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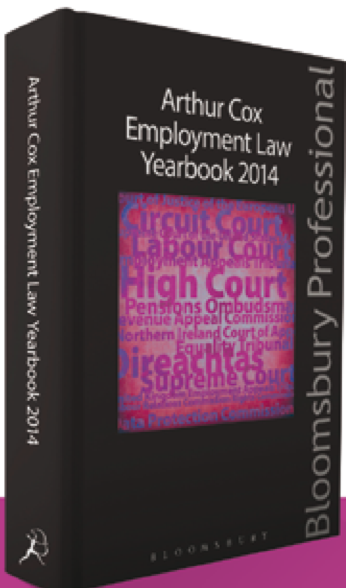

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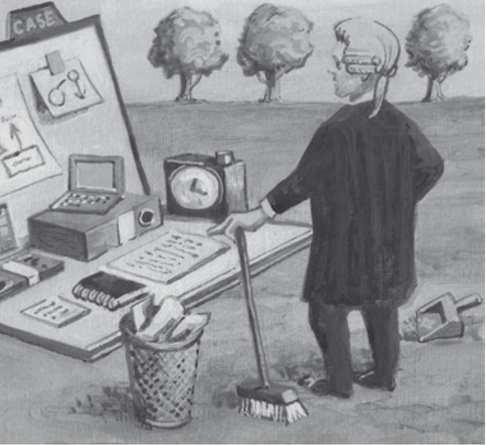

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Recorded Evidence for Vulnerable Witnesses in Criminal Proceedings

Miriam Delahunt BL*

Introduction

Almost five years have elapsed since the first use of recorded examination in chief evidence for vulnerable witnesses[1]. Yet, practitioners still encounter difficulty with the implementation of these measures. Section 16 (1) (b) of the Criminal Evidence Act 1992 (hereafter "s.16(1)(b)") allows for the recording and admission of examination in chief evidence for complainants under 14 (or for complainants who have an intellectual disability). The first cases using the provision took place in late 2010 and it appears that there has been no State assessment of how the provision is working in practice. However, since its commencement, the parameters of s.16(1)(b) have been widened, suggesting some faith in its efficacy. The Criminal Law (Human Trafficking) (Amendment) Act 2013 now extends the provision to witnesses under 18 involving offences under s. 3 (1), (2) and (3) of the Child Trafficking and Pornography Act 1998 and ss.2, 4 and 7 of the Criminal Law (Human Trafficking) Act 2008.[2]

Difficulties regarding the use of this provision were previously described in *The Bar Review* in February 2011.[3] Four years later, little has changed and certain cases observed by, or communicated to, the author, illustrate issues which appear to be indicative of the wider experiences of legal practitioners.

DPP v AB[4], Circuit Criminal Court, November 2014

The case of *DPP v AB* involved the admissibility of a recording under s.16(1)(b) concerning an allegation of sexual assault by a complainant who was 7 years of age at the time the recording was made and 11 years of age at trial, the case having been adjourned three times. The offence was alleged to have occurred some years prior to the recording.

The trial was due to last two to three days. During the pre-trial hearing,[5] no issues regarding the recording of the evidence had been made known to the prosecution.[6] On the first day of trial, the defence challenged the admissibility of the recording. Legal argument concerning the admission took two days in which the recording was played to the trial judge and the complainant was cross examined as to the evidence that would be given at trial. The trial judge ruled that the recorded evidence was admissible and after a trial that took approximately two weeks, the defendant was found guilty.

DPP v AC, Circuit Criminal Court, July 2011

In the case of *DPP v AC,* two child complainants had given examination in chief evidence under s.16(1)(b) which, despite defence objection, was then admitted at trial. The trial took place approximately 16 months after the recording under s.16(1)(b) and the court allowed the complainants to be cross examined via video link. The matter originated in one county but as there were no video link facilities in the appropriate court room,[7] the trial was moved to a neighbouring county for one day. On that day, the trial was delayed due to audio difficulties while playing the recording. An application was made by the prosecution for a transcript to be given to the jury while the recording was played at trial[8] but the judge ruled against this and a means was found to allow the recording to be played more audibly.

The first recording was approximately one hour in length while the second recording was one hour and 36 minutes

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* Miriam Delahunt is a practising barrister and is finishing a PhD in the School of Law, Trinity College Dublin on the subject of support measures for child witnesses in criminal proceedings. She wishes to thank all those who helped with the research and writing of this article. All errors and omissions are the responsibility of the author.

1 The definition of vulnerable witnesses varies by jurisdiction (see *s. 16 Youth Justice and Criminal Evidence Act 1999 (England and Wales)* but for the purposes of this article, the term is used to describe children and persons with an intellectual disability.

2 At time of writing, it is understood that no recordings under the new provisions of the Act have been conducted as yet.

3 Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992*, The Bar Review, Vol.16, (1), February 2011.

4 The names of the cases described have been changed to preserve the anonymity of the complainants and defendants involved.

5 The pre-trial hearing is conducted under:

'Circuit Court Practice Directions, CC12 Pre-Trial Procedure'. (CC13-Midland; CC14-South Eastern Circuits)

'Prosecution Counsel on the Dublin Circuit are required to alert the court as to:

4 c) Video link, video recorded and CCTV evidence

4. Whether it is intended to have admitted as evidence a video recording of any evidence.

6 *'Circuit Court Practice Directions, CC12 Pre-Trial Procedure'*

5. The defence will be required to be in a position to notify the court as to:.....

d) whether there are any requirements for the running and presentation of the defence case which need to be addressed by the court or the Courts Service in advance.'

Despite this practice direction, applications regarding the admissibility of s.16(1)(b) recordings still take place on the first day of trial without any consequences if no admissibility issues are raised at pre-trial hearings.

7 At time of writing, video link facilities are still not available in that county.

8 The application cited English case law which provides for the jury to have transcripts of recorded evidence under narrow parameters e.g., the jury cannot bring the transcript into the jury room during deliberations in case the evidence is given an unnatural weight. *R v Welstead* [1996] 1 Cr App R 59 CA; *R v Popescu* [2011] Crim LR 227 CA. (Reaffirmed in *R v Sardar* [2012] EWCA Crim 134; See Archbold 2013 at para. 8-92 at page 1316.)

in length.[9] Having heard evidence from the first witness, the second witness' cross examination only began at 6pm. Defence counsel stated that he would have no objection to postponing cross examination until the following day. The court decided to continue and when cross examination began, the child witness became too distressed to carry on. The court reconvened on the following day and cross examination was completed without incident. The defendant was ultimately found guilty.

DPP v AD, Central Criminal Court, January 2015

The *Good Practice Guidelines*[10] provide that the witness may watch the recording of his or her statement while it is being played to the court or jury.[11] In *DPP v AD,* a rape trial, there was an interval of more than two years between the recording and the trial.[12] Defence counsel argued that to allow the complainant to watch the recording as it was being played to the jury would sanction a significant and prejudicial departure from traditional practice where the witness gives evidence from the witness box. Where evidence is given live at trial, there would be no opportunity for the memory of the witness to be refreshed after giving examination in chief evidence and before being cross examined. The trial judge, McCarthy J, ruled in favour of the defendant's challenge on the basis of the length of the interval between the recording of the evidence and the trial. No transcript of the recording was given to the witness *in lieu* and the witness was cross examined without watching the recording or having been able to refresh her memory as to its content.[13] Ultimately, the defendant pleaded guilty to a lesser charge.

DPP v AE, Dublin Circuit Criminal Court, June 2014

A significant advantage of the recording of evidence is that it allows the court to place the witness in the temporal context of the offence. In *DPP v AE*, due to internal investigative issues, the interval between the taking of the examination in chief evidence under s.16(1)(b) and the trial was five years. The complainant was 12 years of age at time of the recording and was cross examined at trial when she was 17 years of age. While the length of this delay was unusually long, waiting times outlined in the Courts Services Report[14] indicate consistently long waiting times for trials which vary considerably from venue to venue. *DPP v AE* resulted in an acquittal but there were several evidential factors which impacted on the trial.

DPP v AF, Central Criminal Court, November 2014

In *DPP v AF*, Hunt J gave careful consideration to the defence challenge to the admission of a s.16(1)(b) recording, in a trial involving rape, where the complainant had an intellectual disability. During the *voir dire,* the recording was played to the court. In ruling the recording admissible, Hunt J observed that the purpose of the provision was to facilitate the taking and admission of evidence in circumstances where the complainant would have difficulties giving evidence otherwise, and that there was a legislative presumption to admit the evidence unless its admission would be unfair to the accused.[15] He noted that the outdated words of the Act, 'mental handicap', were very clear in that, where a complainant had an intellectual disability, he or she was eligible to have his or her evidence admitted via s.16(1)(b) regardless of his or her capacities. The complainant in this case had a strong regional accent and the prosecution applied for a transcript to be given to the jury while watching the recording citing English case law.[16] Hunt J ruled against this on the basis that the need for a transcript, which may not have become a necessity, did not outweigh the potential risk of unfairness to the accused.

The defendant subsequently pleaded guilty to aggravated sexual assault. At sentencing in April 2015, defence counsel stated that it was during the *voir dire* that the defendant realised the harm he had caused to the complainant and at that point, he had decided to plead guilty. As the ruling that the recording was admissible came soon after its viewing, it will remain unknown as to which factor was more persuasive. Hunt J noted that it was unfortunate that the legal issues were not dealt with sooner and hoped that the situation would change in the future referring perhaps to the possible placing of pre-trial hearings on a statutory basis under the General Scheme of the Criminal Procedure Bill (2014*)*.[17]

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9 The length of the recording was due to the Specialist Interviewer wishing to avoid asking leading questions which might prejudice the admission of the recording at trial.

10 *Good Practice Guidelines* – S. 16(1)(b) of the Criminal Evidence Act 1992 (Dept of Justice) (July 2003).

Not all counsel have been supplied with the *Good Practice Guidelines* and not all counsel know that they exist. While the *Guidelines* are non-statutory and subject to overruling by the courts, they may assist the court by furnishing some parameters for practitioners to work within. They require revision in the face of changing practice. For example, the *Guidelines* state that should a subsequent recorded interview be required, a request should be made to the DPP. (Para.1.30 at page 14) This has now been revised and a request for a supplemental recorded interview can now be made to the senior investigating officer in the case. *Revision of Policy by Deputy Director, November 2009*.

11 *Good Practice Guidelines* – s.16(1)(b) Criminal Evidence Act 1992 (Dept of Justice) (July 2003) Section XV.

12 Where there has been a significant interval between the time of the incident and the recording of evidence, or the recording of the evidence and the trial, questions may arise as to whether the witness, having watched the recording, is remembering details of the event or details of the recording itself. This may then give rise to issues of competency, particularly in very young witnesses See *R v Powell* [2006] EWCA Crim 3; *R v Malicki* [2009] EWCA Crim 365;

13 In England and Wales, the guidance (albeit also non-statutory) regarding this support measure is significantly more comprehensive but also states that that witness may watch the recording prior to trial. See *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures Chapter 4, Witness Support and Preparation, Refreshing the Memory of the Witness* at page117. (Ministry of Justice) (March 2011). http://www.cps.gov.uk/publications/docs/best_evidence_in_criminal_proceedings.pdf

14 Details of the waiting times it may take for a trial to be heard are outlined in the most recent report, *The Courts Service Annual Report 2013*, Chapter 3, S. 6 at page 53.

15 See S. 16(1) Criminal Evidence Act 1992 '…a video recording…. **shall** be admissible'. S.16(2) provides that the recording shall not be admitted if it is not in the interests of justice to do so and if its admission will cause unfairness to the accused.

16 See footnote 9.

17 *Head 2 – Preliminary Trial Hearings, Criminal Procedure Bill, (*1st April 2014)

General observations

In trials involving vulnerable witnesses, it is not always the case that the same representative of the Chief Prosecution Solicitor will attend on any given day with the consequent risk that particular knowledge of the issues may not be applied. It also appears that quite junior Gardaí frequently prosecute cases involving sexual assault, bearing the responsibility for any issues which may arise. The Specialist Interviewer[18]is experienced with conducting recorded interviews with vulnerable witnesses as well as with the procedural aspects of their admission at trial. However, the Specialist Interviewer is not the lead prosecuting member in the case and this role is limited to the recording of the testimony as well as testifying in relation to procedural aspects concerning its admission at trial *i.e.* when, where and how the evidence was taken.

The question of transcripts is a consistent difficulty. In assistance of the prosecution of cases using s.16(1)(b), Specialist Interviewers prepare a *Verbatim Record of Salient Points* in relation to what offences and sections of the recording may be relevant. This is enclosed with the recording prior to the preparation of the Book of Evidence. Section 16(1)(b) states that a recording under this section shall be admissible, under certain provisions, '*at the trial of the offence as evidence of any fact stated therein of which direct oral evidence would be admissible'*. If admitted at trial, one contention is that the evidence is sealed and no further examination in chief questions can be asked. Whether a transcript is made of the relevant sections of the recording or the entire recording, and whether the recording and/or the transcript become part of the Book of Evidence is a point at issue. However, a reliable transcript is imperative to ensure efficient progress. For example, where transcripts are not supplied with the Book of Evidence, delays will occur where early pleas are made as the prosecution cannot furnish the court with details of the relevant offence(s). There is no clarity as to which agency has responsibility for the preparation of transcripts of the recordings made under s.16(1)(b). Another significant question is which agency retains responsibility for the editing of the recording where this is required at trial. Playback issues, especially with regard to the audibility of the recording, occur frequently, possibly due to different audio visual systems being used to record and/or edit and then play the recording in court.

Future Reform

Given that the legal challenge to the Children's Rights Referendum has failed in the Supreme Court, Article 42A is now part of the Constitution.[19] The focus of Article 42A is on the rights of children in custody cases and it does not address specific rights of children in criminal and immigration contexts. It does outline a general underpinning of children's rights in the Constitution. Article 42A.1 states:

> 1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

Theoretically, Article 42A could ground an assertion of an unenumerated right under Article 40.3 of the Constitution, in terms of the inadequate use of support measures and the right of the child witness to protection from psychological harm.[20] Ultimately, however, Article 42A falls short of what the child, as complainant and witness in the criminal justice system, requires as a rights framework.

The *General Scheme of the Criminal Law (Sexual Offences) Bill 2014*, published in November 2014, includes a proposal to widen the eligibility for s.16(1)(b) to witnesses under 18 in relation to sexual offences and also to amend the interpretation of '*sexual offences*' within the *Criminal Evidence Act 1992*.[21] The *EU Victims Directive*[22] must be implemented by 16th November 2015 and at the time of writing, the legislation is being drafted. Indications are that s.16(1)(b) will be widened for witnesses under 18 (and persons with an intellectual disability) in certain proceedings, as well as to victims who may be deemed in need of the support measure. This will increase the burden on an already overloaded system which has not seen the section implemented efficiently so far. How the legislation will exist in its final form remains to be seen.

As a signatory to the European Convention on Human Rights, Ireland has positive obligations to protect the most vulnerable in society. Jurisprudence from the European Court of Human Rights, including the judgment in *O'Keeffe v Ireland,* [23] indicates that there is an enhanced State responsibility to protect children that are in the purview of the State and to ensure that the investigation and trial processes, particularly where vulnerable witnesses are involved, are as efficient and protective as possible. [24]

Increased rights protection may provide an impetus for judicial review proceedings obligating the courts to assist the vulnerable witness where delay is significant and/or where appropriate support measures have not been furnished. However, judicial review proceedings should remain a last resort where further delay and disruption is anathema to the vulnerable witness in the trial process.

18 S.16(1)(b) Criminal Evidence Act 1992 allows for the recording to be taken by a person competent for the purpose. While the majority of Specialist Interviewers are Gardaí, some HSE personnel conduct S.16(1)(b) interviews.

19 '*Supreme Court rejects appeal on Children's Referendum'* The Irish Times, Friday 24th April 2015. *http://www.irishtimes.com/news/crime-and-law/supreme-court-rejects-appeal-on-children-s-referendum-1.2187741.*

20 David Kenny, *Recent Developments in the Right of the Person in Article 40.3: Fleming v Ireland and the Spectre of Unenumerated Rights (2013), 1 DULJ, 322-341.*

21 Part 5 – Head 46–Amendment of section 2 of Act of 1992 (Interpretation); Head 50 (Amendment of section 16 of Act of 1992 (Video recording as evidence at trial)).General Scheme–Criminal Law (Sexual Offences) Bill 2014.

22 *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*).

23 *O'Keeffe v Ireland* 28th January 2014 (Application No 35810/09) ECtHR.

24 *CS and CAS v Romania* (Application No. 26692/05) 20th March 2012; ND v Slovenia *(Application no. 16605/09)* (15 January 2015; *Z and others v United Kingdom*, (App.29392/95, 10 May 2001 [GC],(2002) 34 EHRR 97, ECHR 2001 – V at 73. *X and Y v The Neztherlands* (1986) 8 EHRR 235;

Conclusion

When counsel receive a file involving a vulnerable witness which does not contain a transcript, or contains a recording that will not play audibly in court, or a recording that does not contain evidence necessary to the prosecution of the offence, or a recording that requires editing, delays will occur. If such issues are inadequately resolved or resolved at a late stage in proceedings, the rights of the defendant and the vulnerable witness may be significantly undermined.

The system requires:

- Fast tracking of all cases involving vulnerable witnesses.
- Detailed legislative reform based on an evaluation of practice and reform in this and other jurisdictions.
- Specific authoritative, procedural guidance.
- Specialised training for all agencies involved in cases involving a vulnerable witness
- Consistent assignment of experienced and trained personnel in cases involving vulnerable witnesses.
- Placing pre-trial hearings on a statutory basis and adherence to pre-trial rulings in all but exceptional circumstances.
- Sanctions for arbitrary late change of personnel in cases involving a vulnerable witness.

The use of intermediaries in England and Wales has prompted changes to the length and manner of cross examination of vulnerable witnesses at trial, modifications which have been upheld in the Court of Appeal.[25] Extremely negative trial reports instigated further reform.[26] The use of recorded cross examination under s. 28 of the Youth Justice and Criminal Evidence Act 1999 in pilot projects has seen further alteration to cross examination techniques, including the requirement to submit a list of cross examination questions to the trial judge prior to commencement of recording.[27] The use of full pre-trial recorded evidence for vulnerable witnesses could only occur in this jurisdiction if disclosure issues were resolved earlier in the process[28] but it would be far wiser if reform occurred in full consideration of the relevant issues rather than through prompting by circumstances as occurred in England and Wales.

The trial process should not be a contest where the defendant can exploit the frailties of a vulnerable witness in order to secure an acquittal.[29] If current procedures allow tactics such as delay, late challenges to the use of support measures and/or delayed pleas arising from circumstances where the s.16(1)(b) evidence is admitted and the vulnerable witness is present to be cross examined, abuse of the system can only be encouraged.

Significant reform has been required for some time to protect vulnerable witnesses in trial proceedings in this jurisdiction[30] and it should be considered that consistency and transparency may serve the defendant as well as the vulnerable witness. If reform is not prompted by constitutional and international momentum, the use of support measures will be left in the hands of the ingenuity of legal practitioners. It is also unjust that the judiciary must resolve issues which should be dealt with by the Executive. With minimal legislative guidance, when issues arise, the court must resolve them anew on each occasion causing unnecessary delay and uncertainty within the trial process. This has a negative impact both on the defendant, the vulnerable witness and the criminal justice system. Comprehensive, updated legislation regarding the provision of support measures for vulnerable witnesses is required in this jurisdiction but, as can be seen from the issues involved with the provision of recorded evidence under s.16 (1)(b) Criminal Evidence Act 1992, it is as vital to implement the legislation correctly as it is to have it well drafted. ■

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25 *R v B* [2010] EWCA Crim 4; [2010] Crim LR 233, CA; *R v Wills* [2011] EWCA Crim 1938; [2012] 1 Cr. App. R. 2; [2012] Crim. L.R. 565; *R v Lumbeba* [2014] EWCA Crim 2064; [2015] 1 W.L.R. 1579;

26 '*Pre-recorded evidence to spare vulnerable victims court ordeal–Move comes in response to several high-profile cases which have raised questions about how victims should be treated'* The Guardian, 11th June 2013. *http://www.theguardian.com/law/2013/jun/11/pre-recorded-evidence-victims-court*; *'Lawyers' treatment of gang grooming victims prompts call for reform' The Guardian,19th May 2013, http://www.theguardian.com/law/2013/may/19/lawyers-oxford-abuse-ring*

27 Andrew Ford*, Pre-Record, Not fade away – S. 28 of the Youth Justice and Criminal Evidence Act.* Counsel 2015, Mar, 18-20. March 2015;David Wurtzel, *Pre-Recorded Cross Examination and the Questioning of Vulnerable Witnesses in the Criminal Justice System,* Counsel 2014, Dec 2015;

28 See *Law Reform Report on Disclosure and Discovery in Criminal Cases* (LRC 112 – 2014),15th December 2014. See also *Part 5 – Head 52. (Disclosure of third party records in sexual abuse cases), General Scheme– Criminal Law (Sexual Offences) Bill 2014*.

29 The Criminal Practice Directions in England and Wales include an 'overriding objective' which makes clear that guilt and innocence should not be determined by procedural manoeuvres.

The overriding objective *CPD I General matters:*

'1A.1 The presumption of innocence and an adversarial process are essential features English and Welsh legal tradition and of the defendant's right to a fair trial. But it is no part of a fair trial that questions of guilt and innocence should be determined by procedural manoeuvres…]

Criminal Practice Directions [2014] EWCA Crim 1569, 14th July 2014.

30 See Úna Ní Raifeartaigh SC, The Bar Review,*Child Sexual Abuse cases: the need for cultural change within the criminal justice system*–Volume 14, Issue 5, (November 2009); Claire Edwards, Gillian Harold, and Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (UCC/CCJHR) (February 2012) National Disability Authority. http://nda.ie/Policy-and-research/Research/Research-publications/Access-to-Justice-for-People-with-Disabilities-as-Victims-of-Crime-in-Ireland/

Developments in Merger Control and the Need to Notify

Conor Talbot*

In this article, it is proposed to highlight a series of evolving risks that should be taken into account by all businesses in Ireland, especially those seeking new business partners or exploring acquisition opportunities in Ireland or abroad. Most experienced practitioners will be aware of the legal obligation to notify specific types of transactions to competition authorities before completion. Equally, it is widely known that any transaction which should have been notified under the competition rules, but is completed before the proper approval is obtained, will be void. However, the decision whether a transaction must be notified or not is increasingly complex and depends on a number of fluid factors which are discussed in this article.

A number of recent developments have significantly increased the risks associated with merger control process for businesses in Ireland. The first of these came about through the recent legislative changes which significantly lowered the turnover thresholds for mergers and acquisitions which fall within the legal requirement to be notified to the authorities. A second important development for practitioners in this area relates to a discernible trend amongst competition authorities in the EU, led by the European Commission ("the Commission"), towards more proactive use of the legislative provisions imposing heavy sanctions on businesses found to have implemented a notifiable transaction without first securing the approval of the relevant authorities.

The first section of this article outlines the recent legislative changes at the Irish level from the perspective of merging businesses and the duties on their advisors. The second section details the sanctions applicable under Irish and EU law for a failure to notify a notifiable transaction. The third section then details some recent cases from across the EU which indicate that this is a priority policy enforcement area for European authorities. The concluding remarks analyse what these developments could mean for Irish businesses and their advisors going forward.

New Thresholds for Notifiable Transactions under Irish law

The Competition and Consumer Protection Act 2014[1] ("the 2014 Act") came into force on October 31st 2014 and introduced some noteworthy reforms. Effectively, it broadens the scope of application of Part 3 of the Competition Act 2002 (as amended) ("the Act") which contains the rules and procedures for merger notifications and reviews. This review function is now undertaken by the Competition and Consumer Protection Commission ("CCPC"), which replaced the Competition Authority under the 2014 Act.

The new compulsory merger control thresholds for notifying a merger to the CPCC are that, in their most recent financial year:

- o the aggregate turnover in Ireland of the parties is at least €50 million; and
- o the turnover in Ireland of each of two or more of the parties is at least €3 million.

In practical terms, this means that if a purchaser with turnover in Ireland of €47m seeks to acquire an entity with €3m turnover in Ireland, a notification to the CCPC will be required. This is a significant departure from the previous position whereby a transaction was only caught if each of the two parties had aggregate worldwide turnover in excess of €40m and one of them had turnover of €40m in the State. From the point of view of the business community and their advisors, the new legislation means that requirement for a notification can arise where only one of the parties has truly significant turnover in the State.

A further important point to note is that any transaction which falls within the scope of the Act and surpasses the revised turnover thresholds will require compulsory notification to the CCPC and the parties will be required to suspend implementation of the transaction until clearance is granted.

New Timelines for Notification under 2014 Act

The timelines involved in obtaining an approval from the CCPC are considerable and should be taken into account by the businesses involved and their advisors from the outset.

The 2014 Act introduced a provision that permits a notification to the CCPC to take place before the agreement is signed, e.g. where the undertakings involved demonstrate a good faith intention to conclude an agreement or where an intention to make a public bid has been publicly announced by one of the undertakings involved. This can represent an attractive option for businesses and their advisors in some cases, but the parties should be aware that the CCPC will acknowledge on its website that it has received a merger notification – something which may not be commercially acceptable to the businesses involved if the negotiations are ongoing at the time.

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1 Act Number 29 of 2014: http://www.irishstatutebook.ie/2014/en/act/pub/0029/index.html.

The 2014 Act also introduced amended timelines for a merger review by the CCPC. Initially, this involves a Phase 1 review of 30 working days (extendable to 45 working days if remedies are proposed to the CCPC) commencing on the later of:

- o The date of receipt by the CCPC of the statutory notification form; or
- o If more information is formally requested by the CCPC within 30 working days of notification in Phase 1, the date of receipt by the CCPC of the further information or if the request for further information was not met, the day immediately following the expiry of the deadline imposed by the CCPC to supply the further information.

This second sub-clause above is significant in that it means that, where an incomplete notification is submitted, the CCPC can reset the Phase 1 period back to the full 30 working days. There is, therefore, a considerable incentive for businesses and their advisors to take great care in compiling the statutory notification form (available on the CCPC's website) and to take specialist advice if required to meet the technical requirements of the form.

If the CCPC has concerns over the transaction at the end of the above Phase 1 period, it is empowered to initiate a full Phase 2 investigation which can take up to 120 working days (extendable to 135 working days if remedies are proposed to the CCPC) commencing on the date of the beginning of the Phase 1 review. The CCPC may, within 30 working days of the commencement of a Phase 2 merger review, make a request for further information which will have the effect of suspending the 120 working day period. Therefore, the CCPC can only pause the clock in the Phase 2 stage.

There have been very few full Phase 2 merger reviews conducted by the CCPC and its predecessor but, given the considerable timelines involved and the risk that such a delay could pose to the commercial viability of a transaction, businesses would be ill advised to ignore the possibility of such an in depth review being undertaken and should factor that possibility into their commercial planning process.

Sanctions for Failure to Notify a Notifiable Transaction

In recognition of the fact that the notification requirement is fundamentally important in allowing the authorities to ensure that harmful transactions do not come about unbeknownst to them, there are considerable sanctions that apply if a notifiable merger is not notified under the Irish or EU merger rules. A failure to make a compulsory notification can have serious consequences for the transaction itself, on the businesses concerned and even the persons deemed to have been in control of them at the time.

Under Irish law, as regards the transaction itself, any notifiable merger or acquisition which purports to be put into effect in contravention of the notification requirement, is void under Part 3 of the Act. Businesses and their advisors should also be aware that a failure to notify a notifiable transaction is also a criminal offence and may incur penalties of fines of up to €3,000, plus €300 per day for continued breach. Conviction on indictment will incur penalties of up to €250,000 plus €25,000 per day in the case of a continued breach. In such instances, liability will be determined based on whether the persons controlling the enterprises knowingly and wilfully authorised or permitted the breach.

It should also be noted that transactions falling below the thresholds set out above are still subject to the rules on anti-competitive agreements and abuse of dominance in Sections 4 and 5 of the 2002 Act, respectively.[1] Equally, aggrieved persons may still sue for damages, exemplary damages, injunctions and/or declarations. Therefore, advisors must also take care to ensure that a transaction falling below the thresholds does not give rise to competition concerns.

Under Article 14(2) of the EU Merger Regulation (EUMR),[2] meanwhile, the European Commission may impose a fine of up to 10% of a party's annual turnover for a negligent or deliberate failure to comply with the notification and stand-still obligations. As we shall see below, the Commission and EU Courts have become increasingly comfortable in imposing fines under this provision in recent times, which has perhaps encouraged national competition authorities to do likewise.

Trends in European Case Law – Punishing Failure to Notify

If parties fail to notify a transaction meeting the thresholds of the EUMR before completion, and that failure comes to the attention of the European Commission, the penalties for non-compliance can include very significant fines which will usually be imposed on the acquiring party.[3] In light of the importance of the notification requirement as the cornerstone of the merger control regime, the EU Courts have become increasingly harsh with offenders, and less inclined to exercise their theoretically broad powers of review on fines.

Some recent case law has shown that it is clear that the European Commission is now treating this as a priority area for competition policy enforcement. The most interesting cases which have arisen have dealt with situations where acquirers have been deemed to breach the EUMR because they have completed the first step of a two-step acquisition which meets the EUMR filing thresholds before the Commission has granted approval.

Electrabel

In June 2009, the Commission fined Electrabel the sum of €20 million for failing to notify its acquisition of Compagnie Nationale du Rhône (CNR).[4] That fine was upheld on appeal to the Court of First Instance (now the General Court)[5]

1 See CCPC Notice in Respect of Non-Notifiable Mergers and Acquisitions, available at: http://tca.ie/images/uploaded/documents/CCPC%20Mergers%20Non%20Notifiable%20Mergers.pdf.

2 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. L 2004/1 (2004).

3 Paolo Palmigiano, Merger control: Why is competition law relevant to M&A?, *International Financial Law Review*, Apr 2013.

4 Case No COMP/M.4994 – Electrabel / Compagnie Nationale du Rhone, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m4994_20090610_1465_en.pdf.

5 Case T332/09 – *Electrabel v European Commission*, 12

and then the European Court of Justice.[6] The Commission concluded that the infringement lasted for a significant period and that Electrabel should have been aware of its obligation to receive Commission approval before proceeding with the acquisition.

In that case, by acquiring in December 2003 the shares of CNR held by EDF, the leading electricity producer in France, Electrabel became by far CNR's largest shareholder holding close to 50% of CNR's shares. The Commission undertook an economic investigation of the corporate structure and practical realities at CNR and found that, due to the wide dispersion of the remaining shares and past attendance rates at CNR's shareholders' meetings, Electrabel enjoyed a stable majority at CNR meetings. This was reinforced by other factors, notably the fact that Electrabel was the sole industrial shareholder of CNR and had taken over the role previously held by EDF in the operational management of the power plants and the marketing of electricity of CNR. Together, these elements meant that Electrabel had indeed acquired decisive influence over CNR and, given the large turnover of each entity, the transaction ought to have been notified under the EUMR.

While this case was clearly on a very large scale and concerned a very sophisticated operator, it does hold some lessons for Irish businesses and their advisors. For instance, it appears that Electrabel were under the impression that they had not obtained control but, having examined the circumstances, the Commission deemed that the corporate structure was such that the requisite degree of influence over the target had indeed passed to Electrabel, meaning that a notification should have been made. Irish businesses and their advisors would, therefore, be wise to apply the principles of the *Electrabel* case to any and each of their transactions which meet the turnover thresholds under the Act as the CCPC and the courts would undoubtedly be influenced in their approach by the position on the EU level.

Marine Harvest

In a further case dating from 23 July 2014, the European Commission fined Marine Harvest ASA €20 million for failing to notify its acquisition of Morpol ASA in accordance with the EU Merger Regulation and closing the transaction prior to receiving the European Commission's approval.[7] This was the first time the European Commission had imposed a fine in relation to a two-step transaction comprising a sale of a block of shares followed by a mandatory public bid for the remainder of the target's shares.

Marine Harvest and Morpol were both active in the farming and primary processing of Scottish salmon. On 14 December 2012, Marine Harvest entered into an agreement to acquire 48.5% of Morpol's shares from Morpol's two largest shareholders. The acquisition closed on 18 December 2012, triggering a mandatory public offer under Norwegian law, which closed on 12 March 2013. Marine Harvest began pre-notification discussions with the Commission shortly after the acquisition but only formally notified the transaction to the Commission on 9 August 2013.

Article 7(2) of the EUMR sets out a special stand-still obligation for public bids and allows completion to occur prior to the acquirer receiving the Commission's approval, provided that the acquirer: (i) notifies the transaction to the Commission immediately following publication of the bid; and (ii) does not exercise voting rights attaching to the tendered shares prior to the Commission's approval of the transaction. The Commission determined that by acquiring the 48.5% stake in December 2012, Marine Harvest had acquired de facto sole control of Morpol, and thereby breached the requirement under the EUMR not to complete the acquisition of control of Morpol prior to receiving the Commission's approval.

The lesson for practitioners from this case is clear – if a transaction is split into several different stages with control passing as a result of conditional or linked transactions, then the parties may well be wise to consult the relevant competition authorities earlier rather than later. Practically speaking, the authorities at both domestic and European level are open to informal pre-notification correspondence with parties and their legal representatives, so this avenue should be pursued when there is uncertainty about when control passes.

Case Law from Other EU Member States

The trend towards increasingly punishing failures to notify reportable transactions has been followed in several other EU Member States where, like Ireland, the domestic rules include an obligation to notify certain types of transactions.

Netherlands

In the Netherlands, the Nederlandse Mededingingsautoriteit (NMa) – now called the Authority for Consumers & Markets – has been particularly active in this area. In one well reported instance, the NMa fined the Sofiprotéol and Bunge groups, both active in the oilseed industry, for failing to notify a concentration on time. Sofiprotéol was fined €677,000 while the Bunge group was fined €1,730,000.[8] The fines arouse out of a transaction in December 2009, when the Bunge group transferred its shares in Saipol S.A.S to the Sofiprotéol group. It was held that Sofiprotéol acquired full control over Saipol as a result of this transaction, and therefore should have pre-notified it to the NMa. Instead, Sofiprotéol officially notified the transaction to the NMa in April 2010.

In the event, the NMa approved the acquisition in May 2010 which would indicate that it did not pose any competition issues, but subsequently pursued the parties for having competed the transaction without the necessary

December 2012, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=131705&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=676434.

6 Case C-84/13 P – *Electrabel v European Commission*, 3 July 2014, available at http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62013CJ0084&from=EN.

7 Case No COMP/M.7184 – *Marine Harvest/ Morpol*, 23 July 2014, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7184_20140723_1465_3883087_EN.pdf; see also: European Commission Press Release, 23 July 2014, available at: http://europa.eu/rapid/press-release_IP-14-862_en.htm.

8 Dutch Authority for Consumers and Markets PressRelease, 20 December 2010, https://www.acm.nl/en/publications/publication/6290/NMa-imposes-fines-for-failure-to-notify-of-an-acquistition-on-time/.

clearance. This confirms the view amongst authorities that the failure to notify is an offence that is distinct from the underlying competitive effect of the transaction in question. Therefore, parties are clearly not entitled to self-diagnose a merger as not warranting a notification. Businesses and their advisors should carefully follow the letter of the relevant thresholds when deciding on whether to inform the authorities of a given transaction.

France

In a French case from 2013, the Autorité de la Concurrence (Autorité) imposed a fine of €4,000,000 on Castel Frères, a Bordeaux-based wine maker, for failing to notify its acquisition in 2011 of 6 companies that were part of the Patriarche group[9] The Autorité only became aware that the deal had been done when reviewing information provided by a third party as part of another transaction in the industry (*Cofepp/ Quartier Français Spiritueux*[10]). The Castel group's appeal to the French Conseil d'État against the levying of the fine was rejected in July 2014.[11]

Castel's lawyers argued that, while Castel's turnover exceeded the thresholds, the French turnover generated individually by the entities among the acquired companies active in France was below the thresholds triggering the mandatory notification obligation in France, and therefore not subject to prior notification. The Autorité referred to the methodology set out in the EUMR – and especially its overall purpose of assessing the actual economic strength of the concerned undertakings – to point out that the French turnover of all the target entities should have been combined. Using this standard, the combined turnover generated in France by the target entities combined exceeded the French thresholds.

In its decision, the Autorité noted that there were three aggravating circumstances that had to be taken into consideration: (i) the obligation to notify was obvious; (ii) the only reason why the parties did not notify was to accelerate the closing; and (iii) the Castel group is a major corporation which was fully aware of merger control obligations.[12]

The Authorité also dismissed Castel's argument that the transaction did not need to be notified because it did not raise any competition issues (as was evidenced by its eventual clearance without commitments). Again, this is in keeping with the principle that the impact of the transaction on competition, or the lack thereof, has no bearing on whether a transaction must be notified prior to its implementation.

Concluding Remarks

It is abundantly clear that the changes both to the legislation and the enforcement policies of the competition authorities in Ireland and Europe will have significant repercussions on the business community and their advisors. The legislative changes highlighted above will affect the planning process for businesses and must be taken into account by advisors before the completion of any notifiable transaction.

In setting its policy enforcement priorities, the Commission takes into account the fact that the standstill obligation is a cornerstone of the EU merger control system. In essence, the guiding principle is that there can be no excuse for a business or its advisors to say that it did not know that the transaction exceeded the relevant thresholds or that they had not realised that it had acquired de facto control. It is abundantly clear, therefore, that the business community, corporate finance advisors and lawyers operating in the M&A field should be aware of the requirement to review all corporate transactions prior to implementation in order to determine whether they involve a de facto merger or acquisition of control, so as to be able to respect any notification and standstill obligations of EU and domestic merger control rules.

The developments in the enforcement policies of competition authorities including the European Commission and the Irish CCPC continue to evolve and the recent cases indicate that further enforcement in the area is likely. The sanctions as set out above are weighty and should not be underestimated by practitioners, especially when the legal costs and negative publicity attaching to defending a competition authority enforcement procedure are factored in. ■

9 French Autorité de la Concurrence Press Release, 23 Decemeber 2013, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=482&id_article=2287.

10 French Autorité de la Concurrence Press Release, 13 December 2011, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=388&id_article=1739.

11 French Conseil d'État Decision of 16 July 2014 (Nr 375658).

12 French Autorité de la Concurrence Decision of 20 December 2013 (Nr 13-D-22).

Striking a Blow for Change — Proposed Changes in Sentencing for Assaults Causing Harm

Ed O'Mahony BL

Introduction

The Non-Fatal Offences Against the Person (Amendment) Bill 2014 ("the 2014 Bill") is a Private Members Bill, currently at Second Stage, before the Houses of the Oireachtas. Given that it has languished at that stage for some time, it is unclear if the Bill will ever be enacted. However, the Bill highlights some of the difficulties associated with sentencing for assaults causing harm in this jurisdiction and attempts to address those difficulties.

The Bill aims to be the first major amendment to the Non-Fatal Offences Against the Person Act 1997 ("the 1997 Act") which, at the time, represented a major reform and codification of the law on assault. However, in the 17 years since that legislation came into force, the trends in violent crime have changed drastically and the distinction between the statutory offences has become blurred, leading to confusing and inconsistent sentences. While there is no noticeable rise statistically in the number of incidents of assault reported to Gardai, the nature of assaults that have come before the Courts since the enactment of the 1997 Act have certainly changed drastically, with an increased use of weapons. As such, the wide range of possible behaviour that can be classified as an assault can only be pressed into the limited categories currently provided, leading to noticeable discrepancies, particularly with reference to sentencing for other offences.

The explanatory memorandum attached to the Non-Fatal Offences Against the Person Bill 2014 references section 4 of the Criminal Justice (Violent Crime Prevention) Bill 2008 (which is currently lapsed), which states that the current maximum sentence for section 3 "is disproportionately low for the scale of the harm that can be encompassed in this category of assault and the violence required to cause it. It is felt that such an increase is an important deterring element of a comprehensive approach to preventing violent crime." The language used in this instance is a clear indication of an apparent dissatisfaction with the current regime and the need for reform in the area.

The Law

The current offence of assault is defined in section 2 of the 1997 Act, where any person "without lawful excuse, intentionally or recklessly – (a) directly or indirectly applies force to or causes an impact on the body of another, or (b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact," punishable by sentence of 6 months imprisonment and/or a fine of £1,500.

Section 3 of the 1997 Act defines the separate offence of assault causing another harm,[13] which can be tried either summarily, with a punishment of 12 months imprisonment and/or a fine of £1,500, or on indictment, which is punishable by five years imprisonment and/or a fine. The most serious offence is defined in section 4, punishable by life imprisonment and/or an unlimited fine where a person "intentionally or recklessly causes serious harm to another..."[14]

Effect of sentences

The purpose of sentencing is a vast area that has been discussed in detail elsewhere[15]. It is neither possible nor proposed to examine it in detail here. Nonetheless, in examining whether or not sentencing in this context is effective, it is necessary to start by evaluating the proposed aims of sentencing with specific regard to assault.

The Law Reform Commission noted that the two traditional justifications for sentences (which are being questioned more regularly)[16] are generally categorised as: the utilitarian approach, with which rehabilitation, deterrence and incapacitation are associated, which concentrates on the *future* beneficial consequences of the imposition of sanctions, justifying them in terms of their social utility, such as crime prevention or crime control; and the moral approach, with which retributivism is traditionally associated, which concentrates on *past* activity, arguing that justice requires retribution to be exacted for blameworthy conduct. [17] Neither one can said to be the prevailing opinion but elements of each, such as retribution and rehabilitation, can be found throughout sentencing jurisprudence, which deal with the needs of the victim and offender respectively.

O'Malley notes that while the attitude of the victim can have an impact on the outcome of sentencing, the practice of sentencing is a matter of public policy which cannot be subverted to the wishes of private parties and as such, the attitude of the victim, while occasionally informative, cannot

13 Harm is defined in section 1 as "harm to body or mind and includes pain and unconsciousness."
14 Section 4 is not an offence of assault, but is grouped with the other two offences for convenience sake.
15 See for example O'Malley*, Sentencing Law and Practice*, Dublin, Round Hall Ltd, 2000
16 *Law Reform Commission Report on Sentencing,* Dublin: Government Publications, 1996 (LRC 53-1996)
17 *Ibid* at page 5

be decisive when it comes to sentencing,[1] meaning the judiciary are focused solely on the offender and his culpability. However, the legislature has defined the different offences – and therefore, the powers under which the judiciary can punish the offender – with reference to the consequences of the offending behaviour in terms of the harm caused, which automatically includes the views of the victims, as psychological harm also comes into play. This causes an obvious problem for sentencing when the culpability and consequences do not readily align.

ISIS records[2]

The Irish Sentencing Information System ("ISIS") is a project still in the developmental phase, which aims to collect and chart information on sentences and will potentially provide practitioners and the judiciary with a form of guidance against which sentences can be structured with some degree of consistency.

In total, ISIS records a total of 708 defendants charged with assault,[3] 509 of which pleaded guilty. Of the 199 trials, 55 were convicted and 85 were acquitted, the remainder being the subject of a *nolle prosequi*. The sentences recorded against these defendants show that 385 defendants received custodial sentences, with 225 receiving suspended sentences. The ISIS survey divides the custodial sentences into several brackets – sentences of less than two years (199 defendants), between two and five years (121), between five and ten years (60), greater than ten years (5), 22 community service orders, 18 fines and 41 "other" methods.

While these figures only provide a limited picture, they are informative to a point in that they show a clear trend to stay closer to the lower end of the sentencing range. Including suspended sentences, 60% of all defendants receive an effective sentence of less than two years while 77% of all people charged with assault received an effective sentence of less than five years. When one considers the maximum sentence available to the Courts extends to life on a charge of causing serious harm, it is clear that there is a discernible restraint on behalf of the judiciary in exercising the sentencing powers available currently available. When one considers the range of offending behaviour that falls into the remit of each section, it is apparent that there are difficulties in availing of the sentences currently available.

Nature of assault

In *DPP v. McDonagh,*[4] the accused assaulted a couple by punching them both in the head/upper body, with a single blow to each. However, the gentleman had a heart condition which resulted in his death from this incident. Due to the obvious causation issue, the charge brought against the accused was simply one of section 3 assault. In sentencing, both the Circuit Court and the Court of Criminal Appeal noted that they could only impose sentence in accordance with the charge before the Court and were not bound or influenced by any consequences beyond those in the indictment, regardless of their nature.

In *DPP v. MJ Walsh*,[5] one of the two charges against the accused centred on an altercation where a number of punches and kicks were inflicted by two persons on the injured party, most of which resulted in soft tissue injuries. One blow, however, lead to a severe break of the injured party's ankle, leading to both a missed job interview and the loss of an opportunity to train with the Tipperary Senior Hurling panel. Counsel for the accused noted that there was a significant gap between the criminality involved and the consequences suffered by the injured party. In passing sentence, the Court noted the severe physical and psychological consequences the assault had on the injured party and determined that the appropriate sentence was one of four years, to be served consecutive to a three and a half year sentence imposed in respect of the other offence for which the accused was before the Court, with the final 18 months of the total sentence suspended.

In *DPP v. Liam McCarthy*[6], the assault occurred in the context of a violent disorder involving a number of people in the town of Cappawhite in County Tipperary. The accused, having been struck himself in the course of this fight, stormed into a nearby house, took a decorative samurai sword off the wall, returned to the melee and struck the injured party with considerable force to the back of the head. The injured party did not see the blow coming. As a result of the blow, the injured party suffered significant cognitive difficulties, including right-sided paralysis and speech impairment. Judge Codd imposed a sentence (on a charge of section 4) of 9 years (backdated for six months), noting the 'catastrophic and life changing' consequences of the attack on the families of both the accused and the injured party.[7]

These cases clearly show the wide range of behaviour that can fall under the remit of assault offences. The recurring theme throughout is that there are significant gaps in terms of the ability of the legislation to adequately cover all instances of assault. *McCarthy* and *McDonagh* both deal with assaults where a single blow was occasioned to the victim, but both had life altering consequences. However, the culpability issue sets them apart as falling either side of the divide between sections 3 and 4. While culpability was obviously a significant factor in the first case, it is arguable that a higher sentence could have been imposed on a different charge, had one been brought. *Walsh*, in addition to *McDonagh* shows the severe consequences that can accrue from an objectively minor incident and shows the potential gap between culpability and consequences.

Meanwhile, other offences, such as offences against property or drugs and even other non-fatal offences, such as threats to kill, carry much higher maximum sentences and often do not involve such a degree of violence or imposition on a person. For instance, theft under section 4 of the Criminal Justice (Theft and Fraud) Offences Act

1 O'Malley*, Sentencing Law and Practice*, Dublin, Round Hall Ltd, 2000, page 203-204
2 The information referenced from ISIS is only from Limerick, Cork and Dublin Circuit Criminal Courts and is limited to the calendar year of 2008.
3 The records do not show whether or not the offences were dealt with under section 2, 3 or 4.
4 2012, IECCA 12

5 Unreported, Clonmel Circuit Criminal Court,
6 Clonmel Circuit Court, unrep, 30/10/2013
7 The sentences in both *McCarthy* and *Walsh* were upheld by the Court of Appeal.

2001 ("the 2001 Act") carries a maximum sentence of 10 years imprisonment. A similar analysis of ISIS records in this regards shows that 22% of defendants receive a sentence of over 5 years, compared to 10% of all assault cases.

Serious Harm

Serious harm, as the effective element of a charge of section 4 – and the difference between sections 3 and 4–is defined under section 1 of the 1997 Act as "injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ." By contrast, the comparable offence under English law, namely sections 18 and 20 of the Offences Against the Person Act 1861, does not refer to any explicit definition of the term. Bodily harm was defined in *R v Donovan* as "[having] its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling." [8] Furthermore, grievous bodily harm has simply been referred to as "really serious" bodily harm, with the severity or otherwise to be a matter for the jury.[9] This presents one of the first stumbling points for a charge of section 4. As the definition of serious harm is placed at such a high mark, it is often open for defence counsel to apply to the Court at the close of the prosecution case for a direction on the basis that the medical evidence does not disclose serious harm. The more practical English approach removes this problem and a similar approach would make it more attractive for the prosecuting body to proceed on a charge of section 4.

Director of Public Prosecutions v Fitzgibbon

The net effect of all these difficulties was touched upon by the Court of Criminal Appeal in the recent decision of *DPP v Fitzgibbon.*[10] This case was one of three judgements delivered on March 18th 2014.[11] All three cross reference each other with regard to certain principles of sentencing, but *Fitzgibbon* dealt primarily with sentencing with regard to causing serious harm. Therein, the Court outlined that for offences on the lower end of the scale, a sentence of 2 to 4 years would be appropriate; for offences in the middle range, a sentence of 4 to 7 ½ years and for offences in the upper range of serious, a sentence of 7 ½ to 12 ½ years would be appropriate[12]. The Court also acknowledged that there would be situations for which sentences higher than 12 years, up to and including the maximum of life imprisonment would be appropriate and even that there were situations in which sentences below the minimum – even down to a non-custodial sentence–would be appropriate. [13]

The cross over between these three judgements would make it appear that it is a concerted attempt by the judiciary to lay down sentencing guidelines, which is a long discussed issue in the criminal justice system in Ireland.[14] Whether or not these judgements are a tentative step in that direction remains to be seen. While the full effect of this judgement is yet to be seen in practical terms,[15] it is indicative of an attitude of the Superior Courts to attempt to put some guidelines in place for section 4 cases. However, this alone does not address the issues highlighted herein, meaning other solutions need to be examined.

Reformulation of existing offences

The difficulty shown herein with regard to effective sentences most often rests on the definitions of sections 3 and 4, which focus on the difference of harm caused. Changing this definition would free the judiciary to impose what would be regarded as appropriate sentences. For instance, the English Offences Against the Person Act 1861 do not contain a precise definition of harm–instead cases such as *DPP v Smith,*[16] *R v Cunningham*[17] and *R v Brown,*[18] all clearly display that there is no desire on the part of their judiciary to impose any meaning beyond the ordinary everyday meaning of those words. Removing the statutory definition of harm and, more importantly, serious harm would arguably have the effect of making the issue of whether or not harm was caused, and to what degree, a question of fact and not of law, thereby putting firmly within the realm of the jury, making prosecutions under the more serious section less risky.

New Intermediate offence

A further possibility is to introduce an entirely new offence on a scale somewhere between sections 3 and 4 with a maximum sentence above that of section 3, to fully delineate between the separate offences and also to provide a so-called 'catch-all' offence on the boundary between sections 3 and 4. The Sentencing Council for England and Wales, in their sentencing guidelines for non-fatal offences outline a number of aggravating factors to be taken into account,[19] such as use of a weapon among others. One can immediately see how the current sentencing regime is lacking in allowing for such behaviour to be properly dealt with in circumstances where the injuries may not allow for a charge under section 4. An intermediate charge, such as aggravated assault, could be tailored to cover these situations and would allow the Courts, but particularly prosecuting authorities, to properly deal with these tricky situations.

8 [1934] 2 KB 498
9 As per the Crown Prosecution Service '*Prosecution Policy and Guidance*' document, available at www.cps.gov.uk
10 2014 IECCA 12
11 The other two cases were *Director of Public Prosecutions v Z*, 2014 IECCA 13 and *Director of Public Prosecutions v Ryan*, 2014 IECCA 11
12 *Ibid* paragraph 8.10
13 The Court in *DPP v Z* dealt specifically with situations in which the maximum sentence can be imposed.
14 See, for example, *Law Reform Commission Report on Mandatory Sentences*, Dublin; Government Publications (LRC 108-2013)
15 The Court later found in *DPP v Fitzgibbon (No 2)* 2014 IECCA 25 that the original sentence of 15 years with 3 suspended should be replaced with one of 9 ½ years.
16 [1961] AC 290
17 [1982] AC 566
18 [1994] 1 AC 212
19 http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf

There is also the issue of allowing more characterisation of different types of assault. The Joint Committee on Justice, Defence and Equality touched on the issue[20] when it called for the implementation of two new offences to cover both marital assault and domestic assault. The Committee specifically noted the relative inadequacy of the 1997 Act as it stands to deal with these types of offences and called for the implementation of these two new offences, specifically recommending a higher sentence than that of section 3 assault. While these offences would potentially need their own legislative regime, it further enhances the need for the legislation to be re-examined.

Non-Fatal Offences Against the Person (Amendment) Bill 2014

The simple solution proposed under the proposed Bill is to increase the sentence of assault causing harm under section 3 of the 1997 Act to one of ten years, as opposed to five. On its face, this would address most of the problems faced by the judiciary. It is a course of action that would undoubtedly benefit from judicial interpretation in similar terms to *Fitzgibbon*, but it would also not clarify the border between the two existing offences.

Conclusion

In trying to codify the law on assault, the 1997 Act had the unfortunate effect of trying to cover too much ground and has left a large area of uncertainty where offences fall between sections 3 and 4 of the 1997 Act. This has resulted in a situation whereby the charge and subsequent sentence may not adequately reflect the offending behaviour. As such, the intention of the legislation is not being fulfilled. The 2014 Bill would go some way to address these issues and to implement objectively effective sentencing. While the Bill is welcome, it is clear that further change is needed to allow the Courts to develop a consistent, transparent and concise body of jurisprudence in relation to sentences on assault cases. ■

20 "*Report on hearings in relation to Domestic and Sexual Violence*," published October 2014 and retrieved from http://www.oireachtas.ie/parliament/mediazone/pressreleases/name-24774-en.html

Launch of *Criminal Procedure in the District Court: Law and Practice*

Pictured at the launch of their book, Criminal Procedure in the District Court: Law and Practice, *are Stephen Hughes BL and Christopher Hughes BL with the President of the District Court, Her Honour Judge Rosemary Horgan, who officially launched the book in the Distillery Building, Dublin 7.*

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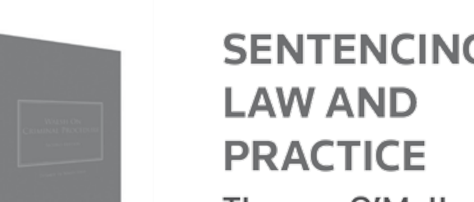
WALSH ON CRIMINAL PROCEDURE



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- Major expansion of chapters on Garda powers and procedures to include increase in range and substance of Garda powers on: detention; encroaching on right to silence; accessing evidence; retaining print and DNA evidence; and stop and search
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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.

Communications Regulation (Amendment) Bill 2015
Bill 33/2015
[pmb] Michael Colreavy

Derelict Sites (Amendment) Bill 2015
Bill 39/2015
[pmb] Brian Stanley

Electoral (Amendment) Bill 2015
Bill 38/2015
[pmb] Colm Keaveny

Firearms (Amendment) Bill 2015
Bill 28/2015
[pmb[Robert Dowds

Garda Síochána (Amendment) Bill 2015
Bill 28/2015
[pmb] Niall Collins

Health (General Practitioner Service) Bill 2015
Bill 30/2015

Office of Fiscal Prosecution Bill 2015
Bill 34/2015
[pmb] Michael McNamara

Protection of the Environment (Criminal Activity) Bill 2015
Bill 27/2015
[pmb] Brendan Smith

Public Electronic Communications Networks (Improper Use) Bill 2015
Bill 36/2015
[pmb] Pat Rabitte

Rural Equality Bill 2015
Bill 41/2015
[pmb] Martin Ferris

Universal Jurisdiction of Human Rights Bill 2015
Bill 32/2015
[pmb] Mick Wallace

Water Services (Amendment) Bill 2015
Bill 31/2015
[pmb] Sean Fleming

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 26TH MARCH 2015 TO THE 11TH MAY 2015

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Bill 43/2015

Harmful and Malicious Electronic Communications Bill 2015
Bill 37/2015
[pmb] Lorraine Higgins

Moore Street Area Renewal and Development Bill 2015
Bill 40/2015
[pmb] Darragh O'Brien

National Minimum Wage (Low Pay Commission) Bill 2015
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Bill 30/2014
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Bill 92/2014
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Education (Miscellaneous Provisions) Bill 2014
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Passed by Dáil Éireann

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Bill 22/2015
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Teaching Council (Amendment) Bill 2015
Bill 3/2015
Committee Amendments

Thirty-fifth Amendment of the Constitution (Age of Eligibility for Election to the Office of President) Bill 2015
Bill 6/2015
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Valuation (Amendment) (No. 2) Bill 2012
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Passed by Dáil Éireann

Children and Family Relationships Bill 2015
Bill 14/2015
Committee Amendments
Report Amendments

Roads Bill 2014
Bill 1/2014
Committee Stage

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Bills & Legislation

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

Government Legislation Programme updated 14th January 2015

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

Case Management: Fairness for the Litigants, Justice for the Parties

Peter Charleton and Saoirse Molloy*

Introduction

The use of judicial case management in litigation suggests a strategy for the most effective use of court time, a reduction in litigation costs and the promotion of fairness for the parties. As to costs, why should the recovery of a sum be exceeded by the legal expenses of litigation? As to putting multiple issues before a court, why should everything be necessarily argued as of right when some points add nothing to adjudication? The problems currently burdening litigation and the dynamic of some proposed solutions were recently emphasised by the Supreme Court in its decision in *Talbot v Hermitage Golf Club* [2014] IESC 57. Denham CJ regarded the use of "judicial case management" to be "crucial to the effective conduct of litigation". Her take on case management would be for the court "to define the key issues and to clarify the responsibilities between the parties." This was not only to make "the case more understandable for all those concerned" since case management allowed a "managed use of limited court resources." It is implicit in her judgment that cases should be determined "within a reasonable timeframe."[1]

This brief article addresses the unwieldiness which has arisen from the adversarial system and advocates a judicial modification with a view to rebalancing the use of time and reducing costs. Throughout this article, guidance is sought by examining the system in place in England and Wales.

The ever increasing problem

Briefs in the 1980s fitted into large brown envelopes. This may be attributable to the fact that during this time there were four principles which underlay litigation. They were that a barrister must: first, show the judge that their client is the party deserving to succeed in the dispute (the merits); second, inform the judge why the law is in their client's favour, or should be interpreted in their favour (the legal merits); third, map out a path through the facts and the law whereby the judge can come to hold for their client (the map); and, finally, demonstrate why the result sought is appropriate (the remedy).

Since about 1995, however, briefs have arrived in boxes. For some time past, these boxes are multiplying at an alarming rate. For instance in the "pyrite" case[2] four expert witnesses on each side provided the Court with evidence about the chemistry of crystal expansion, and a further five on each side gave evidence about building technology – that is a total of 18 expert witnesses. The danger with this tendency continuing is that it can render the system of litigation unsupportable. According to figures[3], proceedings to enforce a contract are not only lengthier in Ireland than in New York City, but are also more costly. Longer litigation racks up further costs and deprives the courts of the opportunity to deal with other waiting cases.

Such inefficiency highlights the insufficiency of the current approach by litigants and the need for change. This in turn raises two questions: what changes might work and how are such changes to be achieved?

The origin of the issue

The solution to any problem may be found in examining why it arose in the first place. With accession to the European Union in 1973,[4] a tide of law came in that went, at first, unnoticed but rapidly affected every case with complexity. European law is central to litigation in this jurisdiction; cases often turn on what that law means, how it is to be interpreted, how it interacts with domestic law and whether there are principles, akin to fundamental rights, that must inform the debate. Regulation from Europe exists for waste disposal, banking, investment, the environment, planning, product liability, insurance coverage, telecommunications, postage, the internet: that is merely scratching the surface. European law is ubiquitous. Even small cases interact with notions of privacy, entitlements to work, commercial confidentiality, and freedom from dominance in competition – all areas of law that once did not exist in Ireland.

The parliamentary draftsman appears to be wary of offending against the principles as laid down in *Cityview Press Limited v An Comhairle Oiliúna*[5]. Acts of the Oireachtas are now drafted and structured in such a fashion so as to provide for every eventuality, afford every possible power and provide against every contingency. In doing so, legislation

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1 *Talbot v Hermitage Golf Club* [2014] IESC 57.

2 *James Elliot Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269.

3 In the World Bank Group *Doing Business Survey* 2015, Ireland was ranked far above the OECD average in terms of the costs of enforcing contracts. The cost of enforcing a claim in Ireland cost 26.9% of the claim against the OECD average of 21.4%.

4 Treaty between the Member States of the European Communities and the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland concerning the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community (22nd January 1972) entered into force on 1st January 1973.

5 [1980] IR 381.

has a tendency to become impenetrably complex. Further, Irish courts are rightly intent on affording particular classes of rights, the most important of which seems to be the right to make representations, to be heard, to challenge administrative decisions, resulting in an upsurge in judicial review applications. This, ostensibly, may appear to be good news for lawyers; however one cannot sit in any court without being aware of the ever increasing number of litigants conducting their own cases. The cost of litigating must have some effect on this. There was a time when lay litigants were a complete rarity. Times have since changed. These trends can only grow.

Subtle changes, like natural growth, if occurring everyday can go unnoticed. Changes in approaching a case are now markedly different to twenty years ago. Transcripts of proceedings from the 1980s and early 1990s illustrate a different style of advocacy. Then, counsel simply made their submissions and resumed their seats. The prosecution arising out of the murder of the Willis brothers[6] in 1985 finished 10 days of evidence by lunch on a Thursday, followed by a speech for the prosecution and a speech for each of the two accused in the afternoon and the trial judge had charged the jury by 4.30pm that day. That would be inconceivable today. There has developed a new approach to examination of witnesses, proceeding through every event, referencing every email and even cross examining the parties' own witnesses. Has this unhelpful methodology escaped from the arena of tribunal of inquires and made its presence felt in the Four Courts? Certainly, none of these changes were sought or were introduced by the judiciary. They are entirely practitioner led.

Whilst these changes have occurred incrementally as small accretions, when combined they impact on the effective running of litigation. Has the time, therefore, arrived when it is necessary to start pushing back against the tide of an ineffective approach to litigation? Have we got to the stage where only very radical approaches can change tack?

Talbot v Hermitage Golf Club – impetus for change?

Th*e Talbot* case was heard by the Supreme Court in July of last year. This case, about whether a note telling a man that he was "building" his golf handicap dishonestly, involved a 22 day oral hearing in the High Court. The case entailed so many motions, hearings and appeals it cannot but be said that the trial judge showed extraordinary patience. By the time the judgment in *Talbot* was eventually given and the costs order made, it had entailed 83 separate days of resources in the High Court and the Supreme Court.[7]

The Supreme Court has made important pronouncements on such matters on previous occasions. Some may say that the filtering down of such pronouncements into practice is not implemented. The same could be said of pronouncements of the High Court. Two years ago, endless notices for particulars were soundly condemned by Hogan J as being wasteful and diversionary.[8] Ten years prior to that judgment, the Supreme Court had warned against oppressive discovery.[9] Then at the same time as the pronouncement about particulars, there was another decision from the High Court regarding the undesirability of procedural steps that added nothing to the clarification of issues in the case.[10] Now we have one from the Supreme Court about court resources being limited and that people have to cut their cloth accordingly.[11] In *Talbot,* the Chief Justice warned that by continuing to adopt a *laissez-faire* attitude towards litigation, which results in the system being encumbered with delay, the State is at risk of breaching Article 6 of the European Convention on Human Rights. Practical solutions to this problem were proffered by the Court in *Talbot*. It was stated that while there was a right to litigate under the Constitution, the resources of the courts were "not, however, unlimited." What any litigant was "entitled to" was "what is reasonably and necessarily required for the just disposal of a case within the context of the other demands on court time." As to how much time was to be given, this depended upon "the importance of the legal issues involved; the gravity of the wrong allegedly suffered by the moving or counterclaiming party; the monetary sum involved; and the public interest in the outcome of the case."[12]

Thus, in effect, it is both right and constitutionally sound that:

- Cases no longer carry an automatic entitlement to last as long as is (ostensibly) necessary.
- Judges have inherent power to give a limited time to parties in which to do a case.
- How much time parties get depends upon factors such as how important the case is to the litigants and to the legal system.
- Judges should hear parties before imposing case limits.
- When judges have heard parties, he or she can go so far as to give each party a number of hours in which to do a case, and the plaintiff or defendant can use it wastefully, opening a case for hours, or use it well, concentrating on important witnesses in chief and important opposing witnesses in cross examination.
- Repetitive evidence, including that from experts, can be controlled.

One might question whether the suggested approach endorsed in *Talbot* amounts to more than the power that is already afforded to the Commercial Court pursuant to Order 63A of the Rules of the Superior Courts, which allows a judge "at any time and from time to time" and whether asked or not, but when the parties have been heard, to "give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings". That applies only, as of now, in the Commercial List. Should that power be extended formally and not simply through judicial decision? After all, as the Rules say the purpose is a hearing which is "just, expeditious and likely to minimise the costs of those proceedings."

6 *People (DPP) v Quilligan* [1986] 1 IR 495.
7 *Talbot v Hermitage Golf Club* [2012] IEHC 372, [2014] IESC 57.
8 *Armstrong v Moffat* [2013] IEHC 148.
9 *Frasmus Ltd v CRH plc* [2004] 2 IR 20.
10 *Webster & anor v Dun Laoghaire Rathdown County Council & ors* [2013] IEHC 119.
11 *Talbot v Hermitage Golf Club* [2012] IEHC 372, [2014] IESC 57.
12 *Talbot v Hermitage Golf Club* [2014] IESC 57 at para 47.

Observations from experience

As has been remarked before, perhaps most notably by Sir John Mortimer in *Clinging to the Wreckage*[13], a lawyer reading the papers in a case for the first time knows in which direction a case is headed. Lawyers not only are aware of the way the case will probably go but, more importantly, know both its hinges and pivots. It is this clarity that is unfortunately getting lost under the mountain of side issues that are being litigated before the courts.

The late Rory Brady SC adopted a helpful approach to conducting his cases. He opened with facts and law in the usual way but concluded his opening by stating, and numbering, the essential points that required determination by the judge. In other words, "so judge you have to decide the following points…" This is a most effective approach to litigation and the call has been made for barristers to present their cases with clarity in the High Court by "concisely telling the judge the numbered points of law and fact necessary to the decision."[14] If it is not done, in reality that is what occurs when a judge retires to consider a decision. Perhaps it may be fairer if at some stage of the case the judge states that the case is now seen in the light of stated points? Why not get these from the start from counsel, the person who knows best why a plaintiff or applicant should succeed?

Indicating the points from which the case is to be decided is not a matter for counsel alone. This is a responsibility to be shared, in more complex cases at least, by the judiciary. As was suggested in the *Talbot* case,[15] some longer cases benefit from a case management hearing. The purpose of this is essentially to hear the parties and then have them set "the issues for trial". Of course, litigants do not fall over each other to agree anything. In the absence of agreement the judge can and should set these. According to that decision, "the core purposes of case management" are to enable "the court to focus on necessary issues and to set fair limits as to the resources of the courts that can be allocated to litigation."[16]

The approach urged in *Talbot* bears resemblance to that of the "Brady" approach; except under the *Talbot* approach, counsel is expected to organise their case. The key problem underlying litigation is that under the current advocate-led system a lack of order creeps into the organisation of litigation. Any possible resolution involves a new dialogue between the judge and the litigants. This, in turn, requires judicial case management: but only where necessary. No one wants, however, to add yet another layer of complexity that will yield nothing but yet more expensive pre-trial motions. Case management has to be targeted and used sparingly. For instance, judicial case management would not be necessary in an ordinary vendor and purchaser summons. Experience has shown the wisdom of such a step, however, where experts are going to populate the litigation.

13 Sir John Mortimer, *Clinging to the Wreckage*, (Penguin Books Ltd, London, 1983).

14 *IBB Internet Services Limited v Motorola Limited* [2013] IEHC 541. In that complex case, overburdened by alternative pleas, an example of what that might mean in practice was drawn up and can be read there.

15 *Talbot v Hermitage Golf Club* [2014] IESC 57.

16 *Talbot v Hermitage Golf Club* [2014] IESC 57 as per Charleton J.

Possibility of Further Problems

It is difficult to argue that things can remain exactly as they are. Change and improvement to the system will yield a greater throughput of cases. From international conferences, one becomes aware that judges from the commercial litigation system in London actively promote the idea that litigation before their courts is efficient and timely. With many cases carrying multi-jurisdictional possibilities, attracting business to Dublin on the basis that the system is reasonable, swift and reliable carries the real possibility of attracting serious legal business. It makes economic sense to look afresh at the system and to see what is needed to approach the targeted nature of litigation that now exists across the Irish Sea. What is not needed, however, is any alteration that adds more rules onto an already unwieldy system; a recipe for adding to expense so that opponents are driven further into costs by some variation of the Commercial List rules.

In any reform, the principle of equality of arms is imperative. Litigants with access to greater wealth should not be allowed to drive a litigant away through unending motions about procedural wrangles. The purpose of any reform must be that of concision, the saving of costs, the identification of issues and allowing the core of the case to emerge and then trying it. The unitary trial is the fundamental rule. We cannot go down the road of splitting up cases for fear of cases being too unwieldy: the unitary trial is the almost invariable default model. That means cases just have to be managed tightly.

Talbot gives us the possibility of first stage judicial case management. It means that judges will be able to assess a case, give parties a chance to lodge a schedule of how long each witness will take, cut that down if necessary or allow leeway if it is demanded, and limit time for submissions: all of that is really not much more than jollying the case along. This form of case management means that the court should use its powers to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage and through the trial, ensuring that the rules applicable during that stage were complied with promptly and not abused. A root and branch reform of the Rules of the Superior Courts, as suggested by Clarke J in his Kevin Feeney Memorial Lecture in Cork[17], is a worthy aim. That will take time. But, even as of now there is much that can be done. Looking at how very complex cases have been cut to a quarter of their length in London is a good place to start. Awaiting that reform does not mean that the powers indicated in the *Talbot* case should not be appropriately used now. They should.

Civil Procedure Rules in England and Wales

The Civil Procedure Rules in England and Wales constitute a complete code for ensuring that parties focus on essential issues from the earliest stage of the case, the allocation of limited time, and reducing the repetition of opinion evidence and of discovery. The developments in our neighbouring jurisdiction were defined by the Civil Procedure Rule Committee subsequent to the publication of Lord Justice

17 The Hon. Mr. Justice Frank Clarke, *Courts for Today's Ireland: A Civil Procedure Review to mark the State's Centenary?* (Mr. Justice Kevin Feeney Memorial Lecture, 2015, University College Cork).

Woolf's Report on Access to Justice.[18] In a 2013 lecture, the judge in charge of the Patents Court Sir Richard Arnold explained those rules thus:

> "Under the CPR "case management" has come to be used in a much wider sense: it refers to the use by the court of powers which go far beyond those necessary merely to ensure compliance with the rules and include powers to manipulate the application of pre-trial and trial procedures on a case by case basis, principally in the interest of saving costs and reducing delays.[19]"

Rule 1.1 of the Civil Procedure Rules provides that the CPR are a new procedural code "with the overriding objective of enabling the court to deal with cases justly"; which includes "dealing with the cases in ways which are proportionate (i) to the amount of money involved … (iii) to the complexity of the issues"; and "allotting to it an appropriate share of the court's resources". Notably, the Chief Justice uses, or approves, similar language in *Talbot*. Rule 1.4(1) imposes a general duty on the High Court to "further the overriding objective by actively managing cases." The powers conferred on judges are expansive and include:

> …
> (b) identifying the issues at an early stage;
> (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
> (d) deciding the order in which issues are to be resolved;…
> (g) fixing timetables or otherwise controlling the progress of the case;
> (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; …
> (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

A judge in a court in England or Wales may step in and make a range of orders, at any stage of the proceedings – preparatory to, or during, the trial. If an order is made of the court's own motion, the parties may later apply to modify or remove such an order. Here, hearing the parties first would be a safer course. In circumstances where the parties have been heard however, then the rules provide for a range of very serious orders, including requirements that:

> (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);
> (b) adjourn or bring forward a hearing;…
> (f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
> (h) try two or more claims on the same occasion;
> (i) direct a separate trial of any issue;
> (j) decide the order in which issues are to be tried;
> (k) exclude an issue from consideration;
> (l) dismiss or give judgment on a claim after a decision on a preliminary issue;
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

Active case management

It may be asked whether it is necessary that we go quite as far in this jurisdiction. The answer to that question, however, may be that the time has now arrived where we have no viable alternative. As previously discussed, the *Talbot* case[20] lays a sufficient constitutional foundation for the validity of such rules. The essence of effective case management is that as of the preparatory stages, counsel for each party are prepared to inform the judge of what exactly it is they are going to litigate. Counsel will require clarity of thought as they will be interrogated by the court: identifying the key points the party will raise and, for the other part, their defence. Indeed, that was the theory of pleadings. Now, some would say that has been effectively submerged. In light of the scrutiny under which lawyers, especially barristers, now operate it is necessary to emphasise however that they ought not be blamed for identifying and isolating what is the essence of the case and treating the background as such. The only viable way to cut down the issues to what is sensible, is for a party who is not burdened with a vested interest in pleading every possible cause of action to take the tough decisions. In our system, that person is going to have to be the judge.

This is where the trial judge must take responsibility by outlining at case management hearings what exactly it is that a case is deciding and, accordingly, restricting the issues and the number of expert witnesses to those necessary to make such a determination. Whilst, at first glance, such an approach may appear extreme, can that also not also be said of a case about a golf handicap lasting over 80 days of court time? Or can it be denied that cases involving experts in certain categories of cases, like medical negligence, are remarkably expensive? Do the courts not have to ensure access to the courts themselves as the mechanism for the reasoned and reasonable resolution of disputes? That can be achieved by active case management.

Necessarily, that involves the judge conducting a case conference. Case management conferences, as noted by Arnold J, are intended to involve pro-active engagement by the court with the case, enabling the court to grasp the issues and make appropriate orders whether on application by the parties or on its own initiative. He also noted in his recent address to the Irish judiciary that this is easier to achieve in specialist jurisdictions such as the Commercial Court, Patents Court and Technology and Construction Court where (a) cases are managed by judges rather than masters and (b) the judges are mainly specialists.[21] Elements of that already exist in our system, hence we are already on the right track. Whilst

18 Lord Woolf, *Access to Justice Part II: Final Report*, (Lord Chancellor's Department, 1996).

19 Sir Richard David Arnold, *Case Management* (Annual Supreme & High Court Conference 2013, Farmleigh House, Dublin).

20 *Talbot v Hermitage Golf Club* [2014] IESC 57.

21 Sir Richard David Arnold, *Case Management* (Annual Supreme & High Court Conference 2013, Farmleigh House, Dublin).

case conferences already occur in some commercial cases, what may also be appropriate best practice moving into the future is that of an approach similar to the model used in England and Wales. Namely, an approach which consists of an interrogation by the judge of counsel where, having read a core book of pleadings and documents, the court knows what the case is about and demands a dialogue of exactly what is going to litigated before the court. This will result in no more than decisions in litigation being made earlier.

Some further issues surrounding pleadings, disclosure and experts also require comment.

Pleadings and Discovery

Wandering statements of claim do not help the current situation and, even worse, defences which say nothing except "as regards the allegation at paragraph 29, this is denied". This is far from unknown. Further, in relation to notices for particulars and replies Hogan J, correctly, has expressed frustration at the futility and waste of costs occasioned by endless notices for particulars in personal injury cases in *Armstrong v Moffatt & anor*[22]. Giant sets of letters from solicitors complaining through bombastic elocution about the other side are another problem. One wonders what a court gains from ever reading these? In England and Wales, r. 4(1)(a) of the CPR requires that particulars of claim must include "a concise statement of the facts on which the claimant relies". That is how pleadings ought to operate, hence the maxim – pleadings allege or deny facts and do not rehearse the evidence on which these are based. On taking instructions, the essence of what the answer to a claim is should be there in concise form in the defence. Indeed, r. 16.5 (1) of the CPR requires the defendant to state in his defence which of the allegations in the particulars of claim he denies, which he admits and which he is unable to admit or deny and requires the claimant to prove. CPR r. 16.5(2) provides that where a defendant denies an allegation, "(a) he must state his reasons for doing so; and (b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version." Thus, the defence provision forces people to lay forth their hand and to say why they are defending the case. Compliance may be checked at the case conference with the judge.[23]

Pleadings previously set out not only the issues to be tried in any case but also, in circumstances where a party is granted an order for discovery, evidenced exactly what discovery was required. The Rules of the Superior Courts since 1984 demand a list of discovery and reasons, with which the judiciary does its best. Discovery has increased exponentially in the digital age and the problem is exacerbated by the test as laid down in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co.*[24] Under this test, documents are to be disclosed which advance a party's case or damages their opponent's or "may either directly or indirectly enable the party requiring [discovery] to either advance his own case or to damage the case of his adversary". This test it is outdated. Whilst discovery has always been based on the requirement of relevance; the diffusion of issues and diffusion in pleadings renders relevance difficult to assess. Discovery has also been based on the requirement of necessity; however under the *Peruvian Guano* case[25] necessity is at a terribly low threshold. The warning of overwhelming parties with high volumes of discovery given by Supreme Court in *Framus Ltd v CRH plc*[26] has not succeeded in easing the costs and burdens associated. Most continental European countries do not have discovery at all. The reason for disquiet in our system is the overarching problem that the fundamental test is too wide and too easily satisfied by a party demanding voluminous discovery. It ought to be replaced by a requirement of a reasonable search for documents. Only relevant documents are needed, not documents that may lead directly, or indirectly, to relevant documents. Furthermore, that which is sought should be cut down in the discovery order of the court to simply the documents required for the resolution of identified core issues.

In England and Wales, the rules surrounding disclosure have been recast. Rule 31.5 of the CPR provides that the court shall give standard disclosure unless it orders otherwise, but the court may dispense with, or limit, standard disclosure. Standard disclosure is defined in r. 31.6 as (a) documents on which the disclosing party relies and (b) documents which (i) adversely affect his case, (ii) adversely affect another party's case or (iii) support another party's case. When giving standard disclosure, a party is required under r. 31.7 to make a reasonable search for documents falling within r. 31.6. What is considered reasonable depends on various factors such as the number of documents, the nature and complexity of the proceedings, the ease and expense of retrieval and the significance of documents which are likely to be retrieved (recently special rules have been introduced dealing with electronic disclosure). Again, an examination of the rules surrounding disclosure in England and Wales has proven instructive of where best practice might move.

Experts

Turning to the thorny issues surrounding the calling of numerous expert witnesses, the equality of arms principle should guide us here. It is clearly wrong that an impecunious plaintiff can hire only one expert witness while a large corporate defendant can pay for several. Balance and equality of arms are surely prerequisites of any fair system.

Looking again to our English neighbour, r. 35.1 of the CPR provides that "expert evidence shall be restricted to that which is reasonably required to resolve the proceedings". Is there anything wrong with that? Also, it is provided in r. 35.4 that "no party may call an expert or put in evidence an expert's report without the court's permission". When parties apply for permission they must identify the field in which expert evidence is required and, where practicable, the name of the proposed expert. Save in exceptional cases, the court

22 [2013] IEHC 148.

23 Experience says, however, relying on the "Madoff" litigation that was heard in 2012, that appointing the actual trial judge at an early stage of a complex case and tasking her or him to guide the matter to trial and to hear all interlocutory applications and, this being the crucial point, interrogate the barristers and move the case along without need of any formal motions, works best (*Thema International Fund plc & anor v HSBC Institutional Trust Services (Ireland) Ltd & ors*).

24 (1882) 11 QBD 55 at 63.

25 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

26 [2004] 2 IR 20.

will generally only give a party permission to call one expert and may require parties who have the same interest to share experts. The court will scrutinise claims that multiple fields of expertise are involved. Rule 35.7 empowers the court to direct that the evidence on an issue is to be given by a single joint expert.

New rules for all non-jury cases

Reforms akin to those implemented in England and Wales are perhaps appropriate in Ireland. There are now proposed rules modifying Order 63A for the Commercial Court to apply to all non-jury cases. Those new rules propose the introduction of case management and the controlling of experts. Drafted in September 2011 and modified in early 2012, the proposed rules have been widely discussed but currently await further work. Very much on the lines of that suggested in the *Talbot*[27] case, the new rules, if passed, provide:

- — Parties are to be given a limited amount of time to present their case.
- — A schedule of how long the case is to last and how long each witness is to last is to be provided to the trial judge.
- — No more than one expert is to be called on each side on any particular topic.
- — Experts can be required to debate with one another in front of the court.
- — The true issues are to be identified by the parties at an early stage of the litigation.
- — The trial judge will say which issues will proceed to trial and which are without merit.

Conclusion

It is unequivocal that the system as it is currently operating requires examination. As Clarke J stated in the Kevin Feeney Memorial Lecture, much of the Rules of the Superior Courts trace their origin back to the Judicature Act of 1877. A return to litigation conducted with clarity and simplicity can reasonably be regarded as necessary. Throwing the kitchen sink at statements of claim is not required for a fair appraisal of a case, whilst specifying a defence is. A more measured approach to the calling of expert witnesses must be found. The test for discovery needs to be recast in a realistic way that takes account of the developments which have occurred since the leading case was decided, when even the typewriter did not exist.

Change for its own sake is foolish. Change that is targeted and specific can help to improve a system that judges work very hard to manage for the benefit of litigants. Even without changing the Rules of the Superior Courts, much can be done on the current state of the law by way of increased judicial intervention. It must be recognised that case management is not anti-lawyer. Rather, an economic benefit has been proven to result from swifter and more focused hearings. ■

27 *Talbot v Hermitage Golf Club* [2014] IESC 57.

Poor Professional Performance After *Corbally v Medical Council*

Nathan Reilly BL

Earlier this year, the Supreme Court gave its much anticipated decision in *Corbally v Medical Council and others* [2015] IESC 9. The decision provides some clarification as regards the meaning of "*poor professional performance*" in the context of the Medical Practitioners Act 2007 ("the 2007 Act") and, in particular, the threshold which must be reached before a finding of poor professional performance may be made against a doctor.

Since equivalent provisions to those that were at issue in *Corbally* can be found in most of the more recent legislation governing the regulated professions, the decision has significant implications for a large number of bodies tasked with regulating the fitness to practice of its members, as well as those who practice in the sphere of professional disciplinary law.

The Historical Context

Since the turn of the century, much of the older legislation governing the regulated professions has been modernised and legislation has been passed to bring a number of professions within the ambit of statutory regulation. A significant feature of this legislation is that, whilst retaining the ability to make findings of "*professional misconduct*", it also allows for findings of "*poor professional performance*" to be made against registrants.

In the context of the regulation of the medical profession, Section 57(1) of the 2007 Act, provides that a person may make a complaint to the Preliminary Proceedings Committee ("PPC") concerning a registered medical practitioner on grounds, *inter alia*, of "*professional misconduct"* and "*poor professional performance."*

There is no definition of *"professional misconduct"* in the 2007 Act, however the meaning of the term has been elucidated in a number of cases, most notably *O'Laoire v Medical Council*.[1] In that case, Keane J. distinguished between two types of professional misconduct, namely "conduct which is 'infamous' or 'disgraceful' in a professional respect" and "conduct which has seriously fallen short, by omission or commission, of the standards of conduct expected amongst medical practitioners." In the latter type of case, before a finding of professional misconduct can be made against a registrant, it is necessary to establish (beyond reasonable doubt) a sufficient degree of *seriousness* in relation to the conduct at issue by reference to the expected standards of practitioners in the area. In a series of further cases, it has been held*, inter alia,* that gross incompetence or negligence can, in an appropriate case, amount to professional misconduct.[2] Further, a serious falling short in the expected standard can be attributable to an honest mistake and inadvertence is not a defence.[3] In practice, many cases in which professional misconduct is alleged against a registrant involve situations where a registrant's competence has been called into question as result of an alleged *bona fide* error (or series of errors), albeit of a serious nature.

"*Poor professional performance*" is defined in section 2 of the 2007 Act as "a failure by the practitioner to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of medical practitioners practising medicine of the kind practised by the practitioner." However, up until the decision in *Corbally,* there was no pronouncement from the Irish courts on how the concept should be interpreted.

The Facts of *Corbally*

The proceedings arose out of the treatment by Professor Corbally, a consultant paediatric surgeon, of a two year old girl.

Professor Corbally examined the girl on 25 February 2010 and recommended division of her upper frenulum, a straightforward surgical procedure, which was to be performed as a day case. In writing up his notes, Professor Corbally, who had correctly diagnosed the girl's condition, described the required procedure as excision of "*upper lingual frenulum*". No such procedure exists; it should have been referred to as an "*upper labial frenulum*". Further, due to coding system deficiencies in existence at Crumlin Hospital, the procedure was required to be booked into theatre as a tongue tie operation. The phrase "*upper frenulum*" could, however, be inserted by way of free text into the system to clarify which procedure was to be performed.

When scheduling the procedure, Professor Corbally completed an "*admissions form*" where he listed the girl for "*Tongue Tie, Upper Frenulum*". However, through no fault of Professor Corbally, the clarifying addition was not inserted into the patient administration system and the procedure was in fact identified solely as 'Tongue Tie'.

On the day of the surgery, Professor Corbally was called away to attend another patient in intensive case and consequently asked a Specialist Registrar to perform the procedure. He delegated the surgery by reference to the description on the theatre list which was inaccurate due to the administrative error, which was no fault of his own. The Registrar performed the tongue tie, which was the wrong

1 High Court, *Unreported*, 27th January 1995, Keane J.
2 *Kudelska v An Bord Altranais* [2009] IEHC 68.
3 *Perez v An Bord Altranais* [2005] 4 IR 298.

operation. Shortly after, it was realised that a mistake had been made and the correct operation was performed: the child made a full recovery after a short period of pain and discomfort and suffered no ongoing disability.

The girl's parents lodged a complaint with the Medical Council alleging "*poor professional performance*" against both Professor Corbally and the Registrar. The PPC of the Medical Council formed the opinion that there was a *prima facie* case to warrant further action being taken in relation to said complaint and referred the complaint to the Fitness to Practise Committee ("*FPC*").

The Decision of the FPC

The FPC of the Medical Council made three findings of "poor professional performance" against Professor Corbally based on the fact that he:

i. He had incorrectly described the procedure;
ii. In delegating the procedure to the Registrar, he had failed to adequately communicate the procedure to be performed;
iii. He had a responsibility to ensure that all necessary precautions were taken to ensure that the patient received the correct surgery. His failure to do so, by relying on systems known or suspected to be flawed, constituted poor professional performance.

The FPC recommended that a sanction of admonishment or censure was the appropriate penalty. The Medical Council (which has responsibility for deciding on sanction) ultimately decided to impose the lower sanction of admonishment.

The High Court

Since no appeal to the High Court lies against a sanction of admonishment under the 2007 Act, Professor Corbally sought judicial review of the decision of the FPC. The primary relief sought in the proceedings was *certiorari* of the decision. Relief was also sought in respect of the compatibility of the 2007 Act with the European Convention on Human Rights Act 2003 and the Constitution, although these claims were not advanced pending the outcome of the standard judicial review grounds of challenge.

The High Court quashed the findings of the FPC. In considering the definition of "*poor professional performance*" in the 2007 Act, the Kearns P endorsed the principles enunciated by Jackson J. in *R (Calhaem) v General Medical Council*, [2007] EWHC 2606 (Admin):

> "(1) Mere negligence does not constitute 'misconduct' within the meaning of section 35C(2)(a) of the Medical Act 1983. Nevertheless, and depending upon the circumstances, negligent acts or omissions which are particularly serious may amount to 'misconduct'.
>
> (2) A single negligent act or omission is less likely to cross the threshold of 'misconduct' than multiple acts or omissions. Nevertheless, and depending upon the circumstances, a single negligent act or omission, if particularly grave, could be characterised as 'misconduct'.
>
> (3) 'Deficient professional performance' within the meaning of 35C(2)(b) is conceptually separate both from negligence and from misconduct. It connotes a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been demonstrated by reference to a fair sample of the doctor's work.
>
> (4) A single instance of negligent treatment, unless very serious indeed, would be unlikely to constitute 'deficient professional performance'.
>
> (5) It is neither necessary nor appropriate to extend the interpretation of 'deficient professional performance' in order to encompass matters which constitute 'misconduct'."(Emphasis added)

Kearns P held that the third and fourth principles set out in *Calhaem* were relevant to the construction of the definition of "*poor professional performance*" set out in the 2007 Act. He found that *"poor professional performance"* was qualitatively different to professional misconduct which would almost always require a review of a fair sample of a doctor's work, unlike professional misconduct which is more likely to arise in the context of a single incident.

He expressed the view that the 2007 Act contains an implied requirement that a single lapse must achieve a threshold requirement of being "serious" before a finding of "*poor professional performance*" can be made. He held that a single slip or error of a minor nature should not normally constitute poor or deficient professional practice, although a grave error, even if of a once-off nature, might. He did not believe that the error at issue in the case constituted such a "grave error" and found that the "real problem" lay with the systems in operation at the hospital. He further found that in light of the unique and special circumstances of the case, including the serious consequences for Professor Corbally and the absence of a right of appeal from a sanction of admonishment, the findings and sanction were not proportionate.

The Supreme Court

The Medical Council appealed the decision to the Supreme Court. Firstly, it argued that the High Court had erred in finding that a "seriousness" threshold had to be passed for findings of "*poor professional performance*". It conceded that, if there was such a seriousness threshold, its appeal must fail. Second, it argued that the High Court had erred in concluding that *"poor professional performance"* would normally arise in the context of a review of a fair sample of a doctor's work. Third, it submitted that *"poor professional performance"* could arise in respect of a single incident even if that "once off error" is not a grave one.

The Supreme Court upheld the High Court orders quashing the finding of poor professional performance and the imposition of a sanction of admonishment on Professor Corbally.

Is there a seriousness threshold to findings of poor professional performance?

Three separate decisions were given by the Court by Hardiman, McKechnie and O'Donnell JJ. All three judges concluded there is a "seriousness" threshold that must be passed before a finding of "poor professional performance"

can be made and that this threshold was not reached in the present case.

Hardiman J, delivering the majority opinion, noted that the sanctions available for findings of poor professional performance are identical to those available for professional misconduct. As these include being struck-off the register, he stated that there was no sense in which the offence of poor professional performance could be considered to be less serious than professional misconduct.

Hardiman J highlighted that a threshold of seriousness is attached to the equivalent standard of "*deficient professional performance*" contained within English legislation. He considered that had it been the intention of the Oireachtas to legislate to render non-serious failings by a doctor sanctionable, it would have used explicit language to do so. Referring to the decision of Keane J in *O'Laoire v the Medical Council*, Hardiman J stated (at para 40):

> "I would apply a "seriousness" threshold to a finding of poor professional performance, as well as to professional misconduct for the precise reason stated by Mr. Justice Keane – only conduct which represents a serious falling short of the expected standards of the profession could justify a finding by the professional colleagues of a doctor of poor professional performance on his part, having regard, in particular to the gravity of the mere ventilation of such an allegation and the potential gravity of the consequences of the upholding of such an allegation." (*Emphasis in the original)*

Hardiman J therefore concluded that before a medical practitioner can be subjected to the ordeal of a public hearing before the Medical Council, that which is alleged must be of a serious nature.

In his short concurring judgment, O'Donnell J agreed with Hardiman J that only a serious error or a series of errors (which may therefore be serious) can justify a finding of poor professional performance. He also referred to the absence of any distinction between the sanctions for professional misconduct and poor professional performance and made reference to the fact that that hearings of the FPC were conducted in public and its findings are made public. This meant "that even the lowest sanction of admonishment can have devastating consequences for the career and livelihood of the individual concerned." He did not believe that serious "should mean very serious", nor did he believe that "only conduct sufficiently serious to put registration in issue is covered by the Act." Rather, he concluded that the conduct must be "sufficiently serious to merit public censure, admonishment or advice, may constitute poor professional performance".

McKechnie J also agreed that a seriousness threshold had to be met before "*poor professional conduct*" could be made out. He also referred to the absence of any differentiation in the sanctions that can be imposed for poor professional performance and professional misconduct, as well as the public media attention given to proceedings before the FPC.

Does a Fair Sample of a Registrant's Work have to be examined prior to making a finding of Poor Professional Performance?

In light of the concession made by the Medical Council that its appeal could not succeed in the event that the Court concluded that there was a seriousness threshold for findings of poor professional performance, there was strictly no need to address this question. Strictly speaking, the remarks of the Court in relation to this issue are *obiter*.

In considering whether a seriousness threshold existed for findings of "*poor professional performance*", Hardiman J stated that he had "derived assistance" from the "learned and persuasive" judgment of Jackson J in *Calhaem*. He referred to the five principles set out by Jackson J and, cryptically, added emphasis to the reference to "deficient professional performance" having to be "demonstrated by reference to a fair sample of the doctor's work" save in exceptional cases.

Hardiman J's decision does not, however, contain any clear statement that he believed that the so-called "fair sample" test also forms part of Irish law, although on one analysis, this follows from his enthusiastic endorsement of the principles set out in a *Calhaem*, as well as the fact that he did not disavow Kearns P's analysis of this issue.

McKechnie J, who dealt with this issue directly and at much more length, unequivocally rejected the adoption of the "fair sample test". In contrast to Hardiman J, he stated that he was "deeply suspicious" of relying too heavily on the English authorities as there are material differences between the Irish and English legislative regimes. He stated that the English test of what constitutes deficient professional performance is "performance related" and is "not a test of competence". Furthermore, he noted that, in contrast to the Irish position, the phrase "deficient professional performance" is not statutorily defined. He also noted that, in England, in order for a sanction of professional misconduct or deficient professional performance to be imposed, it is necessary to demonstrate that a registrant's fitness to practice is in issue and this is not the case under Irish law (a point with which O'Donnell J agreed). McKechnie J concluded that the adoption of the fair sample test "would seriously jeopardize the mandatory obligation of the Council to protect the public from substandard competence or the performance thereof by those subject to its remit."

In light of Hardiman J's decision, it must be doubtful whether this represents the majority view of the Supreme Court. In circumstances where the issue remains unclear, disciplinary tribunals and their advisors would be wise to exercise caution in this regard.

When can once-off error ground a finding of "poor professional performance"?

McKechnie J also dealt with question of whether a once-off error could ground a finding of poor professional performance. He held that it may leave patients unnecessarily compromised if it was necessary to wait for persistent or repeated substandard events to occur and "if the threshold for substandard or misconduct is met, it would be illogical and anomalous to increase the threshold or elevate the test simply because such conduct has not taken place previously ." Similarly, although he did not address this issue in any detail,

O'Donnell J agreed that a serious error can, in principle, justify a finding of poor professional performance.

The judgment of Hardiman J again appears to be slightly more ambiguous on this point. Insofar as Hardiman J enthusiastically referred to *Calhaem,* it can be argued that his view (and thus the majority view) is that a single instance of negligent treatment, unless very serious indeed, is unlikely to constitute "deficient professional performance."

Again, however, there is no direct statement to this effect. Furthermore, confusingly, in concluding his judgment, Hardiman J stated:

> "there may be myriad matters which are plainly not "serious" in the sense I have explained but which may legitimately aggrieve a patient or his or her relatives. But the statutory authority for the governance of the Medical profession must be capable of saying to such a person that a complaint, perhaps legitimate in itself, will not proceed to the point of an inquiry before a Fitness to Practice Committee unless it is, in its nature, a serious act or omission…. This reflects the fact that not every shortcoming, and in particular not every "once-off" shortcoming must either be ignored entirely or, if noticed at all, be the subject of a full hearing before a Fitness to Practise Committee." (*Emphasis added*)

It is certainly possible to interpret this conclusion as meaning once-off errors can be the proper subject matter of a complaint of poor professional performance when they are "serious", rather than "very serious". But, again, such a conclusion is difficult to square with Hardiman J's analysis of *Calhaem,* as well as his reluctance to depart from the principles set out in the English jurisprudence, due to the historic linkages between the Irish and English systems of professional regulation.

Taking the decision in the round, Hardiman J's decision (which represents the majority view of the Supreme Court) certainly supports the less far-reaching (and, it is submitted, common sense proposition) that a single negligent act or omission is less likely to cross the threshold of misconduct or poor professional performance than multiple acts or omissions. There is an argument that Hardiman J did not mean to go any further than this. However, as with the "fair sample test", in the absence of clarity on the issue, it is submitted that regulatory authorities would be prudent to adopt a cautious approach and assume that, to paraphrase *Calhaem*, a single instance of negligent treatment, unless very serious indeed, is unlikely to constitute poor professional performance.

Other Issues: Disregarding the Advice of the Legal Assessor

The Supreme Court also considered the manner in which the FPC dealt with the advice of the Legal Assessor. The thrust of the Legal Assessor's advice was that there was an implied "seriousness" threshold for cases involving poor professional performance. The Medical Council did not object to this advice, which was also in line with what Professor Corbally's representatives had submitted. However, the FPC ultimately appeared to disregard it.

Hardiman J restated the general principle set down in *McManus v. Medical Council*[4], that the Committee was not bound to follow the Legal Assessor's advice. However, he held that, if the Committee was minded to reject that advice, it was necessary to set out, in the presence of the parties, clear and cogent reasons for doing so to allow the parties to have an opportunity to comment and make submissions. Hardiman J stated that:

> "[T]he representatives of Professor Corbally never had an opportunity to comment on the basis on which the Committee were actually going to approach the question of whether poor professional performance had been made out. It appears to me that, if this ground stood alone, it might be sufficient to quash the decision."

O'Donnell J also agreed with the decision of Hardiman J analysis in relation to this issue.

These remarks are of general application to regulatory disciplinary inquires, most of which have the benefit of advice from a Legal Assessor. Whilst it would undermine the purpose of specialist tribunals if the role of the Legal Assessor was elevated with regards issues of fact (and indeed mixed issues of fact and law), there is not – it is submitted – anything objectionable in asking tribunals which disregard the advice of their legal assessor to at least explain the basis for their decision. After all, the purpose of disciplinary tribunals sitting with a Legal Assessor, is to ensure that the tribunal does not err in law.

Insofar as *Corbally* provides a transparent mechanism by which legal errors made by tribunal members can be challenged, it expands on the principles set out in *Prendiville v Medical Council*[5]. The decision also underscores the increasing emphasis by the Superior Courts on the duty on decision making authorities, that are subject to judicial review, to provide reasons for their decisions. Insofar as this aspect of the *Corbally* decision is aimed at enhancing fair procedures and buttressing transparent decision making, it can only be welcomed.

Other Issues: Unnecessary Allegations Made in the Notice of Inquiry

The decision of the Supreme Court also emphasises that regulatory authorities and their legal advisors have a duty to ensure that each and every allegation made against a registrant has sufficient evidential basis.

In this regard, McKechnie J was critical of the fact that the Notice of Inquiry contained a number of unnecessary allegations which had to be later withdrawn. In his view, some of these allegations – such as an allegation relating to an alleged failure to supervise the girl's surgery when attending to a number of other patients in intensive care–had no sustainable basis in fact. McKechnie J made reference to the

4 High Court, Unreported 14th August, 2013, Kearns P.

5 [2008] 3 IR 122.

fact that the Medical Council did not have expert evidence on which to support certain allegations.

McKechnie J. was also critical of the approach adopted by the Medical Council in relation to charging Professor Corbally. He noted that Professor Corbally was charged with both poor professional performance and professional misconduct when, on its own submission, it agreed that the facts of the case could never have met the standard for professional misconduct. McKechnie J. referred to the "significant stress and anxiety" which must arise when facing a charge of professional misconduct, being "the highest, the most serious charge available." He indicated that such a charge should only be made in circumstances where it is capable of being established by available facts and he "deprecated any practice or approach which unnecessarily and unjustifiably increased the concern and anxiety of a registrant."

It is submitted that it is unfortunate that the Supreme Court did not use this opportunity to articulate a general principle that allegations of professional misconduct or poor professional performance should only go beyond the *prima facie* stage once the necessary expert input has been obtained.

It is difficult to see why the absence of an expert report can form the basis for striking out a claim for professional negligence, but that the same professional can, at least sometimes, face serious allegations of poor professional performance in full public view without the relevant authority having the expert evidence to back it up. Even if any findings of poor professional performance or professional misconduct made by a tribunal in the absence of expert evidence are susceptible to challenge, the damage to a registrant's career may already have been done by the mere airing of the allegation in public.

Conclusion

Corbally has settled once and for all the debate about whether there is a "seriousness" threshold for cases involving "*poor professional performance*." However, beyond that, a number of questions remain unclear and are likely to generate further litigation.

Firstly, the difference between "*professional misconduct*" and "*poor professional performance*" remains something of a mystery. Given that it was already possible to sanction a registrant for professional misconduct in relation to competence or performance issues once a "serious falling short" was established, it is not clear that the *'poor professional performance'* standard has added anything to the legislative regime.

The Supreme Court did not clarify whether, if the allegation relates to the competence of a practitioner, it is more appropriate to charge a registrant with poor professional performance rather than professional misconduct. In that regard, it is surprising that more attention was not given to the definition of "*poor professional performance*" within the 2007 Act which, on its face, suggests that *'poor professional performance'* must relate to the standards of competence of a practitioner.

In light of the *Corbally* decision, it is difficult to envisage a scenario where a registrant who faces an allegation relating to his or her competence can be guilty of poor professional performance but not of professional misconduct. One answer is that more serious cases involving a registrant's competence can ground a finding of "*professional misconduct*", whereas less serious (but still "serious") cases can ground a finding of "*poor professional performance.*" Aspects of McKechnie J's decision support this conclusion, however it is difficult to find support for such a conclusion in the other decisions of the Supreme Court which unequivocally reject the suggestion that poor professional performance is a less serious finding for less serious infractions. Perhaps a fully coherent answer to this question is not possible and the problem stems from the way in which the legislation was drafted. That appears to be the view of Hardiman and O'Donnell JJ, both of whom were critical of the drafting of the legislation, the latter even going as far as saying that he did not believe the legislation "was ….fully thought through."

Second, it is unfortunate that further guidance was not given in relation to the question of when a "once off" error can give rise to a finding of poor professional performance. While McKechnie and O'Donnell JJ clearly disavowed the suggestion made by Kearns P that only a very serious "once off" error can justify a finding of poor professional performance, it is doubtful whether Hardiman J shared that view and, consequently, whether this represents the view of the majority of the Supreme Court.

Third, it also regrettable that only McKechnie J expressed a definitive view on whether it was necessary to review a fair sample assessment of a registrant's work or practice before making a finding of "*poor professional performance*". It is again doubtful whether Hardiman J, or the other judges on the Supreme Court, agreed with him on this point.

To the extent that "*poor professional performance"* is intended to assess competence and the application of that competence in practice (i.e. performance), it is submitted that there is a strong argument that this must be assessed by reference to a continuum of behavior and regard must be had to a registrant's overall skill and ability. As such, it is only possible to do this by reference to a sample of a registrant's work.

However, it is still not clear whether *"poor professional performance"* is about competence. Moreover, the adoption of the "fair sample test" for cases of "*poor professional performance*" may lead to significant practical problems, including endless debates as to whether a tribunal has been provided with enough evidence so as to support a finding: it will often be impossible for a tribunal to be provided with a sample of a registrant's work which could be conclusively regarded as "fair" to the registrant–particularly a registrant with a long career. Faced with that situation, and in order to overcome the "fair sample test", regulators might be more inclined to charge registrants against whom competence and/or performance issues are alleged with professional misconduct. To put it at its lowest, it is difficult to see how such a result could be consistent with the legislative intent behind the introduction of the "poor professional performance" standard.

At all events, the decision in *Corbally* is likely to have a significant effect in practice. Experts whose evidence is sought to ascertain if a *prima facie* case of poor professional performance arises will have to be briefed on the high threshold mandated by *Corbally*. Fewer disciplinary complaints are likely to get passed the *prima facie* stage. Those in charge of the initial vetting of regulatory complaints will be obliged, to use the words of Hardiman J in *Corbally*, to have "the courage to say to complainants in an appropriate case who may be understandably aggrieved by an error that the error

in question, even if established in evidence, is simply not capable of grounding an allegation of misconduct or poor professional performance."

Consequently, fewer disciplinary inquiries are likely to be convened. Those inquiries convened are likely to involve more serious allegations than hitherto.

In respect of those allegations which are proven beyond a reasonable doubt as a matter of fact, fitness to practice committees are likely to be more reluctant in making findings of "*poor professional performance*" as a matter of law. Further, in light of the emphasis placed by the Court on the negative publicity to which Professor Corbally was exposed, it is possible that fitness to practice committees may be more willing to exercise their discretion not to hold inquiries in public, since they may feel that this will expose them more readily to an appeal or judicial review.

Some people, be they lawyers or otherwise, will decry the approach adopted by the Supreme Court on the grounds that it is too lenient on professionals who make mistakes. I for one do not agree. Those who are the victims of mistakes made by professionals have other remedies available to them outside of the realm of professional disciplinary law. There is a qualitative difference between conduct which might attract a remedy under the law of tort or contract and conduct which is deserving of sanction and punishment under professional disciplinary law. As Hardiman J put it "[i]t would be a very confrontational, legalistic, and defensive world indeed if a person in any occupation could be put on risk of his livelihood and his irreproachable reputation because it could be proved he had made some error even…one which is not serious." The decision of the Supreme Court is to be welcomed, even if its reasoning could have been clearer in a number of important respects. ■

The Bar

Conor Bowman

We are not popular, we know it, as
Clampers and burglars too know it.
We represent what people who dislike us will us to
Represent (when we're not representing them!)
The second-oldest profession in the world, we
Light the lamps and cover them with red cloths so that
People look a little better in the half-light as they bare their
Souls.

We're anachronistic, we suspect it, as Disco and
The Wren Boys too suspect it.
We hold some things tightly as "progress" prises
And newspaper people step out of
their Chapels to howl us down.
And old ways are sometimes good ways.

We're not always right, we cannot avoid that, as
humans and angels and demons and sinners and
any patchwork battalion too cannot avoid it.
But here and there, in the shade and in the trench, and
out in no-man's-land, we sometimes stand up and shout or whisper
"*Stop" or "Look" or "Why?"* with little more than horsehair,
instinct, and tradition between us and annihilation.

PLAIN Language Conference to be held in Ireland in September

NALA (The National Adult Literacy Agency) has won a bid to have the Plain Language Association InterNational (PLAIN) conference held in Ireland in September of this year in the Dublin Castle Conference Centre. This is PLAIN's 10th conference – previous conferences have been held in Australia, Sweden, Canada, and the Netherlands. One element of the conference will focus on plain legal language and it will take place from September 17 to 20th .

NALA is an Irish charity committed to making sure that people with literacy difficulties can fully take part in society and have access to educational opportunities that meet their needs. PLAIN is the international organisation for plain-language supporters and promotes clear communication in any language.

The PLAIN 2015 conference is attracting speakers and contributors from around the world, including legal professionals. Confirmed speakers include Emily O'Reilly, European Ombudsman and Deborah Bosley, President of PLAIN, USA.

The work of legal professionals demands the use of plain legal language, particularly for complex text such as terms and conditions and contracts. Using plain legal language saves money, makes documents easier and faster to read, and helps with compliance issues. One in six adults in Ireland has a literacy difficulty and one in four has a numeracy difficulty).

PLAIN and NALA are currently finalizing the programme which will have a number of legal inputs. For more information or to register early, please visit www.plain2015.ie. ■

Launch of *The Law of Intoxication: A Criminal Defence*

Pictured at the official launch of The Law of Intoxication: A Criminal Defence *by Micheal Dillon, are, left to right. The Hon Mr. Justice Liam McKechnie, Michael Dillon BL, and Frances Fitzgerald, Minister for Justice and Equality. The launch took place on 15 May 2015, at the House of Lords, Bank of Ireland, College Green, Dublin 2.*

Voluntary Assistance Scheme

DIANE DUGGAN BL

VAS is operated by the Bar Council of Ireland and accepts requests for legal assistance from NGOs, civic society organisations and charities acting on behalf of individuals who are having difficulty accessing justice. Please contact us for further details or see the Law Library website under 'Legal Services'.

Advocacy Training for Charities

In late February, the Voluntary Assistance Scheme embarked on pilot advocacy training program for charities. The aim was to assist charities in the process of making presentations and submissions, writing letters and generally advocating more effectively to achieve their aims. The program was entitled "Speaking for Ourselves". As it was a pilot program, it was decided to keep the number of attendees small and invite detailed feedback to establish if it was something we could pursue on an ongoing basis. We had attendance from the Wheel, the Irish Penal Reform Trust, the Carmichael Centre, Dublin Aids Alliance and the Northside Centre for the Unemployed. The program was comprised of four presentations and a practical exercise. The presentations were: Preparation for Advocacy delivered by Michael Cush SC, Oral Advocacy delivered by Mary Rose Gearty SC, written advocacy delivered by Bairbre O'Neill BL and Principled Negotiation delivered by Turlough O'Donnell SC and Louise Beirne BL. Michael Lynn SC and Aoife Carroll BL prepared the practical exercise. Feedback was extremely encouraging and attendees commented on the high calibre of speakers, the practical benefits of the program and how much other organisations could benefit from it.

Charities Act Application

In April, Michael Cush SC and Kathleen Leader BL made the very first application in the State to the High Court under section 55(2) of the recently commenced Charities Act 2009. Section 55 of the Act states that "*a person shall cease to be qualified for, and shall cease to hold, the position of charity trustee of a charitable organisation if that person… is convicted on indictment of an offence or..is sentenced to a term of imprisonment by a court of competent jurisdiction.*" A charity approached us where that issue had arisen and was of some concern to the charity who were anxious to maintain the valuable contribution of the trustee. Section 55 (2) of the Act allows an application to be made to the High Court for an order that such a person could hold the position of charity trustee. The High Court may upon such an application, make such an order if satisfied that it would be in the public interest and in the best interests of the charitable organisation. Kearns P granted the order on April 20th .

Legislative Drafting Committee

For the past number of months, the Legislative Drafting Committee have been in the course of preparing draft legislation at the request of Ana Liffey Drug Project on the issue of Medically Supervised Injection Units. At the time of writing, this project is nearing completion and the committee are preparing to hand over their draft bill to Ana Liffey. The committee is comprised of Chairperson Emily Egan SC, Bernard Condon SC, Marcus Keane BL, Rebecca Broderick BL, Rebecca Graydon BL and Brendan Savage BL. This project was an extensive undertaking and the work of the committee has been well received. VAS remains committed to accepting such similar requests for legislative drafting from charities and we hope to make it a consistent feature of our work. If you have experience in legislative drafting and would like to get involved in future projects, please get in touch with VAS.

Irish Penal Reform Trust

The IPRT recently requested the help of VAS in conducting some research in relation to laws around victims' rights. The group included Mark Murphy BL, Kate Butler BL, Emma Synnott BL and Marc Thompson Grolimund BL. Their output was a thoroughly professional and prompt piece of advice. ■

Please contact vas@lawlibrary.ie *if you are interested in getting involved.*

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