DAC BEACHCROFT

Insurance Law Year in Review-2023

Introduction

Welcome to the fifth annual edition of DACB Dublin's Insurance Law Year in Review.

2023 was a year packed with many interesting developments, both in the Courts and from a legislative perspective, and at both an Irish and EU level, across the Specialist Insurance, Healthcare, Injury Risk and Cyber & Data areas of practice.

Litigation funding and collective action dominated conversation.

Important clarification was provided by the Courts in the forums of Adjudication, Arbitration, Costs and Damages for non-material loss.

Changes to the law in the realm of Occupier's Liability were implemented, and the full commencement of the Assisted Decision Making (Capacity) Act finally took place.

We have condensed the most important updates from throughout 2023 in this publication for Underwriters, Claims Handlers and those who are involved in Irish claims, so you can look ahead to all that 2024 has in store.

- **Specialist Insurance**
- **Healthcare**
- **Data Protection, Privacy and Cyber**
- **Injury Risk**

Specialist Insurance

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Mediation is Not Always the Answer: *I.E.G.P. Management Company Limited by Guarantee v Cosgrove and others – [2023] IECA 128*

Background

- Judge Costello delivered the judgment of the Court of Appeal (the "COA") in this matter on 25 May 2023. The Plaintiff's appeal concerned the decision of Judge Butler in the High Court, in respect of two security for costs applications and a mediation motion.
- In the High Court, Judge Butler granted the security for costs applications of the Architect and Engineer Defendants and refused the Plaintiff's mediation motion. The Plaintiff sought to appeal these decisions before the COA.
- In the interim, between filing the appeal and the hearing before the COA, the Plaintiff settled the proceedings with the Engineer Defendant. On that basis, only the decision of the High Court in the Architect's security for costs application, and the Plaintiff's mediation motion were before the COA for consideration.

Decision of the Court of Appeal

In short, the COA upheld the decision of the High Court in respect of both the security for costs application, and the mediation motion. This article is focussed on the decision of the Court in respect of the mediation motion only, however our next article discusses security for costs applications in more detail.

The COA noted that any application to the Court pursuant to Section 16 of the Mediation Act 2017 (the "2017 Act") Asking the Court to invite parties to mediation, falls within the type of discretionary order, with which an appellant Court should be very slow to interfere, unless required to do so in the interest of justice.

The COA cited the case of Atlantic Shellfish Ltd v Cork County Council [2015] IECA 283 ("Atlantic"), where Judge Irvine held;

"…the court should only exercise its discretion if it considers 'appropriate' to do so 'having regard all the circumstances of the case'. That begs the question as to the circumstances in which it is appropriate to make the order… the court could not be satisfied that it would be 'appropriate' to make an order unless it was first satisfied that the issues in dispute between the parties were amenable to the type of ADR proposed… It is obvious that it would be a waste of the court's time to consider any such ancillary circumstances unless first satisfied that the process to which its invitation is to be addressed would enjoy a realistic prospect of resolving or substantially narrowing the issues in dispute.

The COA noted that the Court in Atlantic had analysed the issues in dispute, and it was not satisfied that it was appropriate to make an order to invite the defendant to use ADR, because the legal issues involved were not suited to such a process. The Court in Atlantic also noted that the Court must be satisfied the issues in dispute are reasonably suitable for resolution by ADR and that there are not good reasons for refusing the relief sought.

The Court of Appeal noted in the present proceedings that the High Court found it was premature to invite the Defendant to consider mediation on the basis that the issues between the parties were not clearly defined. The COA noted that, while broadly speaking, it is correct to say that multiparty construction litigation may be suitable for mediation, normally this would only be sought where the issues between the Plaintiff and the Defendant have been clearly delineated and also, in appropriate cases, the issues between the defendants.

The COA found that given the wholly generic and undifferentiated claim against the defendant in this case, they would agree with the High Court that, at this point in time, the Court cannot be satisfied that the issues in dispute are reasonably suitable for resolution by ADR for the simple reason that the issues in dispute are not sufficiently clarified to enable the court to reach such a conclusion.

The COA went further and noted that if the Court cannot identify the issues, it would be equally difficult to see how the Court could properly conclude that there is a realistic prospect of substantially narrowing the issues as between the parties.

The COA noted that they did not wish for the judgment to be read as dissuading the parties from pursuing mediation at a later stage in the proceedings, at which point it would be hoped that when issues are clarified and defined, that the parties will again revisit the question of mediation, which the COA noted has undoubtedly great potential in appropriate cases to resolve disputes in a manner which is far less costly and time consuming to the parties than a full plenary trial.

Commentary

This judgment is a clear signal from the COA that they will be slow to interfere with the discretionary jurisdiction of the High Court in respect of applications pursuant to the 2017 Act, unless the interests of justice require that interference. The judgment also represents a clear signal that the Courts will not invoke their discretionary jurisdiction to invite parties to mediation, where there is still an unclear delineation of the issues in dispute as between the parties.

In complex construction disputes such as this one, especially those involving projects constructed and completed up to twenty years ago, the issues in the case are frequently at large well into the proceedings. It is a welcome recognition from the Courts that mediation, while extremely useful and less costly than a plenary trial for resolving for complex disputes, should not be seen as a 'quick-fix' for such disputes. Indeed, it is arguable that applications to invite parties to mediation which are brought at a premature stage of the proceedings, can simply give rise to unnecessary legal costs, which a mediation, if timed appropriately, seeks to avoid.

Security for Costs Applications: A Careful Balancing Act by the Courts

Introduction

In Ireland, the provision of security for costs serves as a crucial mechanism to address a defendant's concerns about a plaintiff's ability to meet its legal costs, in the event the defendant is successful in defending the proceedings the plaintiff has brought against them.

This article provides insights from the recent application for security for costs brought by a defendant in the case of *Sweeney & Anor v The Voluntary Health Insurance Board* [2023] IEHC 553 ("*Sweeney*").

Background

Sweeney provides a practical illustration of the complexities surrounding security for costs applications in Irish legal proceedings.

The plaintiffs initiated legal proceedings in May 2015, alleging that the defendant abused its dominant position by refusing to provide cover to the plaintiff. The claims included various declaratory reliefs asserting violations of the Competition Act 2002 and Art. 102 of the Treaty on the Functioning of the European Union (the *"TFEU"*), along with damages for interference with their constitutional right to earn a livelihood. The defendant denied all the allegations.

The proceedings became drawn out as the defendant sought detailed particulars of the plaintiff's case, lasting over two years and necessitating a court motion to compel replies. A defence was ultimately delivered on 18 June 2018.

In November 2018, the defendant moved to exclude the plaintiffs' expert witness, an economist, citing a conflict of interest due to their prior involvement with the defendant in similar proceedings. The High Court ruled in favour of the plaintiff on 28 May 2019 whereupon the defendant appealed to the Court of Appeal, where it was decided on 9 June 2020, to exclude the plaintiffs' expert witness. The plaintiffs appealed to the Supreme Court, which upheld the ruling on 9 September 2021.

Following the Supreme Court's judgment, there was no activity until 6 January 2023, when a notice of intention to proceed was served. Subsequently, on 4 April 2023, the plaintiffs' solicitor reactivated the proceedings, seeking an expedited trial by the end of December 2023. The defendant deemed this timeline unfeasible given the case's historical background and the substantive steps required.

Security for Costs Application

In 2015, the defendant wrote to the plaintiffs seeking security for costs noting that annual returns indicated the limited company plaintiff had never traded, had no assets and would not be able to meet an order for costs against it. This was reinforced by statements made by counsel for the plaintiff at the hearing of 14 June 2023, that the plaintiffs were in straitened financial circumstances. This was also averred to by the solicitors for the plaintiffs in an affidavit in support of the plaintiffs' directions application.

As a result, the defendant sought security for costs, invoking reliefs provided by section 52 of the Companies Act 2014. The projected costs were estimated at €1,790,500 and the court noted the plaintiffs' failed to establish any special circumstances that could justify refusing an order for security. While the plaintiffs disputed the estimated defence costs up to trial, and the court deliberated on the element of delay, no significant prejudice was found.

Importantly, the plaintiffs did not contest the assertion of a bona fide defence, instead, they claimed that their impecuniosity had been caused by the defendant's refusal to provide cover.

Ultimately, the court concluded that the plaintiffs had not demonstrated any special circumstances that would tip the scales of justice against issuing an order for security for costs. Consequently, the court proceeded to make the order for security for costs in the sum sought, €1,790,500. In doing so, the court noted that there was a lack of clarity in the plaintiffs' pleadings, uncertainty about the alleged loss and further uncertainty as to how the plaintiffs were funding their own legal costs.

Conclusion

The ability to seek an order for security for costs serves to provide a measure of safeguarding for a defendant facing the potential financial burden of defending a claim, particularly when the recovery of that defendant's costs may pose challenges upon a successful defence of the claim. This mechanism involves a careful balancing act by the Court to ensure that the order for security safeguards the defendant's interests, but also takes into account the plaintiff's right to pursue the action. The continued pragmatic approach by the Courts in these applications is to be welcomed by Insurers and Insureds alike.

Statute of Limitations: Crystallisation of financial loss - when does a cause of action in negligence 'accrue'?

Introduction

Shortly prior to the Supreme Court's decision in *Smith v Cunningham* [2023] IESC 13, which is discussed in the next article, the High Court also delivered further clarification in relation to the application of s.11 of the Statute of Limitations Act 1957 (the "Act"), which concerns the accrual of a cause of action, in its decision of *McDonagh & Ors v Ulster Bank Ireland DAC & Ors* [2023] IEHC 242.

The High Court considered, as a preliminary issue, whether the Plaintiffs (the "*McDonagh Brothers*") were statute barred in bringing a claim against a property valuer, CBRE, in which they alleged financial loss suffered following a negligent valuation (the "CBRE Proceedings").

Background Facts

In July 2007 the McDonagh Brothers purchased a 33 hectare site in County Wicklow with a view to developing a data centre. Ulster Bank provided a €21.5 million loan and the McDonagh Brothers invested €4.5m of their own money. During the transaction, Ulster Bank instructed CBRE to provide a valuation of the land and it determined the valuation was €56m.

The site was not developed and on 13 March 2013 the McDonagh Brothers entered into a compromise agreement with Ulster Bank as they had failed to repay their debts.

The agreement included a term stating that the McDonagh Brothers would dispose of the property by a certain date, without developing the property, or otherwise Ulster Bank would be entitled to demand the payment of the debt in full and take whatever steps it deemed fit in relation to the property. The McDonagh Brothers failed sell the property and repay the debt and so, on 1 October 2014, Ulster Bank appointed receivers over the property.

On 2 July 2018 Ulster Bank issued High Court Proceedings, and subsequently obtained judgment on 6 April 2020 for the debt which amounted to €22,947,202.85 (the "Debt Proceedings"). The High Court ruled that the McDonagh Brothers had attempted to enter into a sham sale (for €1.5m) with a company which was a front for one of the brothers.

Ulster Bank issued separate proceedings against CBRE which settled for €5m plus costs, with no admission as to liability (the "Ulster Bank Proceedings"). Ulster Bank ultimately sold the property on 1 February 2021 for €3m.

When did the cause of action accrue?

S.11 of the Act provides that *"an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued"*.

The central issue decided by the High Court, was identification of the date on which the cause of action accrued in respect of in the CBRE Proceedings.

The High Court also considered whether there had been fraudulent concealment of the McDonagh Brothers' right of action by Ulster Bank, by Ulster Bank not providing the settlement agreement in the Ulster Bank Proceedings. If successful on the fraudulent concealment argument this would have extended time for limitation purposes as per s.71 of the Act.

CBRE argued that the cause of action accrued when the valuation report was issued in 2007 and when the property was acquired and financed.

In contrast the McDonagh Brothers argued that the cause of action accrued within the 6 years prior to issuing the CBRE Proceedings and arose only when the loss was suffered as a consequence of the negligent valuation. They argued that loss was suffered either when judgment was given in the Debt Proceedings on 6 April 2020 or when the property was sold on 1 February 2021.

The High Court's Finding

The Judge relied on the extensive case law in the area which, broadly speaking, requires the occurrence of loss or damage for a tort to be actionable, and the clock to run for limitation purposes. It was noted that where there is economic loss, the harmful act may not occur at the same time as the occurrence of loss or damage. Further, in a negligent valuation case, the loss or damage arises when:

1. the value of the property falls below the aggregate of the debt incurred, together with interest, and any personal investment, and;

2. when the investment or debt is lost.

The High Court ruled that the cause of action accrued at the latest on 1 October 2014, which was when Ulster Bank appointed receivers to the property. This was because at this point the McDonagh Brothers suffered the loss of their investment and their opportunity to develop the property.

The fact that the shortfall regarding the loan was not known until Ulster Bank obtained its judgment and after the property had been sold did not alter the fact that the loss of the investment occurred during the events of 2013 and 2014 which culminated in the appointment of the receivers.

The High Court also rejected arguments that there had been fraudulent concealment relating to the settlement of the Ulster Bank Proceedings as this was a step too far. Similarly, the events leading to the accrual of the cause of action i.e. the appointment of the receivers, were known to the McDonagh Brothers at the relevant time.

Comment

The case is a welcome addition to the body of recent case law on limitation periods and provides clarification as to when the limitation period begins in cases where pure economic loss has been suffered by the Plaintiff. Insurers will invariably have a number professional liability claims on their books relating the negligence involving property investments and will look at this closely in respect of any limitation periods that may apply.

Statute of Limitations: Conveyancing Transactions – when does a cause of action accrue?

The second significant judgment of 2023 regarding limitation periods was delivered by the Supreme Court in the decision of *Smith v Cunningham* [2023] IESC 13. This decision provides an important clarification as to when "*damage*" is sustained for the purposes of the applicable limitation period, in respect of a claim involving the alleged professional negligence of solicitors during a property transaction. We have also written about the other significant decision regarding limitation periods in our article regarding *McDonagh & Ors v Ulster Bank Ireland DAC & Ors* [2023] IEHC 242

Background

The Plaintiff issued proceedings in 2014 against his former solicitors following the purchase of a property in 2006. It was alleged that the Plaintiff's former solicitors failed to conduct planning searches which would have revealed that the property constructed did not comply with the planning permission granted. The Plaintiff alleged negligence for the apparent failure to ensure the Plaintiff received good and marketable title. The Plaintiff later tried to sell the property in 2008 but the sale fell through in October of that year because of the planning issues affecting the property.

The issues to be decided

The question to be leading judgement by the Supreme Court was whether the damage occurred when the property was acquired in 2006 or whether it occurred when the contract for sale was rescinded in October 2008. If it was the former, then the claim would have been statute barred under s.11(2) of the Statute of Limitation Act 1957 (the "Act"). This section provides that "*…an action founded on tort shall not be brought after the expiration of six years form the date on which the cause of action accrued"*. The lack of legislative guidance on when a "*cause of action accrued*" has created uncertainty and complexity in determining whether certain claims are statute barred or not.

The Courts have provided guidance on the issue in various rulings, and we briefly summarise three of the key decisions:

- In *Gallagher v ACC Bank plc* [2012] IR 620 a claim in negligence was brought for pure economic loss suffered as result of the Defendant selling a financial product which was unsuitable to the Plaintiff. Proceedings were issued more than 6 years after the investment was made but within the 6 years of the expiry of the investment period and within 6 years of when the losses had been crystallised. The High Court ruled that the cause of action accrued at the expiry of the investment period as until then, the Plaintiff had a contingent loss.
- *Brandley v Deane* [2018] 2 I.R. 741 concerned two properties that were developed and completed in September 2004 and January/February 2005. Cracking was observed in December 2005 but proceedings were not issued against the engineer and until November 2010. It was ruled that the cause of the loss did not arise until physical damage was "*manifest*" and the presence of an underlying defect was not enough to amount to the accrual of a cause of action. In other words the cause of action accrued when the cause of action was capable of being discovered and capable of being proved by the Plaintiff.
- In *Cantrell v Allied Irish Banks plc* [2019] IECA 217 the case concerned the mis-selling of property investment schemes. The Supreme Court ruled that the cause of action in the mis-selling claims accrued when the investment value fell below the amount of the original investment with interest i.e. when the investors were in a worse off position. It also held that the applicable test of when a cause of action accrues is when there is "*real actual damage*" which a person would consider commencing proceedings for.

The Decision

In his leading judgment, Murray J followed the decisions of *Brandley v Deane* and *Cantrell v Allied Irish Banks* and held that, in respect of negligence by solicitors, damage becomes manifest in a conveyancing transaction at the point at which the property is conveyed to them. Unlike *Gallagher* and *Cantrell* this was not a contingent loss case but a "*flawed transaction*" and this was the point at which the damage occurred. This is because at that time the property was less valuable and the Plaintiff had an entitlement to recover the difference in value from the negligent solicitor.

Murray J emphasised that the Court must take pragmatic case-by-case approach when considering when a cause of action accrues. This requires the Court to ask itself the following questions:

1. When was a real and meaningfully measurable loss sustained;
2. At what point does the balance between the benefits and burdens of a transaction become adverse to the interests of the Plaintiff; and
3. When would a lay person understand actionable damage, for which a person would commence proceedings, to have occurred.

Hogan J agreed with Murray J's decision but we note his uneasiness with the decision, stating that no purchaser could realistically been aware of the damage at the time of the transaction. Despite this Hogan J accepted that the damage was capable of being discovered and proved even if this was unlikely or improbable that it would be discovered.

Conclusion

The decision shows that that each case will turn on its own facts and the Courts are willing to apply a common sense approach to determining when a cause of action might accrue. The downside is that there is inevitably a degree of uncertainty of success when a party relies on limitation arguments until the issue is ruled upon by a Court. It is clear however that the Courts are willing to apply more generous limitation period in cases involving contingent loss involving pure economic loss. In cases involving professional negligence in conveyancing transactions the cause of action is likely to begin much earlier. Therefore insurers and legal practitioners handling professional liability claims should be alert to whether there are any limitation arguments that can be deployed in new and existing claims.

Finally we note the comments of Hogan J who stated there is something "*profoundly wrong*" when the Act can operate in an arbitrary and haphazard fashion depending on the facts. He also noted that there is a conflict with the Irish constitution which protects a person's personal and property rights. The need for reform is something that has been commented by the Law Reform Commission in 2001 and 2011. Therefore it seems that the judiciary are frustrated by this problematic area of law and are continuing to encourage the Oireachtas to legislate to prevent further instances apparent injustice on the part of Plaintiffs from occurring.

Strike Out Applications: Has the Tide Turned?

A long and well-established body of case law exists for dismissing cases for delay in situations where litigants have been slow to progress their claims. The courts exercise their discretion to dismiss a claim based on the interests of justice. This can be a source of frustration to insurers and insureds alike where cases remain dormant 'in the long grass'. While it did seem as if the Irish judiciary had become more intolerant of such delays, procedural change via an automatic discontinuance process, as recommended in Judge Peter Kelly's recent paper on Irish procedure, may be required.

The Primor test

The seminal case of *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and the three-step test set out by Hamilton CJ in the Supreme Court, commonly referred to as the *'Primor test'*, has long formed the standard in assessing the merits of applications to dismiss claims for want of prosecution.

In assessing such claims, the Primor Test seeks to establish the following:

1. Was the delay inordinate?
2. Was the delay inexcusable i.e. unjustifiable?

If the answer to the first two limbs of the test is yes the Court must then consider:

3. Whether the balance of justice favours the dismissal of the proceedings.

The burden of proving the delay is both inordinate, inexcusable and proving the balance of justice lies in favour of dismissing the claim rests with the defendant bringing the application to dismiss.

In assessing whether a claim should be dismissed, the court must be cognisant of the unique facts and circumstances arising. Inordinate delay is usually straightforward to assess, however, for the delay to be established as *'excusable'* by the Plaintiff, the evidence presented must relate to the circumstances and facts of matter before the court. Excuses concerning personal or financial circumstances or staffing difficulties, change of solicitors, seeking former solicitor's files or health issues are considered irrelevant.

When considering the balance of justice, factors to be considered by the Court include:

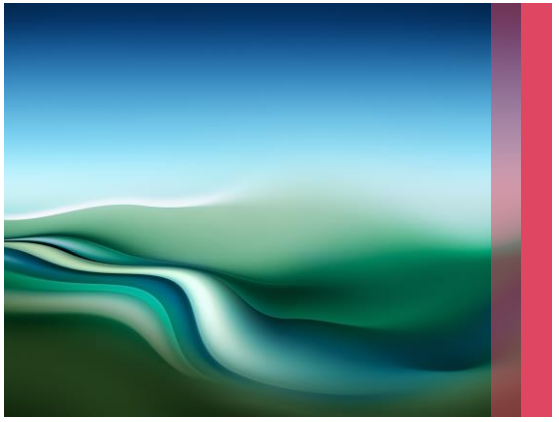
- Potential prejudice to the defendant in not getting a fair trial due to the delay
- The availability of witnesses and documentary evidence available
- If the Plaintiff has a *'late start'* in bringing proceedings (i.e. the proceedings are issued close to the date of the expiry of the Statute of Limitations, there is a greater onus on the Plaintiff to progress the case speedily

The courts have a duty to ensure that litigation is conducted in a timely manner, and this requires the Court to balance the competing Constitutional rights of access to justice and the right to a fair and speedy trial. As can be seen from the recent jurisprudence, there has been a growing judicial intolerance towards delays by litigants in progressing their cases to hearing. We examine some of the recent cases in this area in brief below.

Key Highlights of Recent Case Law

Gibbons v N6 (Construction) Ltd & Galway County Council [2022] IECA 112:

- The Court of Appeal upheld an order of the High Court to dismiss a claim by the plaintiff against the first named defendant, a construction company following an eight-year delay.
- The COA noted that prejudice to a defendant can arise in many ways and is not confined to the risk that a fair trial might not be possible – it can also include damage to reputation and business, as well as the oppressive nature of being involved in protracted litigation.



Vaughan v Philip English and Bill Leahy [2013] IEHC 281:

- The High Court favoured striking out the proceedings, in view of the unavailability of plaintiff due to death, and found this caused significant prejudice to the defendants, and justified dismissal.
- The Court also noted a five-year delay in initiating legal proceedings, coupled with a four-year delay in the life of the proceedings, deemed the delay inordinate and inexcusable.
- The Plaintiff failed to explain delay of over five years in initiating proceedings and the inexcusable delay between October 2017 and October 2021 when proceedings were certified as ready, but during which time the Plaintiff failed to attend medical expert appointments. Importantly, at no point in the four-year period did the plaintiff outline to the defendant the reasons for why the case was not set down for hearing.
- The Court found that the Defendants faced a real disadvantage due to the absence of availability of cross-examination, which caused significant prejudice.
- Interestingly, the Court found that the matter could have been set down for trial earlier and concluded before the plaintiff's death.
- Even though the proceedings were ready for hearing, the countervailing prejudice from the plaintiff's death remained and the proceedings were dismissed on that basis.

Riverview Administration Owners v Waterford City Council [2023] IEHC 518:

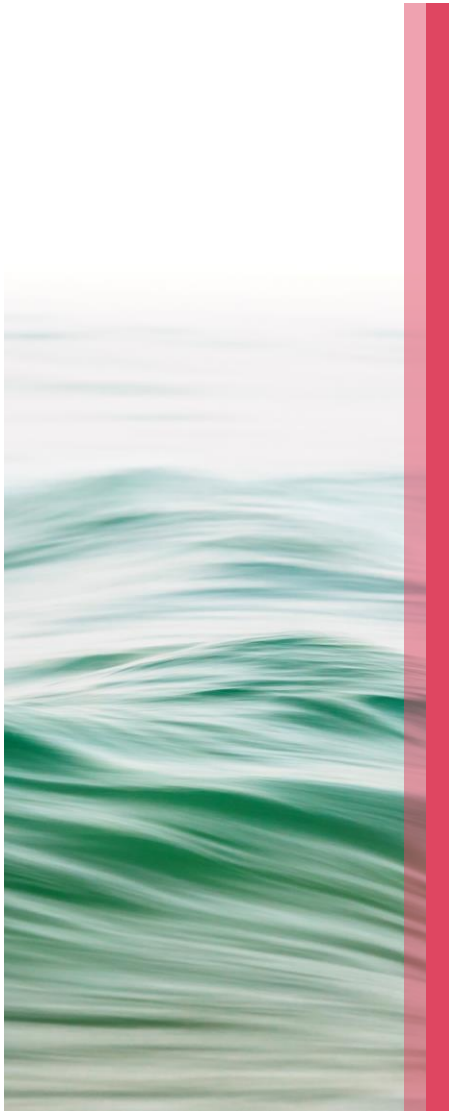
- Proceedings relating to alleged negligent works carried out as part of a flood relief scheme and subsequent nuisance caused by land subsidence. An application was made on 22 August 2022 by the third party to set aside third party proceedings due to a failure on the part of the third defendant to serve the third party motion as soon as reasonably possible.
- Mr Justice Dignam considered Section 27(1)(b) of the Civil Liability Act 1961 which requires that a third party notice is served as soon as reasonably possible. In addition, Order 16, rule 1(3) of the Rules of the Superior Courts sets a 28-day limit for leave applications. This limit does not appear in the Civil Liability Act 1961 and was held to be a benchmark against which the requirement under the Civil Liability Act was to be measured.
- A delay of over six months was deemed insufficient to set aside the application based on delay. The defendant had a right to take reasonable time for investigations, aligning with the test in Connolly v. Casey (Unreported, Supreme Court, 17 November 1999). Periods between completing a preliminary report, instructing counsel, and filing the motion seeking leave were not deemed a fatal delay by Mr. Justice Dignam.
- Ultimately, the third defendant, at all stages, was considered to have acted promptly and was entitled to time for investigations and obtaining advice before applying to join the third party.
- When considering the delay in respect of the third party, Mr Justice Dignam considered the whole period from service of the notice. The third party had contended that the time from delivery of their appearance should be considered but this was deemed to produce an inequitable logic whereby the third party would be able to benefit from their omission in entering an appearance. The obligation to act as soon as reasonably possible applied to both the third party seeking relief and the defendant serving the notice. A largely unexplained 16-month delay from the service of the motion to the issuance of the application was sufficient to reject the relief sought.
- Failure of the third defendant to pursue the third party's appearance was deemed of limited importance.
- Ultimately Mr Justice Dignam held that the third defendant had acted promptly and the delays following the issuing of their motion were outside of their control and therefore refused the third party's reliefs sought.

Brennan v Ireland & Ors [2023] IEHC 107:

- The Plaintiff claimed for €3 million in damages for breach of duty and constitutional duty by defendant.
- Three motions were heard on 23 January 2023, the first motion was brought by the first, second and third defendants under Order 19 Rule 28 of the Rules of the Superior Courts to strike out the plaintiff's claim deeming them vexatious, frivolous, bound to fail or an abuse of process. The fourth defendant brought a motion under Order 28 Rule 27 of the Rules of the Superior Courts to strike out plaintiff's pleadings as unnecessary, scandalous, or prejudicial to a fair trial.
- In addition, the plaintiff brought a motion to join a third party firm of auditors as defendants and for contempt against the third party which related to the receipt of a letter from them demanding that the plaintiff vacate his property and which, it was claimed, was threatening. The plaintiff contended that there was a constitutional case pending in the High Court.
- Ultimately Ms Justice Roberts held that the plaintiff's claim disclosed no reasonable cause of action against the defendants.
- The Court concluded that the intent of the proceedings was to obstruct the fourth defendant and their receiver from legally entitled actions under existing court orders, rendering the proceedings an abuse of process with a meritless motion. In addition, no identifiable relief was sought against the third party as a receiver, and the plaintiff failed to show a justifiable basis for adding them as a co-defendant. There was no suggestion of a breach of any court order by the third party, and no basis for a finding of contempt against them.

Kirwan v O'Connor [2023] IESC 34

- This case concerned a property dispute whereby the Plaintiff had issued High Court proceedings in 2013 for breach of contract. The case was not progressed for five years when the defendant brought an application in 2018 to have the plaintiff's case dismissed for inordinate and inexcusable delay.
- Both the High Court and Court of Appeal found that the delay of five years in progressing the case by the plaintiff was both inordinate and inexcusable. Further, the Court deemed the excuses that the plaintiff was a lay litigant and could not obtain his original file were insufficient to negate the prejudice and reputational damage caused to the defendants by the delay. Therefore, the balance of justice required the dismissal of the case.
- The Supreme Court has now granted leave to the plaintiff to appeal following the dismissal in the claim in the High Court and Court of Appeal.
- The hearing of the appeal in the Supreme Court will be significant given that this case raises the question of how the Primor principles ought to be applied and whether they should be revised or reconsidered in some respects.
- In granting the appeal, the Supreme Court can be seen to be taking the opportunity presented by this case to re-examine the Primor principles at a time when the Courts have become increasingly critical of litigants who delay in bringing proceedings.

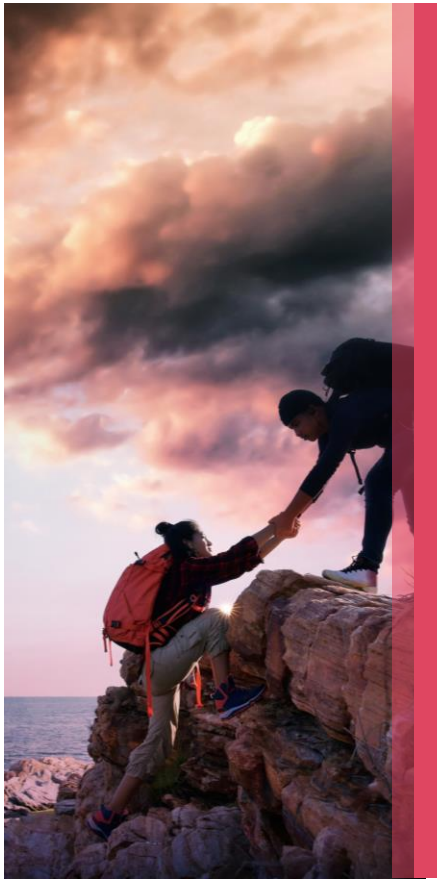


Looking Ahead

A successful application by a defendant to strike out a plaintiff's case for delay was, up until relatively recently, a rare success story with the courts being quite slow to grant such applications. Some recent decisions (for example Gibbons) demonstrated a perceived shift in attitude by the Court, with a body of caselaw developing that suggested a greater willingness to strike out proceedings, and an increasing reluctance to entertain prolonged and perpetuating litigation not being actively prosecuted by a Plaintiff. However, on review of the various judgments, while those judgments find in favour of strike outs – the cases are very much decided on their own facts, and involve significant degrees of prejudice to the defendants bringing the applications.

The Courts remain unwilling to strike out proceedings and deliver the death knell to a Plaintiff's case, unless very clear prejudice exists to the defendant, and evidence has been clearly advance to establish this prejudice. The key takeaway remains that '*prejudice is key*' and defendants considering a strike out applications should clearly line up their evidence demonstrating prejudice suffered due to the delay on the part of the Plaintiff.

The report of Justice Peter Kelly setting out his recommendations for reforms of the civil justice system, recommended 'automatic discontinuance' after 30 months of inaction in proceedings. Minister Helen McIntee has published an implementation report for these reports, which envisages this will be achieved via primary legislation and rules of court. The Bill and rules were to be drafted and approved by the second half of 2023, however there appears to have been some has been some slippage on those timelines, and it is hoped that we will see some further movement towards finalisation of the new procedure during 2024. The effect on cases being dismissed for want of prosecution will be significant once implemented. This would be a welcome development for Insurers and Insureds alike, given the costly nature of strike out applications, which are the only avenue to a dismissal at present.



To Amend or Not to Amend? Leave Granted to Plaintiff to Amend Pleadings

Finbar Tolan -v- John Brady and John Dillon-Leetch, both trading under the style and title of Dillon-Leetch & Comerford Solicitors [2023] IEHC 130 [Record No. 2018/10665P]

In this case, Judge Barr in the High Court granted an order permitting the plaintiff in professional negligence proceedings against his former solicitors to amend his Plenary Summons and Statement of Claim five years after the proceedings first issued, to add new particulars of the ways in which he alleged they were negligent in the handling of a breach of contract case against Connaught Gold. For example, the Plaintiff applied to include a claim that his solicitors were negligent in failing to amend his Connaught Gold pleadings to include a claim for damages for malicious falsehood, as had been advised by Counsel in his advice on proofs in February 2014.

The plaintiff submitted that he only received a copy of Counsel's advices for the first time in February 2022 and once he saw that document he realised the adverse effect that failure to amend his Connaught Gold pleadings, had had on his prospects of success in those proceedings.

The Defendants resisted the Plaintiff's application to amend and argued that:

- The Plaintiff was aware of the content of the advice on proofs all along, so he could have included such pleas from the outset and should not be permitted to add them at this late stage five years later;
- The Plaintiff had given express instructions to his solicitors at the time, that despite Counsel's advices, he did not wish to amend his original pleadings, as he wanted his action against Connaught Gold to proceed without delay;
- Permitting the amendments at this stage would cause severe prejudice to the defendants, because it would deprive them of a defence under the statute of limitations.

In permitting the Plaintiff's application to amend, the Court cited some of the principles summarised by Collins J. in Stafford v. Rice as follows:

- Particular considerations apply where it is said that the effect of permitting an amendment would be to deprive a defendant of a limitation defence that would otherwise be available to it.
- Accordingly, as a "*general rule*", an amendment setting up a new claim will not be permitted where that claim would (or might) be statute-barred if made in proceedings issued at the time of the amendment.
- However, that rule is not an absolute one and ought not to be applied overly rigidly. Where a plaintiff seeks to amend their pleadings to add a new cause of action arising out of *"the same facts or substantially the same facts"* as have already been pleaded, the amendment may be permitted.
- There is some suggestion in the authorities that the power of the High Court under Order 28 to permit an amendment "*on such terms as may be just"* would allow the court to permit a new claim to be added by way of amendment expressly on terms that the amendment will take effect only from the date of the amendment order.

The Plaintiff's application to amend was permitted on the basis that the amendments would only take effect from the date of delivery of the amended pleadings to the defendants thereby preserving any defence that the defendants may have under the statute of limitations, if the matters complained of in the amendments were ultimately deemed to constitute a fresh cause of action. The Judge emphasised that in permitting the Plaintiff's application to amend, he was making no determination as to when the plaintiff first received the advice of proofs, or what instructions he may or may not have given his solicitors. Nor was he making any finding that there was any substance to the allegations of negligence made by the plaintiff in his amended pleadings. All of that would have to be determined at the trial of the action.

It is welcome that the Court confirmed amendment would <u>not</u> be permitted where the claim would, or might, be statute-barred. However, this decision is one that was hopefully very much an isolated one, and one decided on its own particular facts, as otherwise a valid fear of the floodgates opening with Plaintiffs seeking to amend their pleadings at the eleventh hour in proceedings would be held by Insurers.

Cross-Border Claims and Representative Actions in Ireland

We have previously written about developments relating to Representative Actions in Ireland since the EU published its Representative Actions Directive in 2020, which aimed to allow Representative Actions by consumers arising out of breaches of certain consumer protection legislation. The directive was finally transposed into Irish law on 11 July 2023 via the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (the "Act").

The Act is not yet in force as a Commencement order is required by the Minister for Enterprise, Trade and Employment, and therefore there are some uncertainties on how the Act will be incorporated into Irish civil procedure. However, the implementation of the Act raises the possibility of the Irish jurisdiction becoming an attractive location to issue claims in, respect of cross border representative actions across the EU (known as "*forum shopping*") and this article explores this topic further.

Cross-Border Representative Actions

- s.6(2) of the Act confirms that the legislation applies to both domestic and cross-border infringements. Proceedings must be brought via Qualified Entities which are non-profit legal persons or public bodies who must fulfil certain requirements (such as 12 months of public activity in the protection of consumer interests). They must apply to the Minister for Enterprise to be designated as such. A cross-border representative Action is simply when a Qualified Entity brings a Representative Action in another member state than it was designated.
- There is mutual recognition of Qualified Entities across the EU and a list of these will be maintained by the Commission. However s.19 of the Act provides that the Irish Courts may still examine whether Qualified Entity has standing to bring a claim.
- It is inevitable that many collective actions in the EU will contain a cross-border element due to globalisation and digitalisation which has resulted in companies operating across many jurisdictions. Jurisdiction of a claim is determined by reference to the Recast Brussels Regulation and typically a defendant will be sued in their country of domicile. However those with consumer contracts may also sue a company in their own jurisdiction. It is also possible that a company will be deemed to be domiciled in a number of different member states, depending on the rules of that country. Therefore there will be certain situations where Qualified Entities will have a choice in deciding which jurisdiction to issue proceedings in and will want to the most favourable country to them. This is known as *'forum shopping*'.

Ireland as a choice of jurisdiction

- Ireland has not previously had a formal a mechanism for representative actions and multi-party actions have been, up to now, dealt with by way of "*test cases*" which act as a precedent for other claims.
- Other countries such as the Netherlands have long held a mechanism for representative actions and are more established as a popular destination for representative actions.
- The main barrier to bringing representative actions in Ireland for the foreseeable future remains the prohibition of third party litigation funding (save for limited exceptions such as arbitrations). Until third party litigation funding is permitted it is difficult to envisage a scenario where representative actions become popular without adequate funding of claims. This is particularly important since Ireland is typically seen as being a high cost jurisdiction and without litigation funding this will likely be barrier to claims.
- However, as noted in our separate article on Third Party Litigation Funding, we anticipate that this area will be reformed in due course and once permitted there are reasons to believe that Ireland may become a popular jurisdiction for representative actions. Firstly, many technology companies (particularly from the US) are domiciled in Ireland and may be targeted because of their presence here. This will be particularly relevant where there are breaches of data protection legislation. Ireland may also see representative actions for other consumer financial, defective products, and ESG related claims.
- We can foresee collective actions increasing in popularity, particularly since Ireland is typically seen as a pro-consumer jurisdiction. Qualified Entities may target Ireland so as to maximise the chances of receiving a favourable judgment in the Irish Courts. Ireland also has the benefit of being English speaking common law jurisdiction and claims might now be issued in Ireland, that might previously have been issued in the UK. Additionally, if litigation funding is reformed, as commentators believe it will be, there may be an increase in plaintiffs who are willing to bring an action, who may previously have been reluctant to do so, given the costs consequences of litigation in Ireland, which are significant.
- We will be monitoring this space closely for further developments throughout 2024.

Third Party Litigation Funding Developments/Third Party Funding of International Commercial Arbitration in Ireland: signed into law

Background

Third Party Litigation Funding ("TPLF") has become a popular form of financing litigation in other jurisdictions, such as the UK, whereby third parties fund the costs of litigation in return for a share of any damages awarded. Until recently TPLF in Ireland had been permitted only in limited circumstances - with the legitimacy of after the event insurance only recently being confirmed. Ireland's prohibition on TPLF limits the effectiveness of new legislation permitting representative actions within the jurisdiction, a topic which we have written about separately.

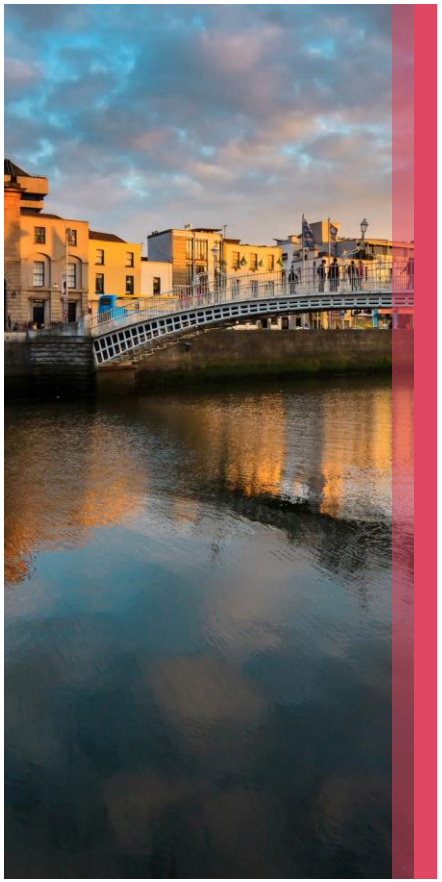
In 2023, Ireland relaxed the archaic doctrines of "*maintenance*" and "*champerty*" in a limited way, in respect of arbitration. These torts and offences of maintenance and champerty had for centuries prevented the funding of litigation of unconnected third parties or sharing the profits of litigation with unconnected third parties. This article looks at the changes introduced potential proposals reform in this area.

Arbitration Act 2010

The Courts and Civil Law (Miscellaneous Provisions) Act 2023 was signed into law on 10 July 2023 and amended the Arbitration Act 2010. The legislation states that the offences and torts of maintenance and champerty "*do not apply to dispute resolution proceedings*". "*Dispute resolution proceedings*" means international commercial arbitration including any proceedings, appeal or mediation arising out of an international commercial arbitration. This change, although limited in scope is welcomed and will undoubtedly make Ireland more attractive jurisdiction in respect of arbitrations.

Law Reform Commission Consultation Paper

It is anticipated that further reforms will be introduced and on 17 July 2023 the Law Reform Commission ("LRC") published its consultation paper (the "Paper") on TPLF. The Paper provides an overview of TPLF and potential advantages and disadvantages in the liberalisation of the rules and the different approaches that could be adopted.



Pros and Cons of Litigation funding

The LRC recognises that there are risks to TPLF in that litigants may not be fully compensated as litigation funders will want to secure a return on their investment. In addition legal costs and insurance premiums could increase as a result of the volume of claims that might result, and TPLF may not be appropriate for all forms of disputes.

However, the LRC identifies that TPLF will help expand access to justice, particularly where one party does not significant financial resources. It would also allow creditors/liquidators of insolvent companies to bring proceedings in circumstances where there would otherwise be insufficient assets available to fund litigation.

We would expect that any legislation would build mechanisms into any legislation to minimise the potential pitfalls of TPLF.

Models of Legalisation

The LRC states that it is in favour of an approach which retains the doctrines of maintenance and champerty but permitting TPLF by way certain statutory exceptions. The LRC recognises this is a "*cautious*" approach but it would be consistent with the approach taken to date on the issue. The alternative options would be to repeal the torts and offences entirely (a simpler approach) or repealing the torts and offences but preserving rules which would render TPLF contracts unenforceable if they were contrary to public policy or were illegal. The latter approach has been adopted in the UK and in other jurisdictions.

Models of Regulation

The LRC puts forward different regulatory models for TPLF in Ireland which would aim to mitigate the dangers of its introduction. The LRC does not indicate a preference as to its preferred model but stresses that the choices for regulation are not separate, mutually exclusive options and the proposal adopted may be a combination of the different models for regulation. The five possible regulatory models are:

- A voluntary self-regulatory regime (as seen in the UK);
- An enforced self-regulatory regime with a supervisory role by the state (as seen in Hong Kong);
- Regulatory regime with certification by the Court as to reasonableness and fairness of the TPLF agreement (as seen in New Zealand);
- A state regulated regime using an existing regulator such as the Central Bank of Ireland; or
- A state regulated regime with a newly created specialist regulator

We would expect the Irish Government to adopt a state regulated regime which would be in line with the European Parliament which previously recommended that the European Commission more tightly regulate TPLF across the EU.

Other issues

The Report also highlights various other issues for further consideration by lawmakers including:

- whether TPLF should be prohibited in respect of personal injury claims or other family law proceedings.
- The LRC sees merit to requiring the disclosure of the existence of TPFL agreements which encourages transparency;
- The LRC considers excessive funder control can be overcome using existing ethical and fiduciary placed on legal practitioners to act in their client's best interests, introducing sanctions for misconduct;
- Whether there should be a minimal capital adequacy requirement for funders;
- Whether there should be restrictions on, or a prohibition on, the withdrawal of TPLF during proceedings; and
- whether there should be a cap on the amount of money funders can recover from funded parties.

Conclusion

The Paper aims to stimulate discussion on the issue which will allow the LRC to prepare its final report setting out its recommendations. The consultation closed on 15 December 2023 and we eagerly await the outcome. We expect that the LRC will make its final recommendations in early 2024 which will give Insurers a clearer idea of how the proposals may affect them in future.

Legislative Developments - Government Adopts State Litigation Principles

On 21 June 2023, the Government approved the adoption of 15 'Litigation Principles' which will act as guidelines in the conduct of litigation by the State. The Principles apply where the State, through the Government, a Minister of the Government, a Department of State or an agency under its direct control engages in litigation. These principles will be welcomed by insurers, given that the State is often a plaintiff in insured disputes large scale construction disputes for example.

The 15 Litigation Principles are as follows:

1. Avoid legal proceedings where possible;
2. Deal with claims promptly;
3. Deal with litigation efficiently;
4. Identify lead cases when multiple sets of proceedings on same legal issue;
5. Minimise legal costs for all parties;
6. Make settlement offers, tenders or lodgments;
7. Act honestly;
8. Make discovery in compliance with best practice;
9. Be consistent across claims;
10. Not to take advantage of the less well-resourced litigant;
11. Defend proceedings in accordance with the interests of justice;
12. Not to appeal unless there is a reasonable prospect of success or in the public interest;
13. Avoid bringing proceedings against another State Department or State body;
14. Seek to agree claimant's costs without the requirement for formal adjudication;
15. Apologise where the State has acted unlawfully.

The 15 Principles recognise that the State should act in the public interest, broadly construed, in pursuing litigation and should consider the broader public interest before taking certain procedural steps in litigation.

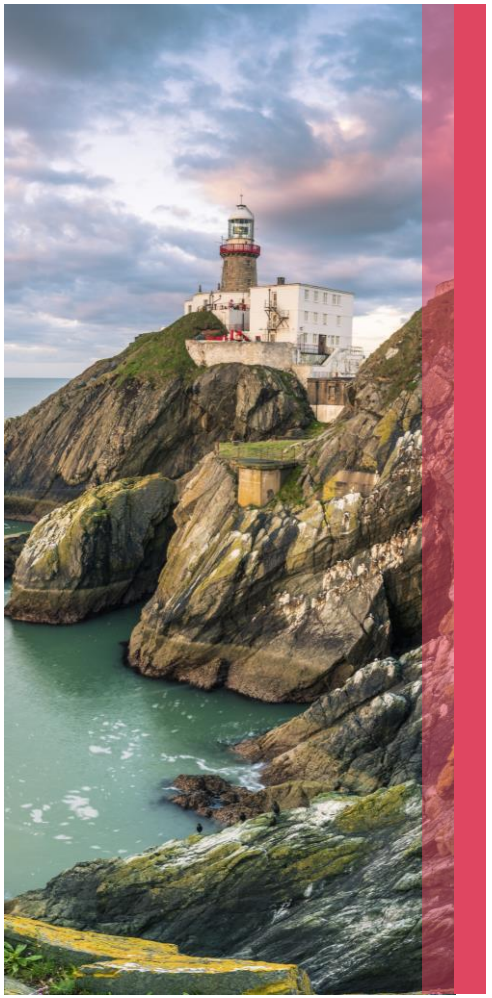
It is also hoped that these Principles will serve as a positive example to other litigants.

The principles do not have any binding legal effect and failure to comply with them cannot in itself defeat a claim or a defence advanced by the State in any set of legal proceedings.

Furthermore, the principles do not preclude the State from (i) contesting, (ii) appealing or (iii) settling litigation; (iv) relying on the entitlement to assert legal professional privilege or (v) applying for recovery of their costs where appropriate.

During the launch of the new litigation principles in June, Rossa Fanning, Attorney General noted that many of the principles are already applied by officials and lawyers managing litigation on behalf of the State and that the principles may best be described as a "*codification and public statement of existing best practice.*"

The principles are to be welcomed by Insurers and practitioners alike and will hopefully serve to assist in allowing litigation to progress in the most efficient manner possible, and the most cost-efficient manner possible.



It's not easy being green on the Emerald Isle - *The tightening of greenwashing rules in the EU*

Introduction

On 12 June 2023 the EU Commission announced new measures to regulate ESG ratings agencies which will improve transparency of sustainable investments. This is a key part of the EU Taxonomy Regulation (2020/852) which helps to direct investments towards environmentally sustainable activities and helps fight greenwashing by creating a classification and reference system enabling investors to assess the degree of sustainability of economic activities.

This is on the back of measures announced in 2022 and 2023 to tackle environmental claims made by companies about their products. The draft Green Claims Directive aims to tighten the rules on companies who make false environmental claims about their products (known as "*greenwashing*") ensuring that buyers receive reliable, comparable and verifiable information to enable them to make more sustainable decisions. The aim is to ensure that consumers are protected and to empower them to contribute to the transition to net zero.

In addition, the European Commission had proposed a Directive "Empowering Consumers for the Green Transition" which also aims to improve product labelling and ban the use of misleading environmental claims. In this article, we take a look at the current legal framework for greenwashing claims in Ireland and future change proposed by the European Commission.

The Power of Marketing

To achieve net zero commitments by 2050, Irish companies and consumers will need to contribute to this transition by changing their habits and making sure that the collective carbon footprint is reduced. A company's green credentials can be a powerful marketing tool for consumers who are seeking to live a more environmentally friendly lifestyle. PwC reported in 2022 that Irish consumers were willing to pay more money for products that are locally sourced and eco-friendly.

There will be a number of companies who genuinely wish to support a sustainable future but there will be others who will exploit a consumer's willingness to spend more for financial gain. These companies may exaggerate their green credentials in order to give the false impression that their business is more environmentally friendly than it really is. As accusations of greenwashing against companies are made public, there lies potential for litigation to be brought against companies and their directors.

Advertising Standards Authority for Ireland

Currently the main method of regulating greenwashing claims in Ireland is through the Advertising Standards Authority for Ireland (“ASAI”). Companies are expected to adhere to the ASAI Code of Standards for advertising and marketing communications in Ireland. Section 15 of the Code covers environmental claims and includes rules for companies to substantiate qualified and unqualified claims in relation to the extent of environmental impact of products. The ASAI Independent Complaints Committee states that it is seeing a growing volume of complaints for adjudication falling within the general term of greenwashing, consistent with what is being seen on a European level. It operates primarily as a self-regulatory system with penalties, fines only being imposed if decisions of ASAI are not complied with.

The Consumer Protection Act 2007

Greenwashing previously came under focus from the Competition and Consumer Protection Commission ("CCPC") which is responsible for enforcing consumer protection. The Minister of State at the Department of Enterprise, Trade and Employment reported that, as part of the EU Consumer Protection Cooperation Network, the CCPC, undertook a sweep on greenwashing in November 2020 in order to provide consumer protection authorities with more data and to promote compliance. Under section 42 of the Consumer Protection Act 2007 there is a general prohibition on misleading advertising and any person, including the CCPC can seek a prohibition order against a trader.

Draft Green Claims Directive and EU legislation

The draft Green Claims Directive proposes to amend the Unfair Commercial Practices Directive, which regulates misleading practices, with provisions that can be applied to environmental claims. An environmental claim is any message or representation which is not mandatory under domestic or EU law. It includes text or pictures (including labels) which, in the context of commercial communications, state or imply that a product or trader has a positive impact or no impact on the environment or is less damaging than other products.

The proposed directive seeks to prohibit the following practices:

- Displaying sustainability labels not based on a certification scheme
- Making a generic environmental claim without demonstrating excellent environmental performance
- Making a claim about the entire product when it concerns only a certain aspect
- Marketing a feature as being distinctive when the feature is a requirement by law on all products in its category

In effect the directive aims to prevent environmental claims related to future environmental performance without clear, objective and verifiable commitments and targets, and without an independent monitoring system.

Enforcement will be up to each member state and Article 14 provides the power for regulators to access information, start investigations and to require traders to adopt remedies. Penalties may also be imposed, depending on factors such as the nature and extent and duration of the infringement. Fines include, depriving those responsible of the economic benefits from infringements, confiscating of revenues, and exclusion from public procurement processes. The maximum amount of fines should be dissuasive and be at least the level of 4% of the company's total annual turnover.

The draft Green Claims Directive is currently being discussed at committee stage in the European Parliament.

Separately, on 17 January 2024, the European Parliament voted to adopt the Directive on Empowering Consumers for the Green Transition. This will then require final approval from the Council and thereafter member states will have 24 months to transpose it into national law. The Directive includes measures such as making labelling clearer and more trustworthy by banning general environmental assertions (such as products being "natural" or "biodegradable") without proof, and banning practices surrounding early obsolescence of goods or misleading claims on the durability or repairability of products

Comment

he draft Green Claims Directive and new rules promoting repair and sustainability and preventing misleading claims about the durability and repairability of products is indicative of a wider push on an EU level to empower consumers and to ensure a greater emphasis on sustainable business practice. This forms part of the Commission's Circular Economy Action Plan, enabling the EU to become climate neutral by 2050. These measures are in addition to the Corporate Sustainability Reporting Directive which requires environmental reporting by large companies and listed SMEs.

Companies will be keen not to repeat the mistakes which led to the car emissions scandal which arose from misleading claims made regarding the pollution levels emitted from diesel powered vehicles. The new rules should deter Irish companies from making unverifiable claims in their marketing but as ever, greater regulation increases the risk of claims against companies, including SMEs for greenwashing.

There is also potential for claims to be made against directors if they knowingly misled shareholders or are required to sign off on green credentials of products or services and supply chains in company reports. It is an interesting juncture for Insurers who may be reluctant to offer cover for ESG claims given the tightening of rules. However, Insurers now have the opportunity to influence behaviour by working with companies who are less environmentally friendly rather than refusing to insure them outright.

Adjudication Update: Judicial Review - An Appropriate Forum For Dealing With Payment Disputes In Construction Contracts? - *K&J Townmore Construction Ltd -v- Keogh [2023] IEHC 509*

Townmore, as main contractor on a development, sought leave from the High Court to judicially review the decision of an adjudicator to refuse to resign as adjudicator, despite *Townmore's* claims that he did not have jurisdiction to hear the payment dispute between *Townmore* and COBEC, an M&E sub-contractor on the development.

The Court noted the key question before it, was whether the High Court determination of a challenge to an adjudicator's jurisdiction should take place before the adjudication process is complete via a judicial review, or whether it should take place after the adjudication is complete, as part of the enforcement proceedings as provided for by the Construction Contracts Act 2013 (the "2013 Act"). In short the Court refused relief sought by *Townmore* to judicially review the decision of the adjudicator, holding that the determination of any jurisdictional challenge should be carried out after the adjudication is complete, at the enforcement stage.

The Construction Contracts Act 2013

- By way of brief overview, the Construction Contracts Act 2013 (the "2013 Act") allows for a resolution of payment disputes via the appointment of an adjudicator, who delivers a decision on any payment dispute referred to them under a building contract, usually within 28 days.
- The intention of the Oireachtas in introducing the 2013 Act was to ensure that construction professionals get paid money, that is determined to be owed to them by an independent adjudicator, in a much quicker and inexpensive way, than if they had to resolve their payment dispute by pursuing conventional High Court litigation.
- If a party who is subject to the adjudicator's decision is unhappy with the decision, they can challenge or appeal the decision of the adjudicator. The wording of the 2013 Act provides that an adjudicator's decision is not enforceable until there is a decision of the High Court to enforce the decision.

Background

- The adjudicator in this particular dispute was appointed to resolve a payment dispute between *Townmore*, as main contractor and COBEC, as sub-contractor.
- The key point advanced by *Townmore* was that COBEC's claim was not a payment dispute as the payment claim was premature and invalid by reason of its timing. It is on that basis that *Townmore* claims that the adjudicator didn't have jurisdiction to deal with the dispute.
- *Townmore* also argued that the adjudicator lacked jurisdiction to consider part of the claim made by COBEC, which related to its alleged entitlement to payment in respect of delay and disruption allegedly caused by *Townmore*.
- *Townmore* claims that the adjudicator didn't have jurisdiction to consider COBEC's claim for loss and expense arising from such delay and disruption, as any claim that may ultimately result in an award of damages, is a claim in damages, so is not a dispute relating to payment so as to be considered a payment claim for the purposes of the 2013 Act.

Can *Townmore* judicially review the Adjudicator's decision not to resign?

- The adjudicator accepted that he could not issue a binding decision on his own jurisdiction but he reached a non-binding conclusion that he had jurisdiction to proceed with the adjudication, and that he would not resign as adjudicator. The adjudicator had concluded that any challenge to his jurisdiction to decide a payment dispute referred to him would be a matter for a Court to rule on in any proceedings that may arise following his decision in the adjudication.
- The Court acknowledged that the key question and issue between the parties was whether *Townmore* was entitled to judicially review the decision of the Adjudicator in the case. *Townmore* had argued that the most appropriate remedy they could obtain was an Order for a judicial review.
- Conversely, COBEC claimed that the most appropriate remedy was to raise the challenge to the adjudicator's jurisdiction at the enforcement proceedings stage the Adjudicator process as envisaged by the 2013 Act.
- The High Court agreed with COBEC, noting that the Court had previously made it clear that jurisdictional disputes regarding an adjudicator appointed under the 2013 Act are dealt with at enforcement proceeding stage of the adjudicative process.

Oireachtas Intention Behind the 2013 Act

- The Court noted that the intention of the 2013 Act was to provide for a speedy and relatively cheap way of resolving construction disputes. They noted that if judicial review is not available to Townmore to challenge the adjudicator's jurisdiction in advance, but that any challenge must be brought as part of the enforcement proceedings after the adjudicator's decision is made, that appears to be a price which the Oireachtas regards as worth paying for a cheaper and quicker alternative to litigation.
- The Court felt that the Oireachtas balanced the competing interests of the parties to a construction contract dispute and determined that the public interest favoured an adjudication system for the resolution of such disputes. If a party were to be permitted to impose expensive and slow litigation in the form of a judicial review on the other party to the dispute, that would run completely contrary to the intention of the Oireachtas, as well as providing an incentive for employers and contractors to delay payments to building contractors by judicially reviewing the adjudication proc

Commentary

- This judgment has cleared up the question which arose following the commencement of the 2013 Act, as to whether an adjudicator's decision would be susceptible to judicial review. It is important to bear in mind that nothing in the judgment finds that the adjudicator's decision would *not* be susceptible to judicial review, however the High Court appears to be, and will likely remain, unwilling to grant the required leave to bring a judicial review action. That leave is required before the judicial review process can commence. The decision is welcome, as it evidences the Court's respect for a cost effective dispute resolution mechanism such as adjudication for payment disputes in construction contracts. Insurers will welcome the potential limitation of the costs of any payment dispute, with that dispute proceeding through adjudication first, before the jurisdiction of the High Court can invoked.

Arbitration Update : Beware of Waiving Rights to Rely on Arbitration Agreement

The judgment of Judge Bolger in *Kenny and Mullally v BGM Engineering Ltd and Creedon Construction Ltd* [2023] IEHC 368 delivered on 28 April 2023, explored the question of whether a contractor, who had previously issued summary proceedings for payment, could then rely on an arbitration clause within a building agreement, or whether the clause stood repudiated.

Background

- Creedon Construction Ltd ("Creedon") sought an Order staying the proceedings issued against it, pursuant to Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), as adopted by Section 6 of the Arbitration Act 2010 in Ireland.
- Creedon was a contractor engaged by the Plaintiffs in 2012 for construction of a dwelling house, and was last on site in March 2013. At that point its contract was terminated by the Plaintiffs and the works ceased.

The Building Agreement

The parties had entered into a Building Agreement and Clause 23 of the Building Agreement contained an Arbitration Agreement, which stipulated that if a dispute arises with regard to any of the provisions of the Building Agreement, that dispute shall be referred to Conciliation in accordance with the Conciliation procedures published by the RIAI. It noted further that if settlement was not reached by way of Conciliation either party can refer the dispute to arbitration.

The Model Law

Article 8(1) of the Model Law provides as follows:

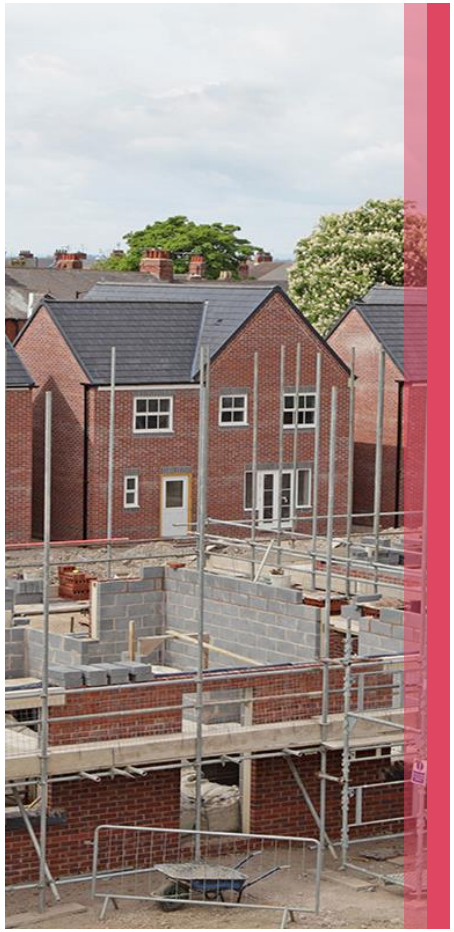
A Court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

- Creedon emphasised the mandatory nature of the Court's obligations pursuant to Article 8(1), and submitted that an (i) action had been brought before the Court in respect of a dispute between the parties, (ii) the action concerned a matter which is the subject of an arbitration agreement and finally, (iii) one of the parties had requested the reference to arbitration not later than when submitting his first statement on the substance of the dispute.

Summary Proceedings & Estoppel

The Plaintiffs did not dispute the existence of an Arbitration Agreement, but they said that the Agreement is in fact inoperative by reason of Creedon having previously issued a Summary Summons in May 2013, which the Plaintiff said they understood as Creedon waiving its entitlements to Arbitration under the Building Agreement.

The Summary Summons issued by Creedon was the subject of an earlier written judgment by Judge Barrett in April 2014. In his judgment Judge Barrett observed that the Court inferred that the parties should be considered, despite the arbitration clause in the Building Agreement, to have agreed subsequently, whether expressly or impliedly, that the matters raised in the proceedings should go to litigation.



Court's Analysis & Decision

The Court examined earlier authority which found that the commencement of summary proceedings did not repudiate an arbitration agreement. However, the case law examined concerned very specific circumstances, whereby the subject matter of the summary proceedings, fell outside of the scope of the disputes covered by the arbitration agreement in any event. Therefore, the Court in the present case noted that the question for them to consider was whether Creedon's commencement of the 2013 summary proceedings comes within those circumstances. In reaching a decision the Court said that they must assess the conduct of both the parties objectively with reference to the context in which it occurred. The Court examined a letter introduced by the Plaintiffs, which was sent by their then solicitors after Creedon's solicitors threatened proceedings arising from non-payment of monies. That letter said "*proceedings cannot be issued as there is an arbitration clause in the building agreement*". Creedon later issued proceedings seeking monies owed by the Plaintiffs, the Plaintiffs did not seek to put a stay on those proceedings.

The Court was of the view that the arbitration agreement, like other cases examined by the Court, was wide enough to encompass the issues in the current dispute that the Plaintiffs had raised as against Creedon, and the issues that Creedon had raised against the Plaintiffs in the summary proceedings. The Court found that the arbitration agreement did not allow for a "*division of disputes that do or do not come within it*" as was the case in other case law they examined. The Court concluded that they were satisfied that summary proceedings 2013 constituted repudiation of the arbitration agreement, and that repudiation was accepted by the Plaintiffs at the time.

Interestingly, the Court also observed that there was a potential for detriment to arise for the Plaintiffs which fortified their decision to refuse the application by Creedon. They noted that the passage of time from when the Plaintiffs issued the Plenary Summons in 2019, to when Creedon raised arbitration for the first time in 2021 may enable Creedon to make a limitation point in the arbitration. In fact, the Court noted that Creedon had gone so far as to reserve its rights to raise such a point in the arbitration.

The Court refused Creedon's application.

This case serves as a stark reminder of the degree of care required on the part of an Insured who is party to a Building Agreement which contains an Arbitration clause, when taking any steps arising out of a dispute, which may be interpreted as a repudiation of the arbitration agreement contained within that agreement. The Court will look objectively at the conduct of the parties. An additional degree of care is required in strategically assessing each step which is taken in the context of any dispute, by carefully examining the Building Agreement.

Business Interruption Insurance - General Developments

The pandemic may seem a distant memory but the effect of Covid-19 continues for Insurers as claims, ombudsman's decisions and court cases were still being dealt with in 2023. In this update we set out a brief overview of Covid-19 Business Interruption developments in Ireland

Hyper Trust Ltd Trading as the Leopardstown Inn v FBD Insurance Plc [2023] IEHC 455

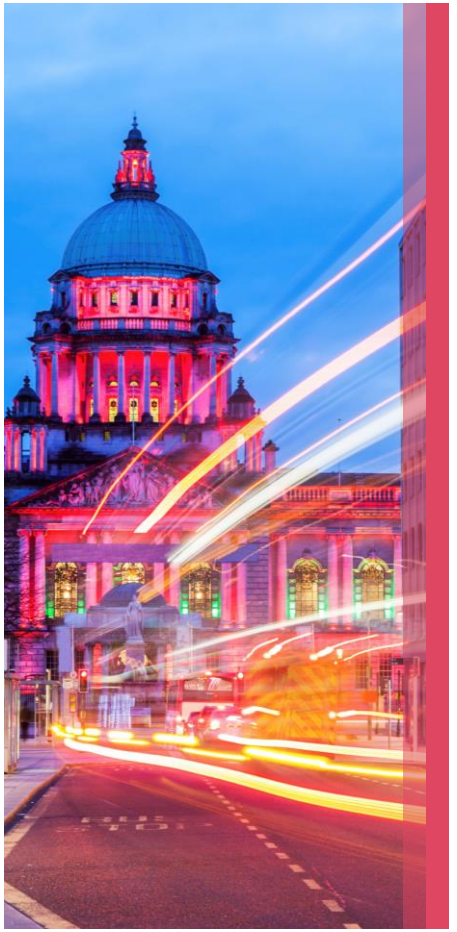
The first judgment handed down by McDonald J in 2021 contained a significant ruling on the test for causation relating to 'radius' type clauses, following imposed closure of pubs by the Government as a result of Covid-19. It was held that causation would be satisfied where an insured who could prove that there was a case of Covid-19 within a 25 mile radius of the insured's premises. This was because each outbreak of Covid-19 was deemed to be proximate cause of the imposed closure. Since then McDonald J has delivered three supplemental judgments.

On 26 July 2023 McDonald J delivered his fourth and final judgment. Although the parties had settled the matter, submissions were made so that the McDonald J could rule on outstanding issues relating to quantum, namely the principle of indemnity in relation to Government support schemes, and the methodology for calculating losses. The indemnity principle means that insureds can only recover for what they have lost and the central question here was whether an insured should account for monies received from the Government through various support schemes.

McDonald J followed the New South Wales judgment of *Mobis* and held that the indemnity principle was relevant but weight would also be given to the language used by the parties in the policy (and the latter would prevail unless there is something else in the context which requires that a different meaning should be given to the words used). McDonald J recognised that there could be potential for over-indemnification if the quantum is calculated using agreed formula but ultimately, effect should be given to the language chosen by the parties even where that does not result in a 'perfect indemnity'. McDonald J considered each of the Irish Government's support schemes and ruled that a number of them fall to be deducted from the amounts recoverable by the insureds.

Marlin Hotel v Allianz

In July 2023 the Marlin Hotel had its business interruption claim heard before the High Court. It has been reported that Marlin Hotel seeks to claim for losses incurred even though there was no physical manifestation of Covid-19 at the hotel. The hotel argued an unknown case of Covid-19 would satisfy the definition of "occurrence" which is broader than the term "manifestation" used in other policies. It argued that, on the balance of probabilities, there would have been a case of Covid-19 at the premises, which is sufficient to satisfy cover. In contrast it is reported that Allianz argued that causation was had not been satisfied as there was no evidence that Government restrictions were caused by an occurrence of Covid-19 'at the premises'. Judgment is still awaited and McDonald J will be providing an update on the delivery of his judgment in March 2024.



Financial Services Ombudsman

All of the Financial Services and Pensions Ombudsman ("FSPO") decisions for commercial insureds listed on the FSPO website for 2023 concern Covid-19 claims, which indicates that business interruption claims continue to cause disputes between insurers and insureds.

However, the most noticeable decision came via the High Court in *Chubb v FSPO* [2023] IEHC 74 which was an appeal to the High Court by Chubb of an FSPO decision relating to a notifiable disease extension. Chubb appealed despite the FSPO ruling in its favour because it argued that the decision would have triggered certain obligations under the Central Bank's Supervisory Framework for Covid-19 and Business Interruption Insurance, namely that it would have to take remedial action for customers to take benefit of the decision.

The FSPO considered whether an occurrence of Covid-19 had to be discovered at the insured premises or whether it was sufficient to be discovered elsewhere in order to be deemed an 'occurrence of a Notifiable Disease at the Premises' as per the policy. The FSPO decided that the policy did not require Covid-19 to have been discovered at the premises as the policy wording only required the 'likelihood' of an occurrence of Covid-19 at the premises.

Ultimately the FSPO held that the policyholder had failed to discharge the evidential burden in this case that there was an occurrence of Covid-19 that was likely to result in the occurrence of a notifiable disease at the premises. The High Court examined the decision and recognised that the decision was a very significant finding which would greatly widen the circumstances in which a valid claim might be made. The High Court overturned the decision on the basis that serious errors were made as the FSPO had failed to provide an analysis of the text or engage properly with the insurer. The High Court considered a situation where the FSPO decision 'might nevertheless have been correct, albeit for the wrong reasons' and whether it should embark on its own detailed analysis, however it held that it would be inappropriate for it to examine the matter afresh in the appeal.

Conclusion

While a number of years have passed since the pandemic took hold, there is no clear end in sight for Covid-19 business interruption claims at the present moment. In 2024 we expect that Covid-19 claims and disputes will continue to feature, albeit perhaps on a less frequent basis. We await the judgment in the Marlin Hotel case to assess any wider impact that decision may have for insurers and insureds.

It is worth acknowledging that litigation in this area has been more active in the UK compared to Ireland, owing to the stricter regulatory framework implemented by the Central Bank of Ireland at the start of the pandemic. UK insurers who were appealing to the Supreme Court in *Stonegate* case settled late in 2023 and the Court of Appeal handed down its judgment in *Various Eateries* on aggregation in early January 2024. However other disputes on other policy wordings continue. Any developments will be closely watched in Ireland as they are persuasive to the Irish Courts.

Healthcare

- O'Keeffe & Anor v Governor and Guardians of the Hospital for the Relief of the Poor Lying in Women Dublin
- Assisted Decision-Making (Capacity) Act 2015 – A Functional Test for Assessing Capacity
- High Court considers the capacity (and advanced healthcare directive) of prisoner who refused food and fluids
- Health Information Bill 2023 – A Review
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- High Court provides clarity on the requirements when briefing expert medical witnesses
- Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023 – An Update
- Telemedicine update
- Developments in relation to damages for non-material loss under the GDPR – from a Healthcare perspective
- High Court considers whether to consent to life saving treatment for person lacking capacity
- High Court issues warning to plaintiffs seeking to withdraw special damages claims

O'Keeffe & Anor v Governor and Guardians of the Hospital for the Relief of the Poor Lying in Women Dublin - Court of Appeal holds in favour of Open Disclosure

We previously wrote an article on the decision of the High Court in O'Keeffe & Anor v Governor and Guardians of the Hospital for the Relief of the Poor Lying in Women Dublin[1] which involved discovery of confidential internal risk management documents.

Overview

In March 2023, the Court of Appeal (the "**COA**") overturned[2] the High Court's previous decision , which held that the statements of a hospital's staff in a risk management enquiry were not discoverable, as they were made with confidentiality assured. The COA overturned this ruling, noting that the assurance of confidentiality was not evidenced, and made further important comments on the presumption of discoverability.

Background

The Plaintiffs in this matter were the parents of a baby girl, Fiadh, who died shortly after birth. They brought a claim against the Rotunda Hospital (the "Hospital") regarding their child's medical treatment. The Hospital had conducted a Risk Management Enquiry (the "Enquiry") into the incident and provided the Plaintiffs with the subsequent report.

The Plaintiffs sought discovery of the statements made by the Hospital staff during the Enquiry, which the Hospital claimed were not discoverable, as staff were assured of the confidentiality of any statements made. The Plaintiffs' position was that these statements would help them in establishing a medical negligence claim, and that the interests of justice should take precedence over the confidentiality of these statements.

Confidentiality versus the Administration of Justice

In the High Court, Twomey J. outlined the tension between the public interest of improving future patient outcomes and the public interest in the administration of justice. In deciding in favour of the Hospital, he noted that to grant the disclosure of the statements of Hospital staff to a risk management enquiry would undermine the confidentiality that is essential to the proper discharge of the enquiry and improving future patient care. Without such assurance of confidentiality, Twomey J. noted that hospital staff might be reluctant to participate in such enquiries.

Court of Appeal Decision

The Plaintiffs appealed the High Court decision and it was overturned unanimously in the COA.

In the High Court hearing, the Hospital had submitted that the Enquiry was, inter alia, undertaken with reference to the HSE Incident Management Framework, that it was clinician led without lawyers involved, and that staff members were assured of the confidentiality of their statements. The COA found that there was no evidence to support these submissions and, particularly, that there was *"manifestly no evidence of any such confidentiality having been established"*.

In commenting on the discoverability of documents, the COA outlined that once a document's relevance is established, this gives rise to the presumption that the document's discovery is necessary, which may be rebutted by the requested party. In order to rebut this presumption, the requested party must establish the nature and extent of the confidentiality, which must be supported by evidence.

Noonan J. noted that solely establishing that statements were given in confidence would not shield them from discoverability and that the evidence would have to go considerably further to rebut the presumption. The Court would have to decide whether such confidentiality outweighed the interests of favouring disclosure. He further commented, obiter, that he would disagree with preserving the confidentiality of the Hospital's staffs' statements.

Additionally, the COA disagreed with the trial judge's view that without the assurance of confidentiality, hospital staff might be reluctant to participate in risk management enquiries. Noonan J. stated this was a "somewhat retrograde position to adopt", in contrast to the move towards open medical disclosure by healthcare professionals over the last several decades.

Conclusion

The High Court decision was repealed on the basis that the Hospital's submission lacked evidence and it was therefore unnecessary to decide on the issue of discoverability of confidential statements. Noonan J. did, however, note that the evidence would have to go very considerably further to rebut the presumption of discoverability even if confidentiality had been established.

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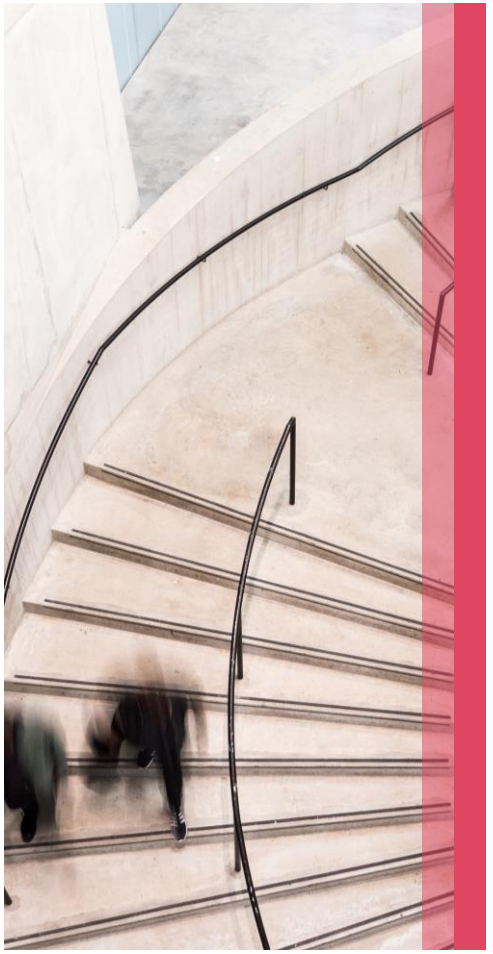
[1] *O'Keeffe & Anor v Governor and Guardians of the Hospital for the Relief of the Poor Lying in Women Dublin, Court of Appeal, 30 March 2023, Appeal Number: 2022/250; Neutral Citation Number [2023] IEHC*

[2] *O'Keeffe & Anor v Governor and Guardians of the Hospital for the Relief of the Poor Lying in Women Dublin, High Court, Twomey J, 26 July 2022, [2022] IEHC 463*



Assisted Decision-Making (Capacity) Act 2015 – A Functional Test for Assessing Capacity

Overview

The Assisted Decision-Making (Capacity) Act 2015 (the "Act") provides a statutory framework for individuals to be assisted and supported in making legally binding decisions about their welfare, property and affairs.

Although the Act was signed into law in December 2015, the complete framework to implement the legislation was not in place. Commencement of the Act was delayed to allow for amending legislation, the Assisted Decision-Making (Amendment) Bill 2022, to be implemented. The full commencement of the Act took place on 26 April 2023.

The Act provides for a functional test for assessing a person's capacity and introduces three new decision-making arrangements. The Act also provides a legal framework for the arrangements of Enduring Powers of Attorney ("EPAs") and Advance Healthcare Directives ("AHDs"), and abolishes the previous system of Wardship

Capacity

The Act establishes a functional assessment of capacity, which allows for a nuanced approach in determining capacity and also allows for changes in a person's capacity over time.

Section 3(1) of the Act defines capacity as the ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made in the context of the available choices at that time. An individual's ability to make a decision is assessed based on a specific decision that has to be made at a specific time. Individuals therefore do not lose capacity to make decisions in general.

In assessing a person's capacity, consideration must be given to their ability to:

- Understand the information relevant to the decision;
- Retain that information for long enough to make a voluntary choice;
- Use or weigh that information as part of the decision-making process; and
- Communicate their decision.

If one or more of the above criteria are not met, a person will be considered to lack capacity, but only in relation to a specific decision at a specific time.

New Arrangements

The Act introduces three new types of decision-making arrangements:

1. Assisted Decision-Making

Where a person considers that their capacity is in question or may shortly come into question, that person (Appointor) may appoint a Decision-Making Assistant to help them to access information or to understand, make or express decisions about their welfare, property and affairs.

2. Co-Decision-Making

Co-decision-making allows the Appointor to appoint someone else to jointly make decisions with them about their welfare, property and affairs.

3. Decision-Making Representative appointed by the Court

The Act provides for the Court to appoint, in certain circumstances, a decision-making representative to act on a person's behalf and make certain decisions for them.

Enduring Power of Attorney (EPA) and Advance Healthcare Directives (AHD)

Prior to the commencement of the Act, EPAs and AHDs were recognised in Ireland, however the Act provides for their legal framework. EPAs and AHDs allow for individuals to plan arrangements, should they lose their capacity in the future.

An AHD is an arrangement that allows a person (the directive-maker) to set out their wishes regarding medical and healthcare treatment in case they are unable to make such decisions in the future. If the directive-maker wishes to ensure that the directive will be implemented insofar as is possible, they may decide to appoint a Designated Healthcare Representative to act on their behalf regarding the decisions outlined in the AHD.

An EPA is an arrangement made by a person (the Donor) that gives authority to another person (the Attorney) to act on behalf the Donor if and when the Donor loses the capacity to make certain decisions in the future. These decisions can be about the Donor's personal welfare, property and financial affairs.

Exiting Wardship

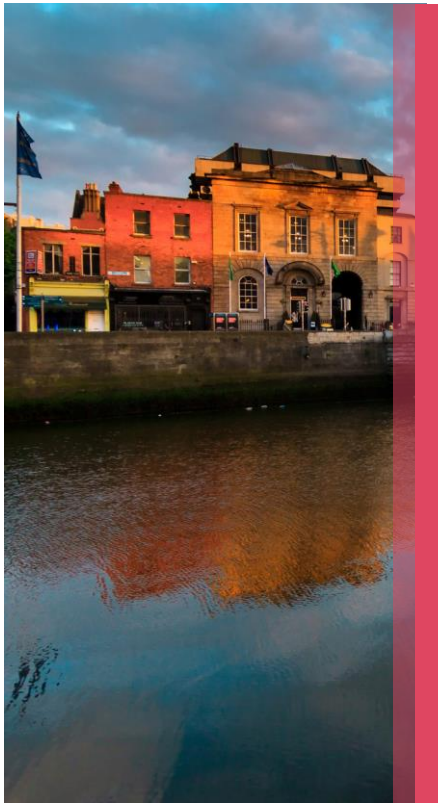
The Act brings an end to the current system of Wardship and adults can no longer be made a Ward of Court. All existing adult Wards of Court are currently undergoing review and will be discharged from wardship within three years of the commencement of the Act.

Once the Court has completed a review of a Wardship, the Court will make a declaration with regard to capacity and, following this, will make an Order as to whether a decision-making arrangement is needed.

Conclusion

The functional approach to assessing capacity establishes that decision-making capacity is issue-specific and time-specific. The Act departs from a determination of lacking capacity generally, and has therefore allowed for a more minimal restriction of an individual's rights.

Indeed, the Act has established a significant overhaul in decision-making assessments and arrangements, and it is therefore imperative for healthcare and social care professionals to be well versed in the changes made by the commencement of the Act.



High Court considers capacity of prisoner who has refused food and fluids, as well as applicability of prisoner's advanced healthcare directive - *Governor of A Prison v X.Y.* [2023] IEHC 361

This matter came before the President of the High Court on foot of an application by the Governor of A Prison seeking assistance in respect of a prisoner, with full capacity, who had decided to cease taking food and fluids in the full knowledge that, if the prisoner persisted in that decision, he or she would inevitably die. Further, the prisoner, acting with full capacity, had made an advance healthcare directive pursuant to the provisions of Part 8 of the Assisted Decision Making (Capacity) Act, 2015 (as amended) ("the 2015 Act"). No court had previously considered the operation of Part 8 of the 2015 Act.

The prisoner in question maintained their refusal to consume foods or fluids from 5 May 2023 to the hearing on 18 May 2023 and stated that it was their intention to end their life. Further, the prisoner executed two advance healthcare directives, one on 12 May 2023 and one on 13 May 2023. The applicable directive was the later directive, executed on 13 May ("the AHD"). Pursuant to the AHD, the prisoner made clear that:

(i) Their wishes were:

a. Not to receive any medical intervention and medication, and

b. If actively dying, a preference to do so in a clinical setting, such as a hospital or hospice.

(ii) That those wishes were to be respected, should the prisoner become incapacitated or unconscious; and,

(iii) That the AHD was to apply to life sustaining treatment and even if the prisoner's life was at risk.

At the time of the making of the AHD and at the time of the hearing, the prisoner had and continued to have full capacity.

Following a full hearing, the Court made a number of declarations as follows:

1. A declaration pursuant to the inherent jurisdiction of the Court that the prisoner had capacity to make a decision to refuse food and fluids and, further, that the prisoner had the capacity to refuse all forms of medical intervention, should the necessity for such intervention arise;

2. A declaration pursuant to the inherent jurisdiction of the Court that the Governor's decision not to feed the prisoner against their wishes, namely, not to force-feed the prisoner or to provide any medical intervention, for so long as the prisoner had capacity, was lawful;

3. A declaration pursuant to the inherent jurisdiction of the Court that for so long as the prisoner had capacity, the Governor is entitled to give effect to the prisoner's wishes not to be fed or to receive fluids or to receive any medical intervention against their wishes;

4. A declaration pursuant to section 89(2) of the 2015 Act that the prisoner's AHD was valid;

5. A declaration pursuant to the inherent jurisdiction of the Court that the Governor was entitled to give effect to the prisoner's AHD insofar as it was applicable to the matter set out in that directive;

6. A declaration pursuant to the inherent jurisdiction of the Court that the prisoner's decision to refuse food and fluids and to refuse medical intervention in the event that the prisoner lost capacity or became unconscious, as expressed in the prisoner's AHD should remain operative in the event that the prisoner became incapable of making a decision to accept food of fluids or medical treatment; and,

7. A declaration pursuant to the inherent jurisdiction of the Court that the Governor's decision not to feed the prisoner against their wishes, namely, not to force feed the prisoner or to provide any medical intervention, in the event that the prisoner became incapacitated or unconscious, was lawful.

Additionally, the Court made an order that the prisoner could be transferred to a hospital or other clinical facility if that was required for end of life treatment, while continuing to adhere to the prisoner's AHD and the wishes of the prisoner regarding food and fluids refusal and medical intervention. The Court also granted liberty to apply at short notice in the event that there was any issue about the transfer of the prisoner to a hospital or other clinical facility in accordance with the wishes expressed by the prisoner in the AHD. Finally, the Court made an order on consent that the Governor pay the prisoner's costs of the proceedings and gave liberty to apply.

In explaining the basis for the decisions made, the Court confirmed that, in light of the evidence provided, the Court was obliged to proceed on the basis that the prisoner was, at all times, a person with full capacity to decide whether or not to accept or refuse food and fluids as well as any other form of medical intervention or treatment. The Court also accepted that the adherence of the Governor to the prisoner's stated wishes to refuse food and fluids and to decline medical attention on the terms set out in the AHD was consistent with the provisions of the Prison Rules, 2007 (as amended).

The Court considered a number of judgments in the area and agreed that, in light of the prisoner's constitutional rights to bodily integrity, including integrity of mind and personality, and to the prisoner's right to autonomy, it was not appropriate that the prisoner's will should be overwhelmed so as to force feed them or medicate them contrary to their express wishes. The Court further agreed that the prisoner's core and basic rights as a human being would be violated by such action.

The Court then considered the provisions of Part 8 of the 2015 Act. The Court confirmed that there was "no doubt" that, on the evidence, the AHD of 13 May was in compliance with the formal requirements of Part 8 of the 2015 Act. The Court also found that the AHD was made voluntarily and that the prisoner had not done anything which was "clearly inconsistent" with any of the relevant decisions outlined in the directive at a time when he or she had a capacity to do so. Accordingly, none of the disapplying factors of section 85(1) applied. As a result, the Court held that the AHD made by the prisoner on 13 May 2023 was valid.

When considering the provisions of section 85(2) and the circumstances in which a directive would not be applicable, the Court held that, since the prisoner had capacity to give or refuse consent to the treatment outlined in the AHD up to and including the date of the decision, the applicability of the AHD would only arise if the prisoner were to lose capacity to give or refuse consent to the treatment outlined in the AHD. On this basis, the AHD was "not applicable" having regard to section 85(2). It might, however, become applicable were the prisoner to lose capacity and provided that the other disapplying factors contained in subparas. (b) and (c) did not apply.

The Court noted that the express provisions of the AHD referred to the prisoner's wishes in respect of life-sustaining treatment and, accordingly, no further consideration arose pursuant to section 85(3) of the 2015 Act.

The Court was not required to provide a definitive view on the AHD and section 85(4) as, while the prisoner stated in the AHD that the directive was being made in relation to the prisoner's current food and fluid refusal in the prison, the directive itself did not expressly contain a directive as to the provision of food and fluid. As a result, the Court suggested that it would tend to the view that force-feeding or forcibly providing hydration to a person would probably amount to "artificial nutrition" or "artificial hydration" as those terms were used in section 85(4)(b). In this regard, the Court stated that a definitive decision on that point should await a case in which the issue directly arose.

Finally, the Court noted that the provisions of section 86(1) meant that, if the AHD were to become applicable in the event that the prisoner were to lose capacity, the prisoner's expressly stated wishes in the AHD would have to be given effect to as if the prisoner had at the point in time at which the treatment was being considered capacity to refuse the relevant treatment. In respect of the provisions of section 86(2) and the imposition of any civil or criminal liability on a healthcare professional who complied with a refusal of treatment set out in a directive, the Court held that, on the evidence, it was clear that the healthcare professionals involved in the treatment and care of the prisoner were seeking to comply with the refusal of treatment set out in the AHD and had reasonable grounds to believe - and did believe – that the AHD was valid and, were the prisoner to lose capacity, would be applicable. As a result, the Court held that there was no question of any civil or criminal liability being imposed on those healthcare professionals by reason of any provision contained in Part 8 of the 2015 Act.

On the basis of the foregoing, the Court was satisfied to make the above declarations in line with the provisions of section 89(2) of the 2015 Act.

The Health Information Bill 2023

In Ireland, hospitals, largely due to historic issues and funding methods, particularly in Ireland's main teaching hospitals, are a mixture of private and semi-private facilities. These are typically based within the same campus, voluntary (typically run by a religious order and funded by the State), independent (e.g. the three maternity hospitals) and State-run hospitals, all with separate computer architecture, none of which communicate effectively with each other. The recent significant hacking of HSE records has shown how vulnerable the entire physical infrastructure is.

The result of the above is that patients' medical records are held on different computer systems (sometimes within the same hospital campus) with no one hospital having access to a complete set of medical records, aside from a patient's GP, who receive patient test results/procedure outcomes by email/post. Information provided in emergency / acute hospital admission situations, is largely based on the patient / patient's family providing an oral medical summary, often meaning that treating doctors are treating patients with insufficient medical history / allergy information, which can have catastrophic consequences.

Hospitals / GPs do not have access to each other's calendars and available appointments, leading to delays, long waiting lists, inefficiencies, patient distress and significant cost overruns. In addition to this, there is no centralised database to gather information in relation to the health of the nation generally. If regional differences, patient outcomes and national chronic illness statistics were contained on a centralised database, the populations' future healthcare needs could be planned and budgeted for.

The Health Information Bill 2023 seeks to address the above by way of legislating for:

a) National digital cloud-based records of significant health data (e.g. underlying conditions, allergies and recent procedures) for every individual in Ireland;

b) A very ambitious national platform allowing healthcare providers, at the point of care / treatment (subject to patient consent), to view more detailed patient records held/maintained by others (e.g. other hospitals) but hosted by the HSE; eventually morphing this platform into a centralised "real time" record system of all patient information including for example dental and pharmacy etc;

c) The establishment of a National Health Information Authority with mandatory obligation / powers to collate large scale health information from providers for a range of specified purposes including service delivery / management, identification of public health threats, policy development, clinical auditing, research, and statistics;

d) A duty to share, obliging healthcare providers to share the information / records (to address Data Protection concerns);

e) Safeguarding measures to protect patient personal data and / or associated rights, including, patient access rights; and

f) Align the above with the proposed EU Regulation on the European Health Data Space, which intends to aggregate European health data on an equivalent basis.

The intention of the proposed legislation is to:

a) Create a National digital cloud-based record of significant health data (e.g. underlying conditions, allergies and recent procedures) for every individual in Ireland;

b) A very ambitious national platform allowing healthcare providers, at the point of care / treatment (subject to patient consent), to view more detailed patient records held/maintained by others (e.g. other hospitals) but hosted by the HSE; eventually morphing this platform into a centralised "real time" record system of all patient information including for example dental and pharmacy etc;

c) The establishment of a National Health Information Authority with mandatory obligation / powers to collate large scale health information from providers for a range of specified purposes including service delivery / management, identification of public health threats, policy development, clinical auditing, research, and statistics;

Conclusion:

The Government is currently preparing a draft Bill, which it aims to put before the Oireachtas, with the goal to have the legislation enacted by Autumn of 2024. The legislation and the fundamental changes which this proposed legislation will address, for the delivery of individual and national healthcare is potentially groundbreaking, to be welcomed and is long overdue. It will also potentially speed up access to records when defending a claim.

Consolidation of Actions - Recent Caselaw

The Rules of the Superior Courts allow for consolidation, but consolidation is relatively rare and there is a dearth of recent jurisprudence on the matter. However, the recent Judgment of Hyland J, arising from the related 'hybrid' cases of *Ryan v O'Donnell & Ors*[1], *and Ryan v Ethicon PR Holdings Unlimited Company & Anor*[2], *and Brennan v Paul Hughes & Ors*[3], *and Brennan v Ethicon PR Holdings Unlimited Company*[4] should be regarded as a welcome development.

This Judgment concerns two motions to consolidate two different sets of proceedings, heard together because of the similarity of issues raised in the matters. These claims arise in respect of both clinical negligence and defective medical products. There were separate proceedings in respect of the clinical negligence claims and defective products claim. The Plaintiffs' sought to consolidate their proceedings so that all issues in relation to their alleged personal injuries could be heard in the same set of proceedings.

Background to the Ryan Proceedings

In the first set of proceedings (the Ryan 1 Proceedings), the Plaintiff had a pelvic mesh device inserted at the Waterford Regional Hospital on 24 September 2012 for the purpose of easing urogynaecological complaints she had been experiencing. A device known as Gynecare TVT Laser Tension Free Support manufactured by Ethicon PR Holdings Unlimited Company was placed by the First Named Defendant. The Plaintiff pleaded the product used was unfit for use and dangerous.

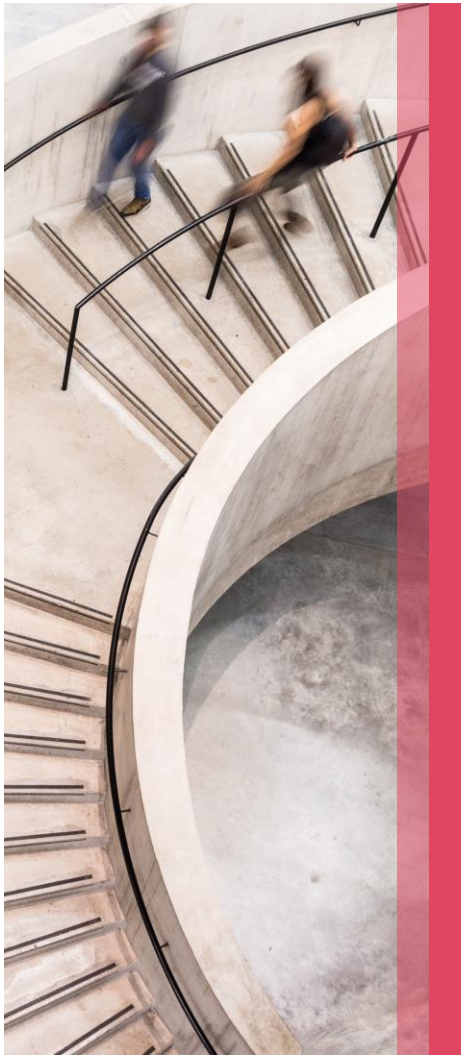
In the second set of proceedings (the Ryan 2 Proceedings), the Plaintiff underwent a second procedure in July 2015 to remedy the injury sustained in the previous procedure in 2012. In this instance, the Plaintiff had an unknown product inserted by the Fourth Defendant, the Consultant. It is further pleaded that the Defendants failed to inform the Plaintiff of the risks of the procedure and / or to ensure that she was aware of and understood the potential risks. The Plaintiff further pleaded that the product used was unfit for use and not fit for purpose.

Whilst not identical, the facts and proceedings in the Brennan cases were largely similar and fell to be considered using the same rationale and for the same underling reasons. Hyland J. considered Order 49 Rule 6 of the Superior Court Rules which provides that: *"Causes or matters pending in the High Court may be consolidated by order of the Court on the application of any party and whether or not all the parties' consent to the order."*

The Plaintiff seeking consolidation claimed that she suffered an injury caused by the alleged deficiencies in the medical device implanted and the manner in which it was implanted.

Hyland J. reasoned that, should the cases remain unconsolidated, the questions including whether the Plaintiff was injured, how the injury occurred, the cause of the injury, interaction between different factors in causing that injury, allocation of liability and assessment of damages and costs would require to be answered

[1] Record No. 2018/8314P ("Ryan 1")
[2] Record No. 2020/5899P ("Ryan 2")
[3] Record No. 2017/10245P (Brennan 1)
[4] Record No. 2018/9902 (Brennan 2")



on two different occasions by two different courts. The Court said that this could lead to two Judges being required to determine the matter without having before them all the constituent parts of the related proceedings, leading potentially to confusion at the very least and possibly a miscarriage of justice if the cases remained separate.

The Court followed the principles set out by McCarthy J in the Supreme Court case of Duffy v News Group Newspapers Ltd [1992] which outlined the tests to be applied:

1. Is there a common question of law or fact of sufficient importance?
2. Is there a substantial saving of expense or inconvenience?
3. Is there a likelihood of confusion or miscarriage of justice?

McCarthy J indicated that there was a *"heavy burden"* which lay on the party seeking to consolidate.

All but one of the Defendants in the Ryan cases were largely supportive on the basis of costs and efficiency. The manufacturer, Ethicon objected on the basis of potential costs exposure. Hyland J. determined that the Court must have regard to the costs of all parties involved and not just one party. Very similar considerations applied in relation to the Brennan cases although the facts were different.

Directing consolidation in the Ryan Proceedings

Hyland J. directed consolidation in both cases. In the Ryan proceedings, Hyland J noted that *"in relation to the common question of fact, the Plaintiff argues that the trial Judge will be required to identify the nature of the Plaintiff's alleged injuries, if any, identify the causative factors of that injury, identify the prognosis of the plaintiff and assess damages (if satisfied of liability and causation) and that the resolution of those questions will involve the defendants in both Ryan 1 and Ryan 2"*.

The decision in both these cases is a welcome restatement of the law in consolidation proceedings and also considers costs and logistical issues involved in detail.

High Court provides clarity on the requirements when briefing expert medical witnesses - *Charlena McLaughlin v David Dealey and Health Service Executive* [2023] IEHC 106

In its judgment, the High Court (Ferriter J.) held that it was permissible for solicitors to refer clients directly to medical specialists for the purposes of obtaining a medical report in the context of litigation.

The High Court noted that it had been asked to attach less weight to the evidence provided by the Plaintiff's medical expert, a Consultant Orthopaedic Surgeon, than to the evidence provided by two medical experts instructed by the Second Named Defendant (a Consultant Orthopaedic Surgeon and Consultant in Emergency Medicine, respectively).

The Court considered this issue and the legal arguments arising. The Court also noted the view expressed in an earlier case also determined by the High Court, where it had been held that a solicitor should not suggest to a plaintiff that he could refer her to a consultant, or range of consultants, chosen for legal reasons, to support the claim for damages as there was no medical basis for such referrals.

Ferriter J. said that the above statement went too far. It was noted that there was nothing in principle prohibiting an independent medical expert being called on behalf of a plaintiff (subject to the ordinary requirement that such expert evidence was reasonably necessary to enable the court to determine the issues). Rather, the Court held that it was important that any independently retained expert was properly informed as to the plaintiff's relevant medical history, has had appropriate opportunity to examine the plaintiff and provided his or her expert opinion to the court objectively and in accordance with their overriding duty to the court. The Court stated that a medical expert who was ignorant of material aspects of a plaintiff's medical and treatment history was not going to be in a position to provide meaningful assistance to the court (and through such assistance, to the plaintiff's case).

The Court made reference to the Law Society's document dated November 2008 entitled "Medico Legal Recommendations" and noted that, while the recommendations did not have legal status, they correctly proceeded on the basis that there was nothing inappropriate per se in a solicitor acting for a plaintiff advising his or her client to obtain the opinion of a medical expert in order to allow the plaintiff's case to be best advanced at trial. This was all the more so where it was almost inevitable that a defendant (very often a better resourced party) would seek to retain expert medical opinion on its side in the event of there being any dispute as to the injury type or severity.

Ferriter J. noted that it was not always possible or practical for a solicitor to obtain a specialist referral through the client's GP and concluded that, in light of the duties a plaintiff's solicitor owed to his client, such a solicitor could not be faulted for engaging a medical expert witness directly in an appropriate case. The critical obligation was to ensure that such a medical expert witness was properly briefed with all relevant information and past medical history and that the medical expert witness prepared his or her opinion thereafter in accordance with his or her overriding duties to the court. A failure to comply with such obligations would inevitably be exposed in cross-examination and would most likely result in reduced – and, depending on the level of non-compliance, potentially very reduced – weight being attached to that expert's evidence.

This decision highlights the importance of providing expert medical witnesses with all of the relevant documentation and information in respect of the injured party. A failure to disclose relevant information could result in any award of damages being reduced, and potentially significantly reduced, depending on the level of non-compliance evident.

Separately and in the wake of this decision, the Law Society of Ireland's Litigation Committee developed the Medical Report Protocol to encapsulate the principles set out above.

Patient Safety (Notifible Incidents and Open Disclosure) Act 2023

The Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023 (the "Act") was signed into law on 2 May 2023. Although not yet commenced, the Act will require mandatory open disclosure of serious patient safety incidents, with transparency and improved communication at its focal point.

Purpose

The overarching purpose of the Act is to improve the health service's management of patient safety incidents and, consequently, improve the safety of patients. The Act outlines numerous provisions to achieve this purpose, including:

Deal with claims promptly;

1. Mandatory Open Disclosure of Notifiable Incidents
2. Notification of Notifiable Incidents to Regulatory Bodies
3. 'Part 5 review'
4. Clinical Audit
5. Liability Protection
6. Extension of the Remit of the Health Information and Quality Authority (the "HIQA") to the Private Sector.

1. Mandatory Open Disclosure of Notifiable Incidents

Mandatory open disclosure of notifiable incidents is established under Part 2 of the Act. Notifiable incidents are specified in Schedule 1 of the Act, almost all of which being incidents where a death has occurred. However, under Section 8, the Minister for Health may make regulations that specify further incidents as notifiable incidents.

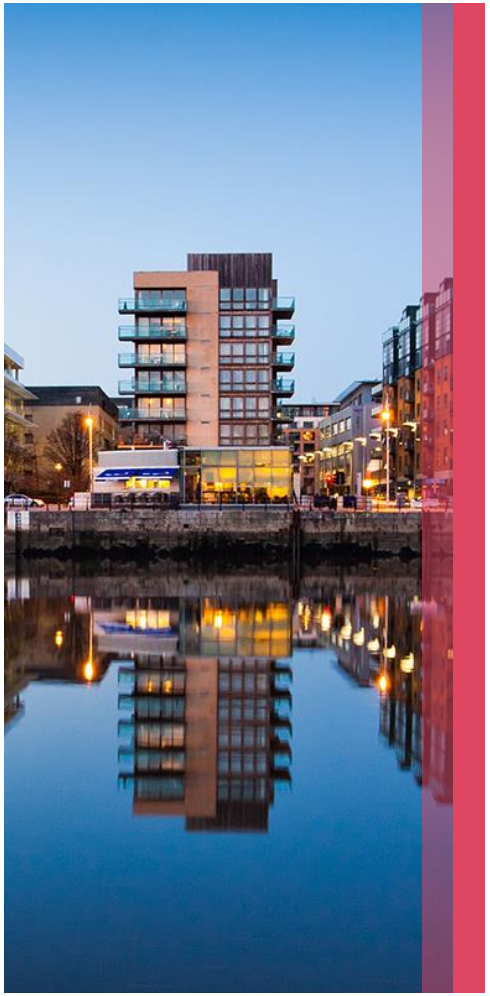
Under Section 7 of the Act, a health services provider is obliged to make an open disclosure to the patient concerned, or other relevant person, when a notifiable incident has occurred. Health practitioners, such as registered medical practitioners, are also obliged, when having formed the opinion that a notifiable incident has occurred, to inform the relevant health services provider of the incident.

The procedure for making such a disclosure is outlined in Part 3 of the Act. This is to be done by way of an open disclosure meeting held in person, or by other means if so requested by the patient or their relevant person. A patient may refuse to participate in an open disclosure meeting, however the health services provider is still required, as per Section 19, to provide an open disclosure meeting if said patient changes their mind within five years of refusal. As outlined in Section 20, all necessary steps must be taken by the health services provider to contact the patient to arrange an open disclosure meeting.

A health services provider is also required to provide a written statement of the information given at the open disclosure meeting to the patient, or their relevant person, within five days of the meeting.

2. Notification of Notifiable Incidents to Regulatory Bodies

Mandatory open disclosure of notifiable incidents is established under Part 2 of the Act. Notifiable incidents are specified in Schedule 1 of the Act, almost all of which being incidents where a death has occurred. However, under Section 8, the Minister for Health may make regulations that specify further incidents as notifiable incidents.



3. 'Part 5 review'

Part 5 of the Act establishes the 'Part 5 review', in which a patient who has undertaken a cancer screening provided by the Health Service Executive's National Screening Service, may request a review of the results. Under Section 37, health services providers are obliged to make an open disclosure of the review to the patient, or their relevant person.

4. Clinical Audit

Improving patient care is furthered under the clinical audit process outlined in Part 6 of the Act. As per Section 58, a clinical audit is a quality improvement process to improve patient care. This may be achieved through a systematic review of care against specific clinical standards or clinical guidelines, and taking action to improve care when such standards or guidelines are not met.

5. Liability Protection

An important element of open disclosure for health practitioners and health services providers is the legislative protection from liability. Any information or apologies given at an open disclosure, in a Part 4 notification, or in a clinical audit, do not constitute an admission or evidence of liability or fault. Accordingly, such information shall not invalidate insurance, constitute an admission by health practitioners of professional misconduct, or be admissible in proceedings. This therefore encourages the practice of open disclosure by health practitioners and health services providers, without fear of legal ramifications.

6. Extension of the Remit of the HIQA to the Private Sector

One final area of note in the Act is the amendment of the Health Act 2007 (the "2007 Act") under Part 7, allowing for the HIQA's remit to extend to the private healthcare sector. Under Section 63 of the Act, HIQA may set standards on safety and quality in relation to the services offered by health services providers. Furthermore, under Section 64, where the HIQA believes there is a serious risk in the provision of a particular health service, it can carry out an investigation. This section amends Section 9 of the 2007 Act, allowing for investigations into private health services providers.

Next Steps

At the time this article was written, the Act had not yet come into force, as it awaits a commencement order signed by the Minister for Health. The Health Service Executive has stated that there are a number of preparatory steps required before commencement, however the intention is to commence the Act at the earliest possible date. With the imminence of the provisions of the Act coming into force in mind, it would certainly be advisable for medical professionals to be well versed in the new practices the Act will introduce.

Telemedicine - An Update

Following on from two previous market update articles prepared since the Covid pandemic, we continue our observation of telemedicine in this update article.

Patients are increasingly (particularly so post Pandemic) resorting to telemedicine, i.e. remotely attending their doctor via telephone, video calls for medical treatment/advice instead of physical visits to the GP's surgery.

Public opinion research was conducted on behalf of the Irish Medical Council in 2020 and found a significant increase in the use of telemedicine services. Between March 2020 and October 2020 there was a significant increase in telemedicine usage, from 4% to 21%, mainly due to the impact of COVID-19 on the Health Services. Telemedicine played a central role in caring for patients during the COVID-19 pandemic.

Many patients are favouring telemedicine for medical treatment over physical visits to the GP's surgery. New research carried out by the Medical Council in 2023, shows that one in four people (25%) report not having visited their GP physically in the past year which is an increase from 15% in 2020.

Telemedicine and Medical Negligence

A number of delayed diagnosis and misdiagnosis cases involving remote/telemedicine during the COVID crisis have been initiated in the UK and Ireland. We will see emerging law in telemedicine, as these cases progress through the Courts/time passes, particularly in circumstances where current technological limitations prevent contemporaneous remote testing of vital statistics (temperature, heartbeat, blood pressure etc.) to accompany a remote consultation/diagnosis. While this form of treatment may be sufficient for common/mild illness, a misdiagnosis of a more serious illness could well create a serious liability, as is apparent from the case discussed below.

An inquest was carried out in January 2023 into the death of David Nash, a student from Leeds in the UK. Over the space of nineteen days, Mr Nash participated in four remote consultations. He died on 4 November, 2020 of an ear infection which caused a brain abscess leading to meningitis. The inquest carried out determined that there was a missed opportunity to seek face to face care on 2 November 2020. Had he been directed to seek face to face or urgent care, it is likely that he would have undergone neurosurgery ten hours earlier which was more likely than not to have been successful.

Telemedicine and Duty of Care

It is also not at all straightforward as to when a duty of care arises in telemedicine. Whether a doctor-patient relationship already exists and determining when it began, will play an increasingly important role in telemedicine medical negligence cases as regards diagnosis timelines.

In the traditional provision of medical care a duty of care arises between a clinician and a patient, when they undertake to care for a patient, whether on foot of a request from the patient or following a referral from a colleague. [1]

What needs to be considered is when the duty of care begins – does it arise once the patient signs up contractually online to a clinic providing medical care and provides credit card details (which may be many hours before the doctor-patient consultation occurs, which could be catastrophic in the case of a very serious illness) or is something further required. There is therefore an increasing blurring of lines in this area which remains to be clarified by the Courts.

Failure to follow advice provided

A patient's failure to follow the over-the-phone advice may prevent the formation of doctor-patient relationships. In the case of *Miller .v. Sullivan* (1995) a prospective patient was suffering from the symptoms of a heart attack. He called the doctor, who advised that he immediately attend the doctor's office. The prospective patient, a dentist, did not follow the doctor's advice and continued to treat his own patients. Upon arrival at the doctor's office he suffered a fatal heart attack in the waiting room.

The Court held that a telephone call advising a prospective patient as to a course of treatment "constitutes professional advice for the purpose of creating a physician-patient relationship". The advice that the doctor provided was correct, but the advice was not followed. As the prospective patient refused the recommended course of treatment, no consensual contract for professional services was formed between the parties and therefore no physician-patient relationship was established.

[1] *Mills 2007.*

The key questions Courts have asked in order to determine whether a doctor-patient relationship is formed in a consultative situation are:

1. Whether the doctor and patient have met;
2. Whether the doctor ever examined the patient;
3. Whether the patient's medical records were ever viewed by the doctor;
4. Whether the doctor knew the patient's name; and
5. Whether the consultation was for free.

Only a few of these elements must be met to establish a relationship.

Standard of care

It could be argued that telemedicine practitioners should have a greater duty of care than that of traditional doctors because of the increased risk of misdiagnosis where the practitioner never personally encounters the patient. The principles of duty of care within telemedicine are the same as with face to face consultations[2].

Doctors providing "virtual house calls", prescribing medication or treatment over the telephone/ internet could potentially be exposing themselves to medical negligence liability and/or regulatory issues. In these situations, a doctor is assuming the same duty of care for a "virtual patient" (without the usual basic diagnostic tools referred to above) as a "physical patient" (who can be examined fully in person and treated effectively) and accordingly telemedicine carries a higher risk of misdiagnosis and therefore potential liability.

Future developments

Insurance

Presumably due to the higher risks associated with it, not all insurers provide cover for telemedicine services and therefore the absence of extensive professional indemnity insurance availability could potentially limit the widespread growth of the telemedicine industry.

Regulation

While the principal European legislation has been partially transposed into Irish law, the regulatory landscape remains to be fully developed in Ireland.

Telemedicine also potentially exposes the treating physician to risks associated with impersonation of patients and/or exaggeration of symptoms to obtain heavily regulated pharmaceutical products. The combined risks of the absence of expansive guidelines, the duty of care issue mentioned above, the lower availability of insurance cover and regularity issues mean that telemedicine, whilst it will be an invaluable tool in medical technology in the future, is currently a problematic field to practice in for the treating physician.

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[2] *Irish Medical Council, 2020, page 4.*

Damages for non-material breach of the GDPR - *Kaminski v Ballymaguire* Foods Limited [2023] IECC 5

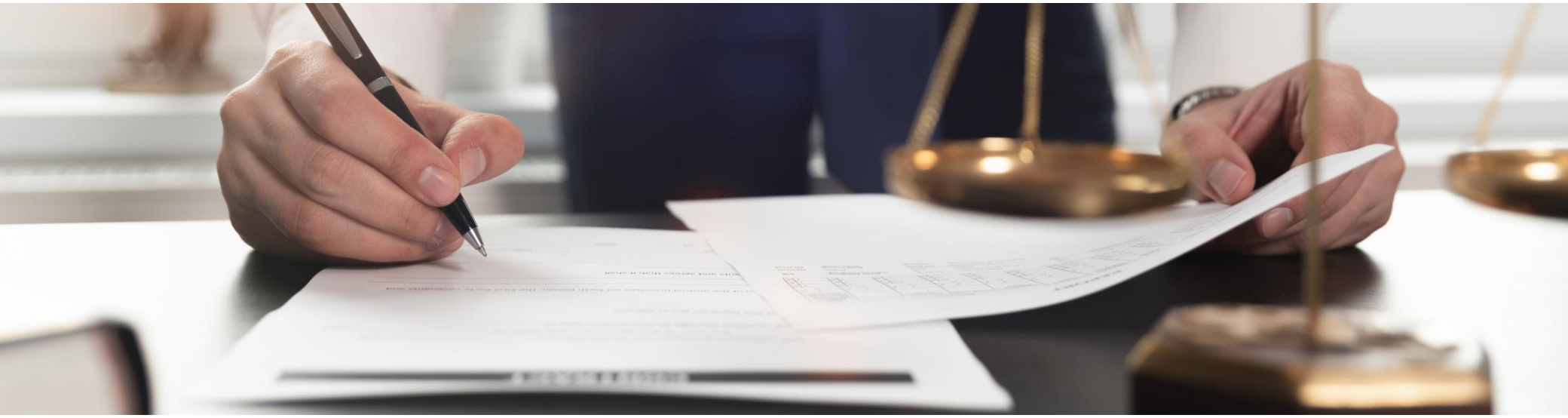
The Circuit Court considered the appropriate level of damages for a non-material breach of a person's rights pursuant to the GDPR.

Briefly, the Court set out a series of issues to be considered when assessing non-material breach of a person's rights and noted that a mere breach was not sufficient to attract an award of compensation, nor was "mere upset". The Court also held that there should be a link between the data infringement and the damage claimed. Damage must be proved, ideally with supporting evidence, and must be genuine, not speculative. In the event that an award of damages was to be made, the Court commented that the award was likely to be modest – and was calculated at €2,000 in this case.

A detailed review of the judgment is set out in the Data Protection, Privacy and Cyber section and we would recommend that all clients review that analysis.

From a healthcare perspective, the judgment provides useful clarity on the level of loss which a claimant must show – which can be lower than the usual proofs required in medical negligence claims. The decision is particularly relevant for any person or entity who may hold significant levels of personal data (a data processor) If, for example, there was to be a large scale data breach which was capable of attracting compensation, the cumulative awards of damages in respect of multiple claimants could be much higher than the modest individual amount envisaged by the Court in Kaminski.

As a result, it is important that all data processors have proper policies in place in respect of the personal data that they hold and that all employees or persons having access to that data are aware of (and abide by) the terms of those policies.



High Court balances constitutional rights of person lacking capacity and the rebuttable presumption in favour of life-sustaining treatment in considering whether to consent to treatment - *In the Matter of C.F.* [2023] IEHC 321

This case came before the President of the High Court on a number of occasions in 2023 as a result of *Mr F's* refusal to consent to certain medical treatment and the capacity of *Mr F*, who was suffering from dementia.

The HSE sought a number of orders providing for the proper care and treatment of *Mr F*. It was accepted that, as a result of his dementia, *Mr F* lacked capacity. *Mr F* had a number of very serious underlying medical issues, including severe peripheral vascular disease. The essential issue to be addressed was whether *Mr F* should have his right leg amputated above the knee in order to try to prevent an imminent life-threatening haemorrhage and other very serious complications. There was a significant difference of opinion between the clinicians in the hospital where *Mr F* was being treated as to whether the amputation should go ahead.

The Court noted that its decision had to be based on what was in *Mr F's* overall best interests, having regard to all of the circumstances of the case.

As the matter was originally brought before the High Court in advance of the commencement of the Assisted Decision Making (Capacity) Act, 2015 (as amended) ("the 2015 Act"), the application was determined in accordance with the Court's wardship jurisdiction, which continued to apply by virtue of section 56 of the 2015 Act, and was expressly stated not be made pursuant to the inherent jurisdiction of the Court. Further, although *Mr F* was a person in respect of whom the Court's wardship jurisdiction had been invoked, he had not been declared a ward of Court.

In determining the matter, the Court noted that, although the various treating clinicians had different opinions on the best interests of *Mr F*, from an ethical point of view, each had acted entirely appropriately, ethically, in good faith and in the bona fide view of what was in *Mr F's* best interests. The Court noted that, because of *Mr F's* lack of capacity, it fell to the Court to make the decision in respect of *Mr F's* care. The Court was conscious of the significance of the decision for *Mr F* himself, for members of his family and for all those involved in his treatment and care.

Having considered all of the evidence and relevant legal principles, the Court was satisfied that the correct decision was that Mr F should not have the amputation but should be discharged home to the care of his family, with the assistance of the palliative care team and other support professionals. Together, the Court held, they would provide the best and most appropriate care for *Mr F*. The Court stated that this decision properly respected *Mr F's* rights to bodily integrity, autonomy, dignity in life and death, and privacy. The Court was of the view that this decision was in *Mr F's* best interests.

In reviewing the relevant legal authorities, the Court noted that the fact that *Mr F* lacked capacity did not mean that considerable weight should not be given to his repeatedly and consistently expressed wishes not to have his leg amputated. On the contrary, the Court held that significant weight should be given to those wishes as part of the Court's consideration of the overall circumstances of the case in reaching a decision as to what was in the best interests of Mr F. In this regard, the Court noted the following principles:

(i) While an adult person with full capacity must provide consent if medical treatment is to be provided, every competent adult has the right to withhold consent to medical treatment, including in respect of treatment which may be necessary to protect or sustain that person's life;

(ii) The fact that a person had lost capacity did not mean that they had lost the benefit of the personal rights guaranteed under the Constitution;

(iii) There was a strong presumption in favour of maintaining life and of taking all necessary steps to do so. However, that presumption was capable of being rebutted and the Court may not be obliged in all cases to take such steps;

(iv) As was clear from the authorities, several other constitutional rights were engaged in a case such as this, apart from the right to life. Among the factors to be considered in determining the best interests of the ward were the constitutional rights to privacy, bodily integrity, autonomy, equality and dignity in life and in death, each of which were to be respected and vindicated, while at the same time acknowledging the strong presumption in favour of taking such steps as might be necessary to preserve *Mr F's* life;

(v) The clearly and consistently expressed wishes of *Mr F* were to be given considerable weight, notwithstanding his lack of capacity. While those wishes were not necessarily the determining factor in a decision as to what was in *Mr F's* best interests, they were particularly significant in this case, having regard to the evidence as to the likely effect on *Mr F's* mental and physical welfare in the event it was to go ahead irrespective of *Mr F's* opposition; and,

(vi) The views of *Mr F's* family were also important and considerable weight was to be attached to those views, notwithstanding the fact that the issue was, ultimately to be decided by the Court.

Having regard to the evidence provided by the clinicians, the views of *Mr F's* family and the principles outlined above, the Court was satisfied that the presumption in favour of life-sustaining treatment had been rebutted. The Court noted, in particular, that the treatment put forward as life-sustaining (the amputation) had very significant risks, including death. The Court concluded that those risks were too great to take in light of all of the adverse consequences an amputation would have for *Mr F* and in light of all his other underlying medical conditions.

In reaching this decision, the Court confirmed that it had carefully considered and taken into account in the context of all of the evidence, the constitutional requirement that *Mr F's* life be respected, vindicated and protected, as well as in the context of all of the other constitutional rights which *Mr F* had and in light of all of the evidence in the case. The Court further confirmed that it had not reached its decision lightly or without due regard to all of the relevant circumstances. The Court was also satisfied that there was clear and convincing evidence to support the conclusions drawn.

It is clear from the detailed decision of the High Court that, in determining the best interests of a person lacking capacity, the court must undertake a comprehensive review of the clinical evidence presented, the constitutional rights of the person, the wishes of the person in respect of their own care and the views of the person's family. However, the decision to consent or withhold consent to any medical procedure to be provided to that person must ultimately be made by the court, having regard to all of the circumstances of the case. Further, although there is a presumption that a court will prefer life-sustaining treatment, that presumption is rebuttable. As a result, there is a heavy burden on the court to determine what is in the best interests of the person in question.

High Court issues warning to plaintiffs seeking to withdraw special damages claims - *May v Barrett and Geoghegan* [2023] IEHC 322

Heslin J. in the High Court allowed a plaintiff, whose proceedings had been dismissed for failure to comply with two previous orders of the High Court – one, given with the plaintiff's consent, compelling the plaintiff to provide Replies to Particulars and a second 'unless' order dismissing the plaintiff's claim unless she provided the Replies – to reinstate portions of her claim. The Court held that the consent of the Court was required for the partial reinstatement of the claim.

In response to the receipt of the plaintiff's Personal Injuries Summons, the defendants had raised a Notice for Particulars which specifically called upon the plaintiff to "vouch all special damages claimed".

The plaintiff did not deliver timely Replies and the defendants issued a motion to compel the Replies. An order was made, on consent, that the plaintiff should deliver her Replies within six weeks of the order ("the consent order"). The plaintiff did not provide her Replies within the six-week period but, when she did, she stated that her special damages were being vouched and that the details would be "forwarded in due course".

The defendants' solicitors delivered their clients' Defence and subsequently wrote to the plaintiff's solicitors calling on the plaintiff to detail her special damages in line with her obligations. No response was received to that letter and the defendants issued a motion to dismiss the plaintiff's claim for failure to deliver adequate Replies to Particulars and, in particular, for failure to provide particulars of the plaintiff's loss of earnings.

When the motion came on for hearing, there was no appearance on behalf of the plaintiff – although this was subsequently explained as arising due to a "regrettable diary mistake".

In the circumstances, the High Court ordered that the plaintiff's claim would be dismissed, unless she complied with the previous order made within a period of eight weeks ("the 'unless' order").

Five days before the expiry of the unless order, the plaintiff's solicitor wrote to the defendant's solicitors replying to the outstanding particulars sought. However, the Replies furnished stated that the plaintiff did not maintain a claim for past loss of earnings other than the 12 weeks she was absent from work due to her injuries, which was estimated at €16,824. The letter further stated that the plaintiff did not maintain a future loss of earnings claim. No detail was provided in respect of the calculation of the plaintiff's loss of earnings claim and the plaintiff failed to furnish any vouching documentation with respect to either earnings or special damages.

Following a further exchange of correspondence between the parties in which the plaintiff ultimately sought to abandon her claims for special damages and loss of earnings, the defendants maintained that the plaintiff's claim stood dismissed for failure to comply with the 'unless' order. As a result, the plaintiff issued a motion seeking an order deeming her compliance good with the 'unless' order.

The Findings of the High Court

On considering the application, the Court set out a detailed chronology of the proceedings and noted that the plaintiff had not complied with the terms of the consent order – accordingly, the claim stood dismissed until the date of the application deeming compliance good.

The Court further noted that, although the plaintiff sought to explain the failure to vouch and detail special damages, the explanation was provided after the claim stood dismissed, as was the plaintiff's signalled intention to abandon her claim for special damages and loss of earnings. Separately, the Court noted that, as a matter of fact, the plaintiff did not have consent either from the defendants or from the Court to withdraw the relevant claims, as was required pursuant to her legal obligations.

On consideration of the suggestion that the plaintiff's claims could have been false or exaggerated, the Court found that the evidence did not support this contention. The Court noted that the evidence proffered by the plaintiff referred to an inability to detail or vouch the claim, which was fundamentally different to a falsehood or exaggeration.

However, the Court held that the "unhappy" situation was brought about by the plaintiff's conduct and through no fault of the defendants.

The Court noted that the defendants had accepted that it had a jurisdiction to save proceedings dismissed by reason of a failure to comply with the terms of an 'unless' order, which jurisdiction, the Court noted was to be exercised sparingly.

Considering the principles of natural and constitutional justice, as well as its own jurisdiction, the Court held that the appropriate course of action was to reinstate, with appropriate orders, the portion of the plaintiff's claim sought to be maintained. The Court was of the view that to otherwise restrict the plaintiff's access to the courts would be disproportionate.

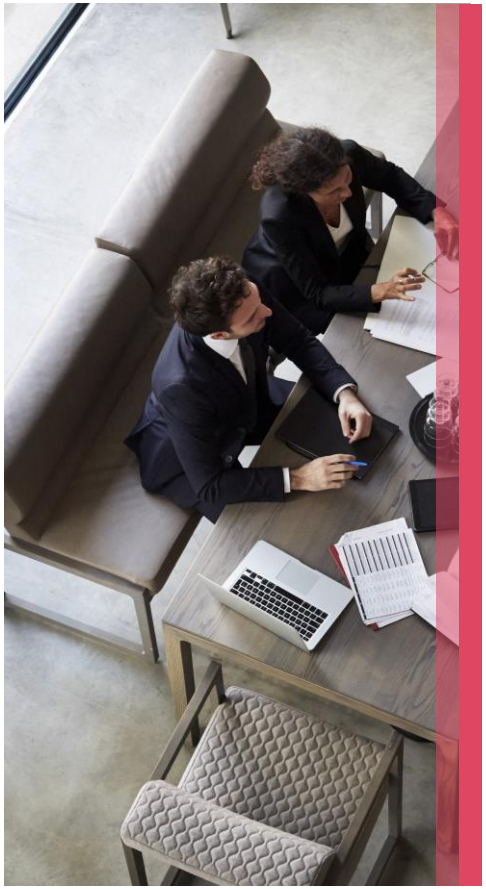
The Court was further of the view that to dismiss the entirety of the plaintiff's claim would be a disproportionate response to the plaintiff's conduct, even though that conduct was substandard. The Court stated that the plaintiff's conduct could be more appropriately and justly dealt with by means of appropriate costs orders.

Although the Court considered the position of the defendants, it was of the view that the defendants did not suffer any prejudice or injustice on foot of this outcome.

Accordingly, the Court stated that the justice of the situation required the reinstatement of the balance of the claim and the Court's consent to the withdrawal of the special damages and loss of earnings aspects thereof.

Having considered the relevant statutory provisions in respect of an award of costs, the Court made an order for costs in favour of the Defendants in respect of the costs of the application and an order that the plaintiff would pay the costs incurred by the defendants in respect of the defence of the plaintiff's claims for special damages and loss of earnings, to be adjudicated in default of agreement. The Court refused a stay on the order for costs, unless it was agreed between the parties.

This decision highlights the increased requirements for plaintiffs to plead their claims with specificity from as early a stage as possible – as well as the risks for a plaintiff should they fail to do so – which is in line with the trends emerging from both the High Court and Court of Appeal to move away from trials by ambush. The courts are increasingly requiring litigants to provide full details of their claims in a timely manner so that the parameters of claims can be known by all parties to the proceedings. Such a re-statement of this position is a welcome addition to the jurisprudence in this area.



Data Protection, Privacy and Cyber

> Developments in Relation to damages for Non-Material loss under the GDPR

Developments in Relation to damages for Non-Material loss under the GDPR

Overview

The General Data Protection Regulation ("GDPR") empowers an individual to institute proceedings where material or "non-material" damage (i.e. distress or upset) has been suffered as a result of his or her data protection rights being breached. Until very recently, there had been a huge amount of uncertainty as regards what constituted "non-material damage" and whether specific damage had to be identified, or if mere upset or distress resulting from the breach would suffice. This was in contrast to the well-established position in the UK, where the courts confirmed that a claimant must meet a "*de minimus*" or non-trivial threshold of damage before an award of compensation would be considered.

Österreichische Post AG Case

Over the last number of years, there have several referrals of questions of law to the Court of Justice of the European Union ("CJEU") by domestic member state courts, raising questions in relation to non-material loss under the GDPR and a definitive ruling on the matter by the CJEU had been eagerly awaited.

The first of these decisions landed in May of 2023 when the European Court delivered its decision in Case C-300/21 – UI v Österreichische Post AG ("the Post AG case"). In Post AG, the respondent, the Austrian Postal Service, had collected the personal data of millions of Austrians and used an algorithm to calculate their affinity to a particular political party. This information was then sold on for election advertising purposes. The claimant, an Austrian lawyer, discovered through a data subject access request to the Postal Service that he supposedly had a high affinity to the right-wing Austrian Freedom Party. He subsequently instituted proceedings in Austria's domestic court, seeking an injunction and damages of €1,000 for the "great upset, loss of confidence and a feeling of exposure" he felt as a result of the data processing.

In first instance, the domestic court granted the injunction sought but refused to make an award of damages, and this judgment which was upheld on appeal. The case was then appealed to the Austrian Supreme Court which subsequently referred the following three questions to the CJEU arising from that case:

1. Whether an infringement of the GDPR alone gives rise to a right to compensation, regardless of whether or not harm has been suffered;
2. Whether the non-material damage must satisfy a certain threshold of seriousness; and
3. How should a domestic court determine the amount of compensation payable in these types of claims.

Ultimately the CJEU decided:

1. In response to the first question, not all infringements of the GDPR will merit an award of compensation and a claimant must prove that the processing infringes the GDPR, that damage was suffered, and that there is a causal link between the two;
2. Secondly, the right to compensation for non-material damage is not conditional on a "threshold of seriousness" being met. However this does not relieve a claimant from proving they suffered negative consequences as a result of the infringement. Unhelpfully however the CJEU did not shed any light on what exactly constitutes non-material damage;
3. And finally, the CJEU left it to the EU member state courts to apply their own existing domestic rules when deciding the level of damages awarded to successful claimants.

Whilst many had high hopes that AG Post would provide the long awaited clarity needed in relation to damages for non-material loss, ultimately, there remains uncertainty.

The Ballymaguire Foods Case

Subsequently, in July 2023, the Circuit Court in Ireland awarded €2,000 in compensation to a claimant seeking damages for non-material loss under the GDPR in Kaminski v Ballymaguire Foods [2023] IECC 50 ("the Ballymaguire Foods case"). This case is believed to be the first case in the EU involving a claim for non-material damage since Post AG.

In the Ballymaguire Foods case, the Circuit Court held that the claimant suffered non-material harm when the defendant, his employer, used CCTV footage of him, in which he was clearly identifiable, in a training session delivered to other employees. The claimant alleged that he suffered damage and distress as a result, as the incident caused him anxiety and humiliation. The Court followed the Post AG decision, in finding that a "mere breach" of the GDPR is not sufficient to justify an award of compensation for non-material harm and that a causal link must be demonstrated, but damages for this type of claim should nonetheless be "interpreted broadly".

Elaborating on this, the Court said that a claim does not have to meet any threshold of seriousness, but it should not cover "mere upset". The Court added that the non-material damage must be genuine, not speculative and it must be proven. The Court also noted that, in many cases, even where non-material damage can be proved and is not trivial, damages will often "probably be modest".

Bulgarian National Revenue Agency Case

Most recently, on 14 December 2023, following a referral by the Bulgarian Supreme Administrative Court, the CJEU ruled in Case C-340/21 - Natsionalna Agentsia za Prihodite that fear experienced by a data subject with regard to a possible misuse of their personal data by third parties as a result of an infringement of the GDPR is capable, in itself, of constituting "non-material damage".

Conclusion

Whilst Post AG did not set a de minimus standard of damage for claimants, it did provide that a claimant is required to demonstrate he or she suffered damage as a result of the breach. Furthermore, in Ballymaguire Foods, the Circuit Court made it clear that compensation for these type of breaches is likely to be modest. Ultimately, 2023 has been an illuminating year for practitioners and organisations alike, and at a minimum, some clarity has been provided in relation to what is required to successfully demonstrate that non-material damage has been suffered under the GDPR.

There have been several other referrals of questions to the CJEU across the EU on the question of non-material damage and these decisions are also expected to be published in the coming months. Undoubtedly commentators will be observing this space with interest.

Injury Risk

- Post-accident medical records generally discoverable
- PIAB to provide more detail in multiple injury assessments
- Changes to Occupiers Duty of Care
- Personal Injuries Resolution Board Act
- Quantum Entanglement and the Reality Check
- An Update on the Dismissal of Cases for Delay
- Clarification on Costs
- Courts and Civil Law (Miscellaneous Provisions) Act 2023'

Court of appeal considers the issue of discovery of post-accident medical records

The Court of Appeal recently considered the above issue in the case of *Egan v Castlerea Co-operative Livestock Mart Limited*.

The appeal related to an Order for discovery made by the High Court which directed the Plaintiff/Appellant to make discovery of pre-accident medical records and post-accident medical records. The Plaintiff/Appellant had agreed to make discovery of pre-accident medical records but the remaining issue between the parties concerned discovery of post-accident records.

The underlying claim related to personal injuries suffered in an incident in a livestock mart. A pre-existing injury subsequently came to the fore including the question as to whether this injury was reactivated by the incident at issue.

The Court of Appeal set out some important points regarding discovery:-

- The Court considers the reasons for seeking discovery as set out in correspondence.
- It has to be considered whether the documents are relevant to the dispute and if discovery of the documents is necessary for disposing fairly of the case or for the saving of costs.
- If relevance of records is established/conceded, this raises a presumption of 'necessity'. The presumption is not absolute and the onus lies on the Plaintiff to rebut it by way of evidence or legal argument.
- The fact that an issue may be the subject of expert evidence at trial does not preclude the possibility that discovery of documents relevant to the issue may be properly sought in advance of the trial.
- The Court considered alterative procedural mechanisms available. The use of interrogatories was considered in this case.
- In considering proportionality, the Court can consider the volume of documentation sought and resources and cost in complying with discovery.

Ultimately, it was found that the trial judge was correct in his decision to allow discovery of the documentation requested. Accordingly the appeal was dismissed.

This helpful judgment reaffirms that discovery of post-accident records can be granted and the factors considered in determining same.

PIAB to provide more detail in multiple injury assessments

The recent Court of Appeal decision of Mr Justice Binchy in the case *Wolfe v PIAB and Mater Misericordiae Hospital - 2023 IECA 245* has provided that PIAB ought to provide more information when making an assessment of a claimant's injuries.

The Appellant in this case had appealed the decision of the High Court which held that PIAB had provided sufficient reasoning for its assessment of her injuries. The Appellant had argued that the Assessment failed to adequately set out the reasoning behind same which had been made in accordance with the new Personal Injuries Guidelines. The Appellant was advised by her Solicitor that they were unable to properly advise her as to whether or not to accept the award given the lack of reasoning provided by PIAB. It was asserted that the Assessment was not in compliance with the Guidelines or the PIAB Act of 2003 (2003 Act). The Appellant had sought an Order to quash the Assessment and remit same back to PIAB and a declaration that PIAB must provide reasons in writing for its assessment and how principles of dominant and multiple injuries were applied.

The Appellant had suffered injuries at work when an oven she was cleaning fell on her.

PIAB had made an assessment of damages in the sum of €11,000 and assessed the Appellant's dominant injury as her back injury. They did not provide detail on the amount of damages which had been allowed in respect of the lesser injuries. Judicial Review proceedings were issued.

Judicial Review

In the course of the High Court action, PIAB denied that there had been insufficient reasoning provided. It was noted that PIAB have two distinct methodologies for assessing claims. One such way is to assess a claim by reference to the dominant injury and where there is a second injury which flows from this, or where there is a second lesser injury which is unrelated to the dominant injury, PIAB can take this second or lesser injury into account when locating the dominant injury in terms of severity. A second method is for PIAB to agree on a dominant injury and to then place this injury within the appropriate bracket under the Guidelines. The Board will then agree an uplift which is based on the severity of the other lesser or minor injuries.

PIAB argued that they would be unable to complete assessments within the statutory timeline if detailed reasoning was required to be provided.

The Appellant had argued that more detailed reasoning ought to be provided in light of the adverse cost implications which a claimant was open to when they had rejected an assessment of PIAB and were awarded a lesser sum at trial under s.51 A of the 2003 Act.

The High Court reviewed the documents which had formed part of the PIAB Assessment. In reviewing same it was held that sufficient reasoning for the Assessment had been provided. It had been accepted by the Appellant that there was nothing in the Guidelines which mandated the provision of reasons by PIAB in using the Guidelines nor any such statutory provision. The High Court found that there was no prejudice to a claimant in terms of the adverse cost implications and considered that this provision was no different to a Calderbank letter or Tender Offer.

Appeal

The Appellant then brought an appeal against the decision of the High Court on the basis that the trial judge had erred in law by holding that the Assessment contained adequate reasons. The Appellant argued that the trial judge had not addressed the fact that PIAB used two methods for assessing claims which was not provided for under the Guidelines. The Appellant's second ground of appeal was that the trial judge erred in holding that there was no prejudice suffered to the Appellant in terms of s.51A of the 2003 Act.

It was argued by PIAB that the matters raised by the appellant in the first ground of appeal were new arguments and were not pleaded in her statement of grounds. This argument was accepted by the Court of Appeal and as such the question of PIAB using two different methodologies to assess claims was not properly before the court.

In making its decision, the Court noted that a claimant has 28 days to accept or reject an Assessment. If they reject and are awarded less than this Assessment, they are at risk of costs. The basis of a calculation was of critical importance to a claimant in terms of accepting or rejecting the Assessment. It should be reasonably clear to a claimant in reading the assessment on what basis it was arrived at. The Court found that if this Appellant had only one injury i.e. her back, the Assessment was sufficient, however, it was found that there was no information provided on how the lesser injuries were accounted for and how much of the assessment related to same. The Appellant had no way of knowing what sum had been allowed to reflect her lesser injuries which did inhibit her ability to decide whether to accept or reject the sum.

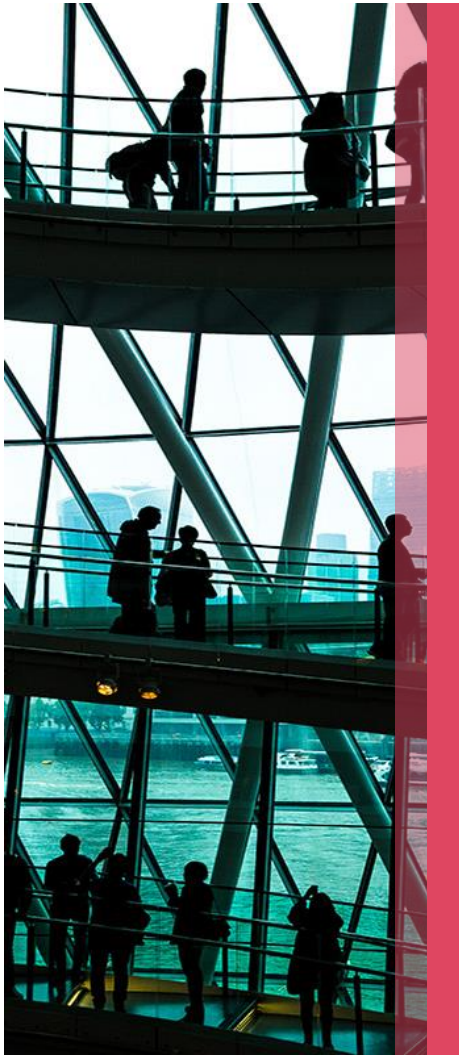
The Court found that the High Court had erred in holding that an objective observer would have been aware of the reasoning behind the Assessment and as such the appeal was allowed.

In addressing PIAB's concerns that a very detailed reasoning would be required, the Court noted that this issue could be addressed by stating within the Assessment that the dominant injury was assessed at 'x', but taking account of the lesser injuries, General damages were assessed at 'y' which would enable a claimant to know how much had been provided for each injury.

The Court quashed the Assessment and referred it back to PIAB. Declaratory relief was not provided. The Appellant was awarded costs.

Conclusion

The implications of this decision remain to be seen. It is notable that the Court of Appeal stated that PIAB were not required to set out a very detailed reasoning for its decision. PIAB are entitled to rely on the medical report and the Guidelines themselves without having to regurgitate same. This will hopefully allow PIAB to continue to make its assessments within the statutory timeframe while also providing claimants with more information on assessments going forward. Future developments are awaited.



Changes to Occupiers Duty of Care

On 31 July 2023, the Occupiers Liability Act 1995 ('the Act') was amended which will have the effect of rebalancing an occupier's duty of care in line with recent decisions of the Courts and to effect reforms set out in the Government's Action Plan on Insurance Reform.

What are the significant changes?

1. Section 3

An amendment to Section 3 of the Act so that the common duty of care owed to a visitor shall now also be determined with regard to –

- the probability of an occurrence causing a danger on the premises;
- the probability of an injury to a visitor occurring by reason of the danger existing on the premises;
- the probable severity of the injury to a visitor that might result from the danger;
- the practicability, and the cost of, precautions or preventative measures; and
- the social utility of the activity or conduct which gives rise to the risk.

The amendments takes into account the Court of Appeal decision in *Byrne v Ardenheath [2017] IECA 293 and the High Court decisions in Mulcahy v Cork County Council [2020] IEHC 547 and Wall v National Parks and Wildlife Service [2017] IEHC 85.*

2. Section 4(2)

This section relates to the duty owed to recreational users or trespassers. The amendments remove an inconsistency whereby despite the section seeking to impose liability only if the occupier was reckless, some of the subsections which followed imposed a lower standard of negligence due to references to reasonable grounds or reasonable action.

The amendments delete the references to reasonableness and makes it clear that recklessness is the appropriate standard for this category of entrant.

The section is also amended to include a clarification that, when determining whether or not the occupier was reckless, the assessment of the conduct of an entrant includes whether the person entered as a trespasser - which was not specifically stated in the legislation previously.

3. Section 4(3)

The amended Section 4(3) of the Act offers clarity as to when liability will be imposed on an occupier if a person enters a premises for the purpose of committing an offence or actually commits an offence.

The amendment provides more certainty to occupiers as it states liability shall not be imposed. A court may however in an exceptional circumstances impose liability having regard to the nature of the offence and the extent of recklessness on the part of the occupier.

This amendment clearly has the effect of setting the bar high and it is expected that the imposition of liability on an occupier in these circumstances will be rarer than heretofore.

4. Section 4A

Section 4A introduced a provision allowing for a broader range of scenarios where it can be shown that there was a voluntary assumption of risk on the part of a visitor or recreational user. Risks willingly accepted by the visitor/recreational user where they are capable to comprehend the nature and extent of the risks willingly accepted previously required demonstration in writing. The amended legislation now allows voluntarily assumption of risk being demonstrated by reference to the words or conduct of the visitor/recreational user and does not require evidence of communication with an occupier.

These are welcome developments which implements a reasonable balance between the respective responsibilities of owners/occupiers and individuals when entering a premises. The interpretation of same by the courts will be closely watched by insurers and businesses.

Personal Injuries Resolution Board Act

2023 saw the commencement of Personal Injuries Resolution Board Act 2022 in three stages. Phase 1 of the Act commenced with effect from 13 February 2023, phase 2 commenced on 4 September 2023, with the third and final phase 3 commencing on 14 December 2023.

1. Name Change

The Personal Injuries Resolution Board or "The PIRB" officially launched in December 2023.

2. Mediation

In December 2023 the PIRB launched the mediation service, which allows parties the option to seek "voluntary and confidential" mediation prior to assessing claims. Hilary McGouran, who heads up the new mediation service in PIRB commented that "… *Mediation will facilitate the resolution of claims that currently end up in litigation in a speedier and lower cost manner."*

For Claimant's this new service means they now have the option for mediation at the start of the assessment process. Whilst for Respondents, they now have the option to choose mediation, assessment, or both. Of note, there is no additional costs for the mediation service.

The PIRB are currently only offering the mediation service for Employer Liability claims and intend on offering the service for Public Liability and Motor claims later in 2024.

3. Fraud Prevention

On the 4th of September 2023 Section 3 (b) and (c) which provide for the mandatory elements required when making an application to the PIRB came into effect.

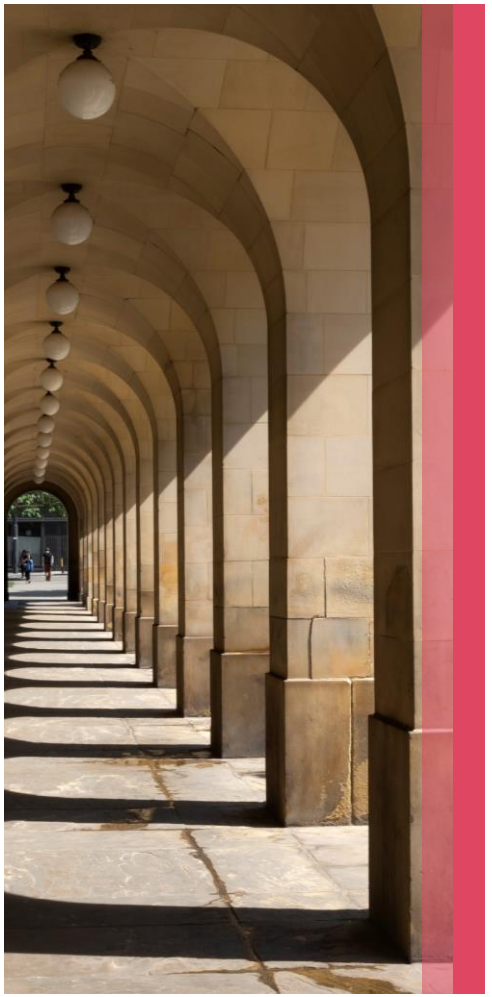
If these mandatory requirements are not included in a claimant's application, the PIRB will not be able to treat the application as complete.

- the Claimant's signature, even where the claimant is represented;
- the Claimant's PPS number / or alternative identification, when making an application to PIRB.
- All applications to PIRB must be accompanied by a medical report prepared by a medical practitioner setting out the nature of the injuries allegedly sustained;
- All applications require more detailed descriptions in relation to when, where, and how the accident or incident causing the injury occurred.

Where an application does not provide the required information, the PIRB cannot deem the Application complete for the purpose of applying to PIRB [Section 11 of the Personal Injuries Assessment Board Act 2003 (as amended] or, for the purpose of the Statute of Limitations pursuant to Section 50 of the Personal Injuries Assessment Board Act 2003 (as amended).

In February 2023 S. 20 (which allows the PIRB to provide information to An Garda Síochána) & S. 22(an offence of supplying false information to the PIRB) were introduced.

As of December 2023, the PIRB have not been required to report to An Garda Síochána any incidences where false or misleading information was provided to the PIRB.



4. Assessment of complex claims

Since February 2023, the PIRB can now assess claims that are wholly psychological in nature and where a long-term prognosis is awaited.

Since theses introductions the PIRB have observed that "…*it has been able to retain more cases in these categories (sections 7 (iii) and (iv), 14 and 15) for assessment than would previously have been able possible.*" With the PIRB noting that since February 2023 to November 2023 only 291 cases have been released, in comparison to 389 cases in the same period in 2022.

5. Costs

The PIRB are exploring a new debt management model to consider the implementation of Section 11(c) of the Act, which sets out that respondents to claims considered by the PIRB will be liable for charges incurred by the PIRB in respect of that respondent and in accordance with regulations.

The PIRB have reported an increase in the rate of acceptance of award since the introduction of Section 16. S16 provides that where a claimant rejects an assessment and subsequently commences court proceedings, then no award of costs may be made in favour of the claimant where the award does not exceed the Board's assessment. However, the PIRB have caveated that it is difficult to attribute the increase in acceptance solely to this initiative as there are several factors which may be responsible for the increase.

The extent of the use of these new provisions can only be measured directly in the Courts. Of note the PIRB have advised that they are collecting data in order to identify average awards made by the courts. During this processthe PIRB noted they became aware of a court using section 16 to refuse to award a claimant their court costs where the award that it made for their injuries was lower than the assessment arrived at by the PIRB.

Quantum Entanglement and the Reality Check - Assessing the Uplift for Multiple Injuries

In 2023 the Court of Appeal in Zaganczyk v John Pettitt & Another, delivered the first judgment on the Personal Injuries Guidelines, since their introduction in 2021.

In *Zaganczyk*, the Plaintiff issued High Court personal injuries proceedings following an incident which occurred during the course of her employment in January 2020. As a result, the Plaintiff suffered burns to her face, neck, ear, left hand and left forearm and psychiatric injuries. The case proceeded as an assessment of damages only before the High Court.

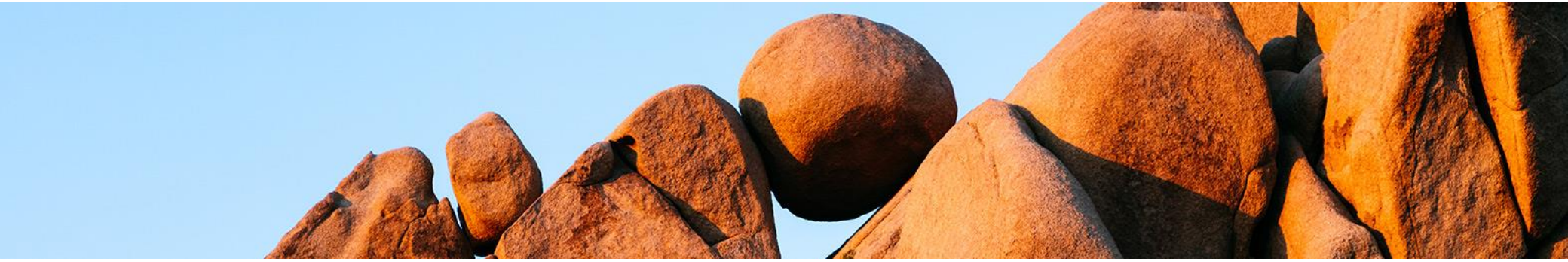
The High Court delivered Judgment in January 2023 and assessed the Plaintiff's dominant injury as her PTSD, in which she was awarded €45,000, in regards to her other injuries, the court awarded an uplift of €20,000 for her depression and €25,000 for her burns and scarring. In total the High Court awarded the Plaintiff €90,000 for her injuries.

DAC Beachcroft representing the Defendants appealed the High Court's decision with Mr Justice Noonan delivering Judgment for the Court of Appeal on the 20th of September 2023. The Court of Appeal reduced the High Court's award for general damages from €90,000 to €60,000. Mr Justice Noonan commented that, the global award of €90,000 was not “an appropriate sum to award a plaintiff who has recovered within three years”.

Mr Justice Noonan provided a "reality check" in referring to some injuries that attract an award at this level on the guidelines with one comparison being the award for "Loss of one eye is valued at €80,000 - €120,000." Having applied this reality check Justice Noonan confirmed he was *"satisfied that the award in this case is disproportionate to a degree that renders it an error of law. "*

Whilst the Court of Appeal eschewed clarifying how the Courts should approach an uplift, stating that *"I would refrain from expressing any view on this issue until it arises for consideration directly in the future…",* the Court of Appeal did comment that "*Whatever mathematical approach is adopted [in awarding an uplift], it is important not to lose sight of the global impact of all the injuries on the particular plaintiff concerned.*" Mr. Justice Noonan was of the view that practitioners should apply a "reality check" to ensure that the total compensation amount is proportionate and should amount against other individual categories of injuries in considering whether any "mismatch" arises.

The Court of Appeal's decision is a welcomed guidance for the Courts and practitioners on how to approach "uplifts" in cases concerning multiple injuries.



Inordinate and Inexcusable - An Update on the Dismissal of Cases for Delay

The wheels of justice in Ireland have a reputation for turning slowly. As any Defendant who has faced down a slow moving Plaintiff will know, the Courts retain an inherent jurisdiction to dismiss cases for delay. The test for this was laid down by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The court must consider three questions in sequence and each must be answered in the affirmative:

1. Is the delay inordinate?
2. Is the delay inexcusable?
3. Does the balance of justice favour the dismissal of the proceedings?

In a recent judgment of the Court of Appeal Barniville J[1] approved an observation by the trial judge that, while the fundamental principles have not changed since Primor, the weight attached to the various factors relevant to the balance of justice has been recalibrated over time. Interestingly, the Supreme Court recently granted a Plaintiff leave to appeal[2] after his case had been dismissed for delay by both the High Court and the Court of Appeal. The Supreme Court expressed the view that the Primor Test may need to be revised or reconsidered. It remains to be seen what approach the Supreme Court will take. However, for now, the Primor Test still stands and three recent decisions in the personal injuries space illustrate the current approach.

Sheehan v Cork County Council [2023] IEHC 46

This was a personal injuries action in which the Plaintiff was seeking damages for emotional suffering as a result of a disciplinary investigation carried out by her employer between 2006 – 2008. Proceedings issued in 2010. The discovery process concluded in 2013 and, thereafter, the Plaintiff took no steps to set the matter down for trial. The Motion to dismiss was filed in December 2021 and heard in January 2023, at which time the Plaintiff has still not taken any steps to set the matter down. The Plaintiff conceded on Affidavit that the delay was both inordinate and inexcusable, so it fell to the Court to consider only where the balance of justice lay.

Simons J dismissed the case citing in particular the fact that the outcome of the proceedings would turn, in large part, on oral evidence and the trial judge would have to adjudicate on what was said at meetings which took place more than fifteen years ago. Simons J found that the ability of the witnesses to recall the events would be limited due to the passage of time, one key witness was retired and in poor health, and any trial would be inferior to that which could have taken place in 2014 but for the inordinate and inexcusable delay on the part of the Plaintiff.

Neiser v Leinster Senior College Limited & Anor [2023] IEHC 374

This was a personal injuries action in which the Plaintiff was seeking damages for an assault by the Second Defendant while she was a student at the First Defendant's school in 2010. Proceedings issued in December 2012. A hearing date was assigned in May 2020 but could not proceed due to the Covid-19 Pandemic. Following this, the Defendant's solicitor wrote a series of letters to the Plaintiff's solicitor without any response whatsoever. A Motion to dismiss was filed in August 2020 and heard in June 2023. The Plaintiff conceded that there had been inordinate delay but denied that it was inexcusable. She stated she did not have the resources to advance the case in 2020 but that she was now ready to proceed.

The Court did not accept that the Plaintiff's financial difficulties could excuse the absence of any response to the Defendants solicitor's correspondence. However Phelan J found that the balance of justice did not favour dismissal of the case in large part because of the Defendant's own contribution to delays; particularly in the length of time taken to make discovery. In addition, while the case would turn on oral testimony, she found that there was no suggestion that any witness would no longer be available or that documents had been lost. This case arose from a single, dramatic event rather than a course of dealing over a period of time in which evidence might be more affected by the passage of time. Contemporaneous documents had been preserved. In light of all this, Phelan J found the balance of justice was not clearly against allowing the claim to proceed.

[1] *Gibbons v. N6 (Construction) Ltd [2022] IECA 112 (at paragraph 93)*
[2] *Kirwan v Connors [2023] IESCDET 34*

Sneyd v Stripes Support Services & Ors [2023] IEHC68

In this case the plaintiff was seeking damages for a repetitive strain injury diagnosed in 2013. Proceedings issued in December 2013. Discovery was requested from the Plaintiff in 2017 and was agreed to but not provided. Thereafter, there was no communication at all from the Plaintiff's Solicitor to the Defendants. A Motion to dismiss was filed by the First Defendant in October 2021 and by the Second Defendant in January 2022. The plaintiff conceded that there had been inordinate delay but denied that it was inexcusable, admitting that the case had been overlooked due to the handling solicitor leaving the firm. The plaintiff also relied on the exceptional circumstances created by the Covid-19 Pandemic and stated that the case was now ready for hearing as they had served Notice of Trial.

The Court found that the delay was not inexcusable. Barr J highlighted that this was not a simple action but one in which causation and liability were particularly complex. The Plaintiff's solicitor had been engaging (albeit not expeditiously) with medical experts and Counsel to progress the case. From March 2020 to June/July 2021, it was not possible to set down witness actions for hearing due to the Covid-19 Pandemic and the Plaintiff could not be blamed for the action not being heard during that period.

Barr J then commented that, even if the delay had been inexcusable, he was satisfied that the balance of justice favoured allowing the action to proceed. He highlighted that neither defendant had pointed to any specific prejudice arising as a result of the delay – indeed one defendant had not even pleaded prejudice. He expressed the view that the oral evidence required by witnesses would be very limited with liability turning on expert engineering evidence. Causation would turn on the expert medical evidence and the Plaintiff's medical records were still available. Thus, the balance of justice lay in favour of permitting the action to proceed.

The above cases demonstrate that the decision as to whether a case will be struck out for delay hinges not just on the facts of the delay but on the facts of the case itself. It is particularly important for defendants to point to specific prejudice arising due to the delay on the part of the plaintiff. In particular defendants should consider the extent to which liability turns on oral evidence from witnesses vs engineering evidence, and whether there are issues affecting the availability of witnesses and contemporaneous documentary evidence. Defendants should also be mindful of their own conduct in the course of the litigation. Finally, it seems the plaintiff will receive the benefit of the doubt in respect of any delays occurring during the period of the Covid-19 Pandemic.

We await with interest the Supreme Court's upcoming review of the Primor Test and whether this will alter the approach.

Clarification on Costs

On 27 July last, the Court of Appeal delivered judgment in Word Perfect Translation Services Limited v. The Minister for Public Expenditure and Reform [2023] IECA 189. Therein it was considered whether in civil litigation there is a requirement of the parties to a case to conduct litigation in the most cost-effective manner possible and the impact this could have on the final costs order.

Background

The appeal arose from a High Court decision which determined that the Minister was entirely successful in the defence of the claim brought. The High Court however held as the Minister did not bring a motion to have a preliminary point on the eligibility of Word Perfect to challenge the Minister determined before the trial of the substantive action the Minister failed to act in the most cost-effective manner possible and awarded 50% of the costs. This was appealed by the Minister.

The Appeal

The Court of Appeal carried out a detailed analysis of High Court decision, the applicable legislation (being section 169 of the Legal Services Regulation Act 2015) and the relevant caselaw.

The court concluded:

- Section 169(1) of the 2015 Act provides that the starting point is that an entirely successful party is entitled to costs and the court may order otherwise having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties – a non-exhaustive list of matters that may be considered in this regard is set out in s169(1).
- The High Court erred in determining that the starting point for the assessment of the award of costs to an entirely successful litigant was to ask whether the parties have conducted the case in the most cost-effective manner possible.
- The 2015 Act did not impose a requirement on an entirely successful party seeking its costs to demonstrate that it conducted litigation in the most cost-effective manner possible.
- A failure to move by way of preliminary application on a point that is ultimately successful is a factor that may be taken into account in assessing whether there ought to be a modified costs order. The test is whether the approach taken in respect of the preliminary issue was objectively reasonable in all the circumstances of the case.
- The costs hearing ought not to be an exercise in nit-picking and a broad brush-stroke approach must be taken. If not, there is a danger that costs applications will spiral out of control and have implications for the overall administration of justice.

The Court of Appeal awarded the Minister her full High Court costs and the costs of the appeal.

Courts and Civil Law (Miscellaneous Provisions) Act 2023

Signed into law on 5th July 2023, the Courts and Civil Law (Miscellaneous Provisions) Act 2023 ("the Act") is a wide-ranging piece of legislation which brings reforms to a variety of areas. For the purpose of this article, we will focus on those amendments most likely to impact Insurers, namely:

1. Changes to the indexation of Periodic Payment Orders impacting catastrophic injury claims; and
2. Changes to the Data Protection Act and their resultant impact on data breach claims.

Changes to the Indexation of Periodic Payment Orders

The indexation of periodic payment orders (PPOs) will no longer be fixed solely on the Consumer Price Index (CPI).

The indexation rate will, instead be set by ministerial regulations with reference to a broad range of more flexible factors. Part IVB of the Civil Liability 1961 Act, as amended, deals with the award of damages by periodic payments.

The index is crucial to whether there will be an uptake in this form of compensation. Indexation based on CPI alone has long been criticised as being unsuitable, leading to a reluctance by courts to apply it or parties to seek PPOs. It is anticipated that this amendment may result in an uptake on PPOs as a viable compensation mechanism in catastrophic injury claims.

Data Protection Litigation can now be brought in the District Court:

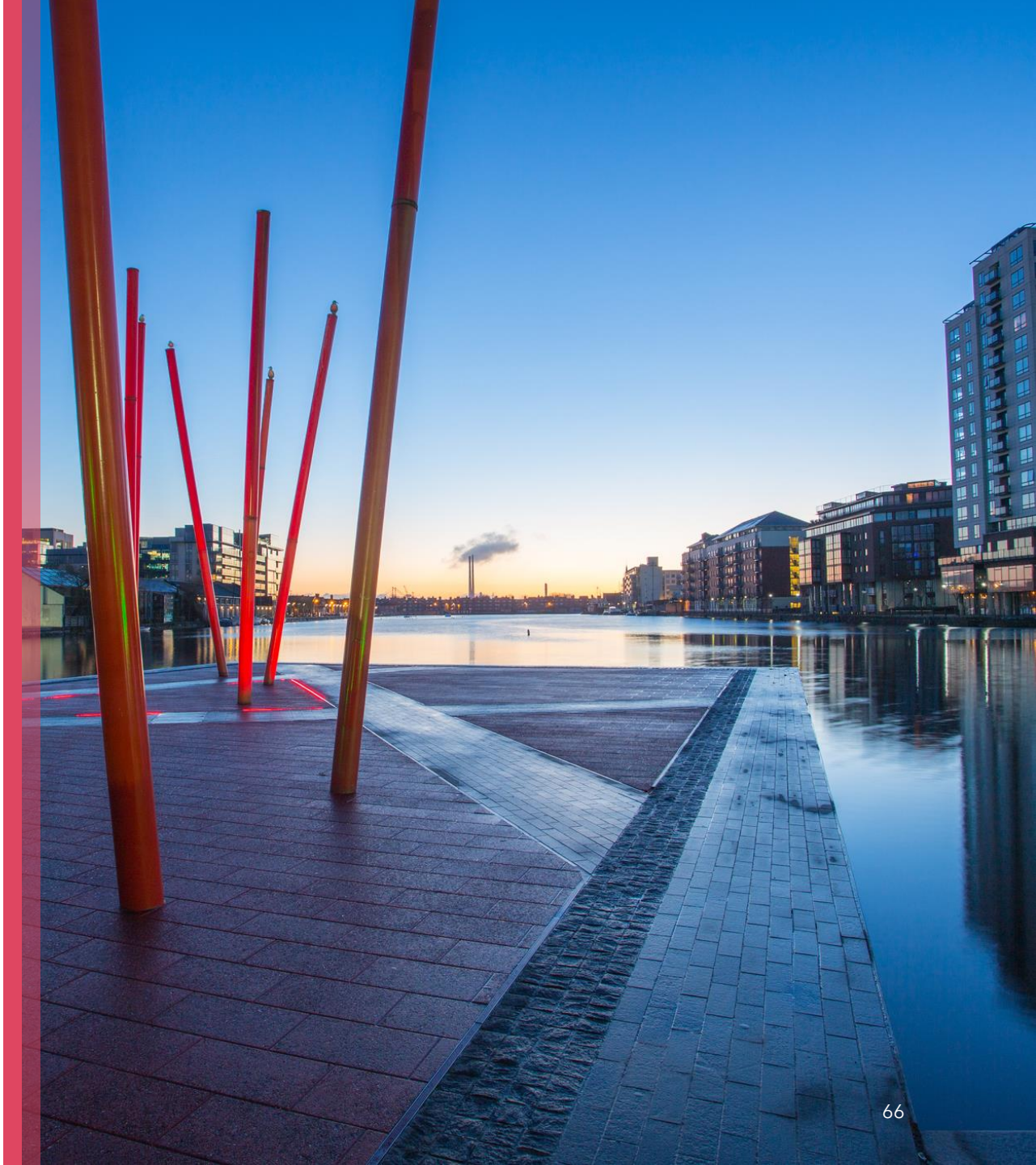
The Courts and Civil Law (Miscellaneous Provisions) Act 2023 provides that data breach claims can now be brought in the District Court as well as the Circuit Court and High Court. The Data Protection Act 2018 previously granted jurisdiction to the Circuit and High Courts only for these types of claims. This was notwithstanding the average compensation in the EU for data breach claims is modest and within the monetary jurisdiction of the District Court. The inability to bring these claims in the District Court resulted in disproportionately high legal costs being incurred as Defendants/ their Insurers could not avail of the scale costs available in the District Court. The Act remedies this situation.

It is expected that many of these claims will now be brought in the District Court with a commensurate reduction in legal costs.

Conclusion

The change to the indexation of PPOs is to be welcomed. However, it remains to be seen, what influence this amendment will have on the uptake of this form of compensation.

The amendment to the Data Protection Act with the inclusion of the District Court as a forum to litigate data breach claims is a welcome development to Defendants/their Insurers who have, until now, often faced disproportionately high legal costs in defending these types of claims.



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