling".[34]

She concluded that there had been a failure in moral duty and awarded provision from the estate of a lump sum of €225,000 (charged on the agricultural lands), relying principally, in coming to this decision, on the absence of competing claims on the deceased's moral obligations, the reasonably significant size of the estate, the absence of any *inter vivos* provision for the plaintiff by the deceased, and the modest income of the plaintiff and his spouse. She also had regard to the plaintiff's psychiatric disorder and to his need to provide for his son.

References

1. (1836) 1 Moore's PC 299.
2. Approved by Kenny J. in *In re Coster deceased* (Unrep., Supreme Court, January 19, 1979).
3. Paragraph 41.
4. Paragraph 46.
5. Paragraph 29.
6. At paragraph 10.
7. At paragraph 10.
8. (1850) 15 PD 170.
9. At 179.
10. (1950) IR 180.
11. At paragraph 15.
12. See paragraph 17.
13. At paragraph 28.
14. At paragraph 20.
15. At paragraph 26.
16. The applicant gave evidence that the deceased had, in 2003, shown him a sealed brown envelope, stating that it contained his will, but he had not opened the envelope (see paragraph 19), and the deceased had not mentioned his will at any stage thereafter.
17. At paragraphs 14 and 25. The will had been made with the assistance of member of a religious order but there was no evidence suggesting that that order would retain possession of the will of a non-member of the order (paragraph 25).
18. (1836) 1 Moore's PC 299.
19. See paragraph 21.
20. The first clause of s. 87, Succession Act, 1965 provides: "No will or any part thereof, which is in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil duly executed and showing an intention to revive it".
21. (1919) 2 IR 485.
22. At paragraph 22.
23. (1978) IR 55.
24. At paragraph 32.
25. See paragraph 36.
26. Note that s. 85(2), Succession Act, seems to envisage the possibility of revocation by destruction of part only of a will.
27. *In the goods of John Joseph Walsh deceased* (1947) Ir. Jur. Rep. 44; *In the goods of Coster deceased* (Unrep., Supreme Court, January 19, 1979).
28. At paragraph 44.
29. At paragraph 45.
30. At paragraph 8.
31. (1984) IR 599, at 608.
32. At 608.
33. At paragraph 40.
34. At paragraph 43.

DEFENDING THE DEFENDERS

International Day of the Endangered Lawyer is a fitting opportunity to raise awareness of human rights abuses concerning lawyers and judges around the globe.

Gavin Rothwell BL

January 24 marks what should be an important day in the calendar not only for lawyers, but for anyone who values a democratic society. International Day of the Endangered Lawyer (IDEL) has been organised for the last 15 years by a coalition of bar associations and NGOs in an effort to highlight the risks facing lawyers around the world. This year the country of focus for the IDEL was Afghanistan, and the Human Rights Committee of The Bar of Ireland was privileged to mark the day with an event featuring some of the Afghan judges now living in Ireland, having fled the Taliban in 2021.

It may be somewhat surprising to hear, but the persecution of lawyers (particularly those practising in human and environmental rights) continues worldwide. In Myanmar, for example, the rule of law has come under severe pressure following the military coup in 2021. A recent report from the International Commission of Jurists details some of the behaviour that lawyers now experience as the norm in that jurisdiction: "Lawyers are often threatened in front of judges and are actually arrested in courtrooms for asking witnesses questions about torture and ill-treatment their clients have experienced or for requesting fair trials".

Twenty human rights defenders were killed in Central and Latin America in the first month of 2022 alone. In the small African state of Eswatini, Thulani Maseko, a human rights lawyer and outspoken rule of law advocate, was recently killed at his home. He had been declared an Amnesty International Prisoner of Conscience for his role in human rights litigation.

Afghanistan

Perhaps the worst persecution facing any lawyer currently is that which is taking place in Afghanistan. The violence inflicted upon members of the Afghan judiciary, female judges in particular, is shocking. A report published by Freedom House in January found that: "Human rights defenders in Afghanistan and those who have fled the country face ongoing threats including arbitrary arrest, kidnapping, torture, imprisonment, and violence against family members". On November 22, 2021, the Taliban's Ministry of Justice formally removed independence from the Afghan Independent Bar Association (AIBA). The next day, Taliban soldiers entered the AIBA Kabul office and after violently threatening its employees, gained access to an AIBA database of over 2,500 lawyers and non-lawyer allies. This database provided the Taliban with contact details of lawyers, names of their family members, details of cases they had worked on and the judges who presided over them.

The response to this crisis from both the Irish and international legal community offers a glimmer of hope at what can be done to assist our fellow lawyers. The International Association of Women Judges led efforts to evacuate female Afghan judges and their families, bringing them to countries where they could be granted asylum and establish new lives.

When ten such judges arrived in Ireland as programme refugees during winter 2021, The Bar of Ireland, The Law Society, the Association of Judges of Ireland, and Irish Rule of Law International, formed the Afghan Justice Appeal to assist the judges and their families in settling into Ireland, with dozens of legal professionals aiding the families in this process. Many of us who have been working with the female Afghan judges in Ireland over the past number of months can see first-hand the human cost when a country's justice system is destroyed. Impunity, chaos and destruction reign. Careers that took decades to build are shattered overnight. Families are separated across continents as sisters, daughters and aunts are forced to flee to save their lives.

These Afghan judges are now our neighbours, colleagues and friends. For their dignity and human rights to be recognised and respected, we should ensure that in years to come, efforts are made to mark the International Day of the Endangered Lawyer. Defending the defenders remains a worthwhile and necessary task. Unfortunately, it looks like this task will be here for some time to come.

The Afghan Justice Appeal would greatly appreciate any support that colleagues at the Bar can offer – be it practical assistance, such as providing informal mentoring to the judges and their families, or financial contributions to the Appeal's fund. Contact afghanassistance@lawlibrary.ie to get involved or visit https://www.irishruleoflaw.ie/afghanistan_appeal to donate.

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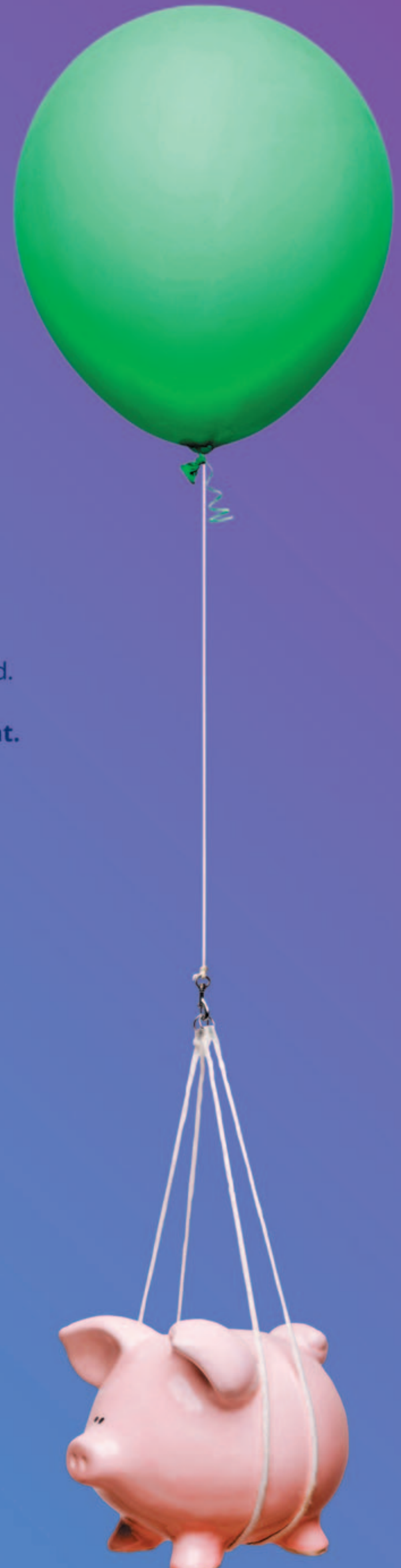

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