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Editorial

Welcome to the first issue of the 2025 volume of the *Irish Judicial Studies Journal*.

The Irish Judicial Studies Journal is one of the pre-eminent law journals on the island of Ireland, and it is my great pleasure and privilege to be appointed its new Editor-in-Chief. A stalwart of Irish legal scholarship dating back to 2001, when it was known as the Judicial Studies Institute Journal, it has had its home at the University of Limerick since its re-emergence in 2017 under the name, "Irish Judicial Studies Journal" (IJSJ) and I follow Professor Raymond Friel, Professor Shane Kilcommins and Professor Laura Cahillane as the fourth Editor-in-Chief of the IJSJ here in UL. I would like to thank the former Editors, and particularly Professor Cahillane, for supporting the transition, as well as Mr Justice Peter Charleton who was an ardent supporter of the Journal as its judicial liaison. I would also like to extend a particular thanks to Professor Lucy-Ann Buckley, Head of the School of Law at the University of Limerick for her support as we transitioned editorship of the journal.

Our new Editorial Board has been convened, and I would like to welcome Mr Justice Brian Murray of the Supreme Court as our new judicial liaison to the Editorial Board. My colleague Dr Una Woods will be known to many practitioners for her expertise in land and conveyancing law, and I am delighted that she will be taking on the role of Deputy Editor of the Journal. Dr Susan Leahy will be known to criminal justice practitioners as the Director of our Centre for Crime, Justice, and Victim Studies here at the University and it will be a pleasure to be working with her and Mr Justice Max Barrett as Book Review Editors on the Board.

As we move into the next phase of the journal, we as a Board will maintain consistently high standards of scholarship but also make some changes to its shape. The first significant change is the creation of a new position on our Editorial Board to promote the use of the Irish language in legal scholarship. Though Irish is the first official language of our State, and an official language of the European Union, its use in practice and in scholarship remains limited. Much of legal academic writing in Irish focuses on the status of the language rather than discussing broader legal issues in Irish. As Editor of the IJSJ, I want to actively promote the use of the Irish language in legal research and scholarship, and I am delighted to announce that Dr Rónán Kennedy from the University of Galway has agreed to be our inaugural Irish Language Editor, or Eagarthóir Gaeilge. In addition to his interest and expertise in the use of the Irish language for and by lawyers, Rónán is an expert in environmental law, information technology law, and the use of technology by lawyers and judges. He has a long-standing involvement with the

journal, having been its first Editor from 2001 to 2003 when he was Executive Legal Officer to the Chief Justice. At that time, the Journal published articles in Irish, and we are delighted to formalise this process now. Chuirfeadh sé fáilte roimh ailt i nGaeilge ar aon ghné den dlí, go háirithe ar ábhair seachas stádas na teanga. We are delighted that Dr Kennedy is a member of the team, and look forward to publishing many articles as Gaeilge in the future.

The Irish Judicial Studies Journal maintains its high standards of scholarship through the operation of a rigorous double anonymised peer review process. The work of reviewers is vital to the journal, and we are indebted to them for their careful and thoughtful approach to review. Some journals have begun to periodically publish a list of all those who contributed to the peer review process as a means of promoting transparency and accountability of review; others issue formal acknowledgments of peer review to acknowledge the invisible work of review. We will discuss ways in which to formally recognise the work of peer reviewers as we move forward, and in this issue we will begin to promote transparency of the peer review process, while protecting the anonymity of the process. As a first step, from now on we will publish the gender breakdown of authors and peer reviewers.[1] In this issue, we have seven articles, and fourteen individuals completed the peer review process:

	Women	Men	Other, including Non-Binary people
Authors	4	3	0
Reviewers	6	8	0

Other adjustments and changes will be made incrementally, to allow for steady and sustainable growth of the journal. Some of these changes have happened already. Our contact details, for example have changed: for submissions and general queries, you can email IJSJ@ul.ie; or you can also contact the Editor of the journal at IJSJEditor@ul.ie. We have changed the journal template, with a new font and template. The IJSJ, already indexed on Scopus, is now also included on the list of scientific journals held by the Italian National Agency for the Evaluation of Universities and Research Institutes.

[1] Gender will be assigned in line with fundamental principles of human rights and personal dignity, and the IJSJ will respect the principle of self-identification in this regard. Thus, "women" includes those who identify as women; "men" includes those who identify as men; and "other, including non-binary" includes those whose gender identity is other than that of man or woman, including those who are non-binary.

While I am formally the Editor of this issue of the Journal, it includes a number of articles which were in process while Professor Cahillane was at the helm, and others which were submitted after she handed over the reins. It features contributions from academics, practitioners and a member of the judiciary, and so reflects the breadth of scholarship that is typically represented in the IJSJ.

The first article in this volume is by Dr Deirdre McGowan, who presents an analysis of decisions of the superior courts on the issue of the provision of ancillary relief to dependent spouses. Using a mixed methods approach, she presents a doctrinal analysis of case law as well as an empirical study of all reported decisions from January 2000-December 2022, finding that when a spouse takes on a dependent or homemaking role, outcomes are mixed with respect to provisions of ancillary relief.

We then have a piece from Dr Máire Ní Shúilleabháin on the issue of private international law. She describes and explores key operational frameworks of private international law in the area of international commercial litigation. Focusing on the core values of party autonomy and proximity, she considers various approaches in domestic and international law highlighting consistencies and inconsistencies as well as offering suggestions regarding useful frameworks for consideration.

Next, Mr Justice Max Barrett concludes his consideration of the interaction of competition law and patent law and the obtaining of injunctive relief in the context of FRAND-pledged standard essential patents. In the first issue of the 2024 volume of this journal, Mr Justice Barrett focused on decisions of the European Commission and Court of Justice; here, he explores how the latter has been interpreted in the English superior courts.

We then have a piece from Dr Keith Rix, who will be known to some practitioners in Ireland as someone who has given expert evidence on issues relating to psychiatric illnesses. Professor Rix explains nosology in the context of psychiatric illnesses by reference to the Diagnostic and Statistical Manual (DSM) of the American Psychiatric Association, and the World Health Organization International Classification of Injuries, Diseases and Causes of Death (ICD). These “bloody books”, to use the language of the title of the article, can be helpful in legal proceedings, he argues. However, he outlines a range of issues that speak to the need for their utility to be carefully considered, concluding that “slavish” adherence to their diagnostic criteria should be avoided.

We then have a piece from our former editor, Professor Laura Cahillane, on the impact of the decision in *Heneghan*[2] on constitutional interpretation. This article places the decision in *Heneghan* within the broader context of constitutional interpretation generally, highlighting the shift of the court – at least with respect to amending text – to a harmonious approach to interpretation.

Our penultimate article in this volume is by Dr Aisling Ryan, who while acknowledging the robust and thriving body of scholarship on Irish public and constitutional law, argues that there is a significant gap in knowledge with respect to how administrative law operates in practice. Dr Ryan proposes a framework for a new field of administrative justice as a means of developing scholarship in the area of public law, highlighting how such a field requires a collaborative approach across sectors, as well as a methodological shift for legal researchers.

In the final article in this volume, Adam McCarthy BL examines the issue of frivolous and vexatious litigation in the Irish legal system. Drawing on experiences from other jurisdictions, he recommends reforms aimed at ensuring that the right of access to justice, as well as the effective administration of justice, are protected.

Our volume is finished off with review of Professor Niamh Howlin's edited collection, *A Century of Courts: The Courts of Justice Act 1924*, reviewed by Mr Justice Max Barrett. This review gives us insights into what is a fascinating text which I am sure will be of interest to the legal community in Ireland generally, and the judicial branch in particular.

As all authors to this volume will be aware, articles published in the Irish Judicial Studies Journal are subject to meticulous copyediting and proofing process by a team of Judicial Assistants. This issue of the journal was proofed and copyedited by Deirbhile Nic Leanacháin and Carrie Anne O'Kelly along with Emma Bowie, Muireann Carton, Alessandra Grosariu, Bríd Kenny, Anna Miskelly and Majella Votta, and thanks is extended to them for their careful and thoughtful review of the articles in this issue.

I would like to pay thanks to our outgoing copyeditors, and particularly to Deirbhile Nic Leanacháin who led the team, and welcome in our new group, and our new lead Carrie Anne O'Kelly. I would also like to thank Deputy Editor, Dr Una Woods, and Book Review Editor Dr Susan Leahy for their assistance in preparing this issue for publication, as well as Declan Calpin of the Courts Service for his assistance and endless patience in editing the journal website. Thanks as always go to our editorial

[2] *Tomás Heneghan v Minister for Housing, Planning and Local Government* [2023] IESC 7.

board at the University of Limerick, our judicial board, all of the authors who contributed to this issue, and all of the reviewers who supported it in giving so generously of their time.

Professor Jennifer Schweppe
Editor in Chief
September 2025

Dependent Spouses and Ancillary Relief – A Review of Cases in the Superior Courts

Deirdre McGowan*

Abstract: This article reviews ancillary relief decisions of the superior courts from the perspective of provision for dependent spouses. It discusses the Supreme Court's partnership perspective on marriage and strong message of non-discrimination in relation to home carers, as well as the Court of Appeal's reluctance to value income-earning and caregiving equally. It then reports the results of a review of all publicly available High Court ancillary relief decisions handed down between January 2000 and December 2022, focusing on the financial outcome of those cases. This review finds that outcomes generally reflect principles of partnership and equal sharing where both spouses contribute financially to a marriage, but not when one spouse takes on a dependent or homemaking role. The article thus argues that the strong message of non-discrimination set out by the Supreme Court in DT v CT has not been uniformly implemented by the superior courts, particularly when one spouse has taken a dependent role during marriage.

Keywords: Family Law; Divorce; Judicial separation; Financial remedies; Ancillary relief; Dependent spouses; Judicial discretion.

Introduction

In the 2002 decision *DT v CT*, the Supreme Court referred to marriage as 'a solemn contract of partnership'.[1] Spouses may take on different roles in that partnership but, according to Murray J, the 'work of a spouse in the home … cannot be a basis for discriminating against her by reason only of the fact that the husband was the major earner or breadwinner during the course of the marriage.'[2] Four of the five judgments in *DT* refer to principles of equality and non-discrimination, leading Buckley to conclude that following *DT*, the legal position is that '[e]ach spouse has an equal stake in the marital partnership, and each is equally entitled to share in the fruits of the marriage.' [3] Similarly, Crowley and Joyce observe that 'the legal framework [governing financial remedies on marriage breakdown] premised upon

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[1] [2002] IESC 68, [2002] 3 IR 334, 405 (Murray J).
[2] ibid 406.
[3] Lucy-Ann Buckley, '"Proper Provision" and "Property Division": Partnership in Irish Matrimonial Property Law in the Wake of *T v T*" (2004) 7(3) Irish Journal of Family Law 8.

significant judicial discretion appears to recognise marriage as a partnership of equals': nonetheless, they also note that the partnership perspective does not create a 'starting point of absolute entitlements.'[4]

This research demonstrates, using both doctrinal and empirical analysis, that the Supreme Court's characterisation of marriage as a partnership between equals has had limited practical import for dependent spouses seeking financial remedies on judicial separation or divorce. It shows that although the application of judicial discretion within the statutory framework can produce financial equality of outcome for spouses, this often only occurs where both spouses have contributed financially to the household economy. Where one spouse takes on a dependent role during marriage, financial outcomes, in the main, have favoured the breadwinner.

This article begins with an overview of the legislative framework governing financial remedies on judicial separation and divorce. These remedies are granted by way of orders made ancillary to a grant of divorce or judicial separation, usually described as 'ancillary relief.' Next, it offers a detailed doctrinal analysis of relevant Supreme Court and Court of Appeal decisions which focuses on financial outcomes for dependent spouses. This demonstrates that despite the strong message of partnership and anti-discrimination in *DT*, the appellate courts have not valued income-earning and homemaking equally. A relatively large number of ancillary relief cases, both appeals and first instance decisions, have been decided by the High Court. The review takes a different approach to analysing these cases, focused on identifying patterns in outcome rather than on the content of judicial reasoning. Whilst all the ancillary relief cases decided by the Supreme Court and Court of Appeal involved dependency model marriages, the High Court has considered a broader range of financial arrangements. In comparing outcomes for dual income *versus* dependency model marriages at this level, two key patterns emerge. First, where one spouse has taken on a primarily dependent/caregiving role in the marriage, financial assets are rarely distributed equally between them by the court. Second, although equal distribution is more common when both spouses make financial contributions during marriage, additional care work undertaken by one of them (generally the wife) during and after the marriage rarely results in additional provision. Both the doctrinal analysis of appellate court decisions and empirical analysis of High Court decisions therefore suggest that contrary to the dicta in *DT v CT,* care work has not been accorded the same value as income-generating work in ancillary relief claims. It follows that marriage has not been treated as a partnership

[4] Louise Crowley and Marianne Joyce, *Family Law* (2nd edn, Round Hall 2023), 69. Murphy J in his dissent takes a different view, discussed further below.

of equals by the superior courts. There is some indication that judicial attitudes may be shifting; a very recent Court of Appeal decision involving a dependent spouse accepted that although proper provision does not require the equal splitting of accumulated assets between income earner and homemaker, it is well within the discretion of the court to decide that a 'roughly 50:50 split of the parties' assets constitutes 'proper or "*fair*" provision for each of the parties having regard to the [relevant] factors… not least the fact that the parties' assets were built up during the marriage'.[5]

The Irish ancillary relief scheme has been the subject of recurring critique since it was first implemented in the 1990s. The lack of a legislative facility to terminate financial obligations on divorce has been a particular target for commentators.[6] Further, the Law Society of Ireland points to the absence of guiding principles and resulting uncertainty of outcome as an issue of concern for their members.[7] Empirical studies of cases in the Circuit Court give weight to the Law Society's concerns, highlighting the variability in outcome at that level and the resulting uncertainty for litigants.[8] Detailed overviews of cases before the superior courts identify useful guidance on discrete issues, but also highlight the lack of principled overarching guidance from the courts.[9] This research builds upon these critiques to foreground the experience of caregivers and dependent spouses using a novel, empirically focused approach.

Ancillary relief – the legislative framework

Part II the Family Law Act 1995 ("the 1995 Act") and Part III of the Family Law (Divorce) Act 1996 ("the 1996 Act") set out the statutory provisions governing ancillary relief orders on the grant of judicial separation and divorce respectively. Key to both substantive remedies is a requirement that financial provision that 'is

[5] *A v A* [2025] IECA 9 [171] (Faherty J). [Emphasis in original]
[6] Frank Martin, 'From Prohibition to Approval: The Limitations of the 'No Clean Break' Divorce Regime in the Republic of Ireland' (2002) 16(2) International Journal of Law, Policy and the Family 223; Louise Crowley, 'Divorce Law in Ireland - Facilitating or Frustrating the Resolution Process?' (2004) 16(1) Child and Family Law Quarterly 49; Louise Crowley, 'Sheltering the Homemaker in Irish Family Law: Ireland's Failure to Evolve with Shifting Social and Family Norms' in Margaret Brinig (ed), *International Survey of Family Law 2018* (Intersentia 2018).
[7] Law Society of Ireland, 'Divorce in Ireland: The Case for Reform' (2019) 5.
[8] Lucy-Ann Buckley, 'Irish Matrimonial Property Division in Practice: A Case Study' (2007) 21 International Journal of Law, Policy and the Family 48; Carol Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Clarus 2009); Kathryn O'Sullivan, 'Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities' (2016) 36 Legal Studies 111.
[9] Louise Crowley, 'Irish Divorce Law in a Social Policy Vacuum – from the Unspoken to the Unknown' (2011) 33(3) Journal of Social Welfare and Family Law 227.

proper having regard to all of the circumstances'[10] is made at the time of judicial separation or divorce for each spouse and any dependent members of the family. 'Proper provision,' as it has become known, is a constitutional as well as legislative prerequisite for divorce,[11] but the legislative schemes for both remedies are otherwise largely the same. The Court of Appeal has held that ancillary relief jurisprudence applies to both remedies.[12]

The 1995 and 1996 Acts set out the financial orders that a court may make in order to achieve proper provision. These include periodic payment and lump sum orders, property adjustment orders, financial compensation orders, pension adjustment orders, orders for sale of property and orders in relation to the family home.[13] All income and assets of both spouses, no matter how they were acquired, are available to the court in making provision.[14] Further, the court's power is not limited to making orders at the time of judicial separation or divorce; both Acts allow many of the orders to be made 'at any time thereafter' during the lifetime of the paying spouse so long as the receiving spouse has not remarried.[15] Therefore, in principle at least, it is not possible to permanently terminate the financial obligations of spouses following divorce.[16] Nor is it possible to ensure that financial orders made on judicial separation will remain unchanged on a subsequent divorce. Each application to the court requires a full reassessment of the spouses' financial position for the purpose of ensuring proper provision.

The legislation sets out factors which the court must consider when making proper provision.[17] It must consider the income, earning capacity and other financial resources each spouse has or is likely to have in the foreseeable future.[18] The court must also have regard to the financial needs, obligations and responsibilities of each spouse and the standard of living enjoyed by the family during the marriage. The age of the spouses, the duration of the marriage and any physical or mental

[10] Family Law Act 1995, s 16(1); Family Law (Divorce) Act 1996, s 20(1).
[11] Article 41.3.2(ii) of the Constitution of Ireland requires a court to ensure that proper provision exists or will be made for the spouses and their children prior to granting a decree of divorce.
[12] *QR v ST* [2016] IECA 421 [51].
[13] The 1995 Act, ss. 6 to 15A; the 1996 Act, ss. 12 to 19. In relation to judicial separation, the court can make an order extinguishing succession rights (the 1995 Act, s 14) or for provision from the estate of one spouse in the case of divorce (the 1996 Act, s 12).
[14] *QR* (n 12) [70] where Irvine J states 'the authorities make clear that all property and income, no matter how it was acquired is available for proper provision.'
[15] See, for example, s 16(1) of the 1996 Act in relation to financial compensation orders. Application for variation of certain orders is also possible under s 22 of the 1996 Act and s 18 of the 1995 Act.
[16] Crowley, 'Divorce Law in Ireland - Facilitating or Frustrating the Resolution Process?' (n 6) 50.
[17] The 1995 Act, s 16(2); the 1996 Act, s 20(2).
[18] The 1995 Act, s 16(2)(a); the 1996 Act, s 20(2)(a).

disability of either spouse must also be accounted for.[19] Crucially, the legislation specifically directs the court to the potential for spouses to make contributions of both a financial and non-financial nature to the welfare of the family and to the fact that the non-financial contributions of one spouse can benefit the financial wellbeing of the other. Sections 20(2)(f) and (g) of the 1996 Act provide that the court shall have regard to:[20]

(f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family.

(g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family.

Finally, accommodation needs, statutory benefits to which either spouse is entitled, the conduct of the spouses if unjust to ignore, and the rights of third parties must be considered. In the case of divorce, when deciding whether to make financial orders, the court must also consider 'the terms of any separation agreement which has been entered into by the spouses and is still in force.'[21] As well as considering the factors set out in section 16 of the 1995 Act or section 20 of the 1996 Act, the court may only make financial orders where it would be 'in the interest of justice to do so.'[22]

The effect of this legislative scheme is to confer a very broad discretion on the court to distribute property and income between spouses when making an order for judicial separation or divorce. The Supreme Court has placed some limitations on the discretion, indicating that ending financial ties is a legitimate aim in appropriate circumstances,[23] setting out clear guidance on the extent to which a court making an order for divorce is bound by the terms of a prior judicial separation order or

[19] The 1995 Act, s 16(2)(b)-(e); the 1996 Act, s 20(2)(b)-(e).
[20] The same factors are set out in s 16(2) of the 1995 Act.
[21] The 1996 Act, s 20(3).
[22] The 1995 Act, s 16(5); the 1996 Act, s 20(5).
[23] *DT* (n 1).

separation agreement,[24] and confirming that only conduct that is 'obvious and gross' will be taken into account in making financial orders.[25] Otherwise, the courts have accepted that the effect of the legislative framework is to confer a 'relatively broad discretion' on the trial judge to create individualised solutions for each separating or divorcing couple.[26] As neatly summarised by Crowley and Joyce, the overall regime is one 'reliant upon subjective, fact-based judicial determinations.'[27]

Constitutional provisions relating to the family can have an impact on the determination of proper provision. In *DT v CT*, Denham J linked the proper provision requirement to the constitutional position of the marital family[28] and in particular, Article 41.2 which recognises the contribution made by women's work in the home to the common good.[29] For the purpose of weighing the statutory factors to achieve proper provision, Denham J commented that '[a] long lasting marriage, especially in the primary childbearing and rearing years of a woman's life, carries significant weight, especially if the wife has been the major home and family carer.'[30] In the same case, Murray J made a connection between proper provision and Article 41.2, observing that its recognition of the value of work in the home to the welfare of the family places a duty on the courts to 'in principle, attribute the *same value* to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home.'[31]

Thus, the constitutional and statutory framework, as well as the specific recognition of the value of care work in the Constitution and the partnership view of marriage espoused by the Supreme Court, suggest that women (and men) taking a caring, dependent role within marriage should expect their contribution to be valued equally with that of their spouse when the court exercises its discretion to make proper provision. Nonetheless, appellate court decisions dealing with ancillary relief demonstrate that care work is not valued equally with income generation in making proper provision.

[24] *YG v NG* [2011] IESC 40.
[25] *DT* (n 1) 370 (Keane CJ).
[26] ibid 365 (Keane CJ).
[27] Crowley and Joyce (n 4) 766.
[28] Article 41.3.1° provides: 'The State pledges itself to guard with special care the institution of Marriage on which the Family is founded and to protect it against attack.'
[29] Article 41.2.1° provides: 'In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.'
[30] *DT* (n 1) 382.
[31] ibid 407 (emphasis added).

Dependent spouses in the Supreme Court and Court of Appeal

There have been just a handful of Supreme Court cases dealing substantively with the issue of ancillary relief on judicial separation or divorce.[32] Interestingly, all the reported cases involved marriages in which the husband was the income earner on whom the wife was financially dependent at the time the marriage ended. The four substantive Court of Appeal decisions on ancillary relief likewise all involve income-generating husbands and financially dependent wives.[33] Whilst legislation and the Constitution refer to proper provision being made for both spouses and any dependent members of the family, these appellate decisions reflect the reality that ancillary relief law requires the financially weaker spouse, almost always the wife, to claim provision from the assets and income of their more financially secure spouse. As noted by O'Sullivan, the discretionary statutory framework establishes a right to apply for relief rather than any actual rights or entitlements.[34] Therefore, in addition to being financially weaker, the dependent spouse must actively articulate why and how she should be provided for and to what extent. As we have seen, the statutory factors require a wide range of issues to be considered, but crucially, the legislation contains no guidance on the relative weight of the factors nor what the aim of provision ought to be.[35] The absence of specific legal entitlements for dependent spouses has been criticised by the United Nations Committee on the Elimination of Discrimination against Women. In its observations on the sixth and seventh periodic reports of Ireland, the Committee pointed out that the discretionary scheme compels women into litigation to seek support from their husbands.[36]

The appellate courts have placed few limitations on the extent of discretion available to a trial judge. In particular, they have not fixed overarching aims or objectives for provision that might guide decision making in the lower courts or assist a dependent spouse seeking ancillary relief.[37] Rather, Supreme Court cases have focused on the potential for terminating financial obligations on divorce whilst

[32] *JD v DD* [1997] 3 IR 64; *MK v JPK* [2001] 3 IR 371; *DT v CT* [2002] 3 IR 334; *MD v ND* [2011] IESC 18 and [2015] IESC 66, [2016] 2 IR 438; *YG v NG* [2011] IESC 40, [2011] 3 IR 717; *T v L* [2018] IESC 26.
[33] *T v L* [2015] IECA 363; *QR v ST* [2016] IECA 421; *NO v PQ* [2021] IECA 177; *AX v BX* [2022] IECA 215. It is worth acknowledging that these are all 'ample resources' cases – whether the analysis would be similar for lower value Circuit Court cases remains open to question.
[34] O'Sullivan (n 8) 117.
[35] The weighting to be applied to each factor is a matter for the court in light of the facts of each case, see *MK v JK* [2001] 3 IR 371, 384 (McGuinness J).
[36] Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the Combined Sixth and Seventh Periodic Reports of Ireland' (9 March 2017) UN Doc CEDAW/C/IRL/CO/6-7 para 56.
[37] Crowley, 'Divorce Law in Ireland - Facilitating or Frustrating the Resolution Process?' (n 6) 237.

more recent Court of Appeal cases have centred on the practical objective of meeting the needs (broadly defined) of the dependent spouse with a combination of property adjustment and periodic payment orders.

McGuinness J considered the meaning of proper provision in the Supreme Court decision of *MK v JPK*.[38] In a rather bold decision, Lavan J in the High Court had relied on the English case of *White v White*[39] and 'common law rules' to award an equal share of the husband's capital and income to the dependent wife as proper provision on divorce. On appeal, McGuinness J made it clear that there was no rule of equal financial sharing between spouses in Irish law. She pointed out that the aim of ancillary relief is proper provision and that it must be achieved through a careful consideration of the factors set out in section 20 of the 1996 Act. The case, she noted, was not 'an ordinary or average case',[40] as the Court needed to consider the existence of a prior separation agreement, the 20-year period that had elapsed since the separation, the wife's needs and her role in caring for their children, as well as the fact that the entire of the husband's wealth was accumulated after the parties separated. She set aside the original decision and remitted the case to the High Court for consideration in line with the statutory framework, meaning that no indication of how the Supreme Court might have weighed the statutory factors was provided. Nonetheless, in ruling out strict equality and allowing the husband's appeal, the implication is that the High Court award was excessive.

Financial equality was not directly at issue in the next ancillary relief case to come before the Supreme Court. The High Court in *DT v CT* had considered the statutory factors and made proper provision for the dependent wife by way of lump sum payments and pension adjustments amounting to approximately 40% of the husband's capital assets. The wife was not awarded, nor did she seek, any periodic payments. The husband appealed, arguing that the provision made for the wife was excessive and that periodic payments rather than a substantial lump sum was more appropriate. The wife had not been awarded an equal share of assets and income, nor did she seek equality. Her concern was to secure enough capital to allow her to work primarily in the home for the benefit of the three children of the marriage without relying on periodic payments from her ex-husband. The specific issue between the parties on appeal was therefore whether a 'clean break' from financial obligations was permissible under the legislation and if so, how it ought to be

[38] [2001] 3 IR 371.
[39] [2001] 1 AC 596.
[40] *MK* (n 38) 384.

achieved. The Supreme Court distinguished *MK v JPK*[41] and held that although a clean break award was neither mandated nor facilitated by the legislation, it was within the scope of the discretion afforded to the trial judge.[42] In addition, Keane CJ, supported by Denham J, indicated that 'the court might be justified in treating, in "ample resources" cases, one third of the net assets as a yardstick at the lower end of the scale.'[43] Although not expressly stated, 50% is assumed to be the upper limit of provision. Keane J opined that:

> ...had the [wife] in this case been awarded more than half the assets of the [husband] and appealed to this court on the ground that this was not proper provision, the yardstick of equality [accepted in English Courts] would certainly have been a relevant consideration.[44]

The dicta of Keane CJ and Denham J are the clearest indication given by the Supreme Court of how a homemaker's contribution might be valued in financial terms; financial equality is not the aim of provision and although a dependent wife might be awarded more than one third of her husband's capital, this could only happen if she accepted a clean break and no ongoing share of his income. Denham J provided a list of circumstances in which even the one third benchmark might not be appropriate: where paying a substantial lump sum would 'destroy a business, or the future income of a party or parties, or if it related to property brought solely by one party to the marriage'.[45] There is no indication of what alternative could be available to a dependent spouse in such circumstances or what share of income thus protected ought to be available to make proper provision for her.

The financial outcome and discussion of specific shares in *DT* are difficult to reconcile with the strong endorsement by the majority of a partnership model of marriage. The spouses entered the marriage as two equally placed professionals, with the wife at times directly assisting the husband with the development of his professional practice. She had stepped back from her own work following the birth of their third child whilst his business continued to expand. Following the breakdown of the marriage, the wife found it difficult to re-establish herself as a professional whilst continuing in her role as primary carer for the children. In contrast, the husband's professional success, unencumbered by day-to-day care of three children, enabled him to make successful property investments after they

[41] ibid.
[42] *DT* (n 1) 365 (Keane CJ).
[43] ibid 369.
[44] ibid 368.
[45] ibid 384.

separated. In the Supreme Court, Keane CJ identified the relevance of sections 20(2)(f) and (g) of the 1996 Act in determining proper provision for this couple, stating that there ought to be no discrimination between income earner and home carer in making proper provision. He pointed out that once the husband married and started a family, it would have been difficult for him to achieve financial success without the support of his wife.[46] In her judgment, Denham J stated that 'Article 41.3.2 of the Constitution and the Act of 1996, clearly require that value be placed on the work of a spouse caring for dependents, the family and home'[47] and Murray J noted that 'the work of a spouse in the home … cannot be a basis for discriminating against her by reason only of the fact that the husband was the major earner or breadwinner during the course of the marriage.'[48] Fennelly J also supported the proposition that home carers should not suffer discrimination.

In his dissent, Murphy J favoured the approach of McGuinness J in *MK v JPK*, arguing that provision for a dependent spouse should, in the normal course, be made by way of periodic payments that automatically cease when the receiving spouse remarries. Any lump sum orders made, in his view, should be ancillary to maintenance payments.[49] Whilst this perspective is not necessarily antithetical to a partnership view of marriage, it does place the dependent wife fully in the position of lifetime supplicant to the husband and rules out any significant sharing of capital assets between spouses.

The guidance of 30-50% suggested by the majority in *DT* is of course *obiter;* the wife did not appeal the sum awarded in her favour. Arguments in the case focused on whether the clean break ordered by the High Court was permissible within the legislative framework and whether the lump sum awarded was excessive. A partnership view of marriage was used to justify the quantum of the lump sum order made in favour of the wife. She was entitled to this money because of her 'family role'.[50] The Court thus acknowledged that her role was valuable, but not quite as valuable as her husband's. Whilst the Court saw the spouses as partners, the husband held the larger equity share. It is worth noting that at the time of hearing, the husband in this case had vouched income exceeding £210,000 per annum and his total net worth was £14m. The outcome of the case left the wife with £5.6m and

[46] ibid 372.
[47] ibid 381.
[48] ibid 406.
[49] ibid 398.
[50] ibid 382 (Denham J).

the husband with £9.4m plus income; a split on capital of 38% to wife and 62% to husband but with no sharing of income.[51]

The Supreme Court in *DT* left open a possibility for future development of a partnership perspective on marriage based on a principle of non-discrimination. In England and Wales, the application of a similar discretionary legislative scheme (albeit with an overarching aim of clean break) led the House of Lords to establish equal sharing as a benchmark for fairness in ample resources cases.[52] This has been further refined to recognise that equality does not always mean fairness and that it may be necessary to make a periodic payments order in addition to a capital payment to fully compensate a dependent spouse for a loss of earning potential resulting from the marriage.[53] Herring argues that the current complexity of the law in that jurisdiction results from the subsequent failure of the Court of Appeal to apply the principle of equality.[54] A similar point can perhaps be made in this jurisdiction. Three Court of Appeal decisions did not adopt or adapt the partnership approach and instead focused on meeting the needs (broadly interpreted) of the dependent spouse.[55] In a fourth, very recent case, the aim of approximately equal division of assets adopted in the High Court was not challenged in the appeal, and thus not directly at issue. Nonetheless, the Court of Appeal did indicate that equally dividing assets could represent a 'fair' outcome in a long marriage where one spouse took on a homemaker role.[56]

In the first case, *T v L*,[57] the parties had lived together as spouses for 12 years and had been separated for more than 20 years at the time of divorce. Since separation, the wife had been the primary carer for the three children of the marriage whilst the husband had continued to develop his career. The Court recognised that the wife had 'three children to rear effectively as a single parent' and that without this obligation, she would have been able to develop a career and build a pension fund.[58]

[51] ibid 372 (Keane CJ).
[52] *White* (n 39).
[53] *McFarlane v McFarlane* [2006] UKHL 24.
[54] Jonathan Herring, *Family Law* (10th edn Pearson 2021) 307. He also notes that the principle of equality must be balanced against the needs of children in less well-off families because the primary carer may require substantially more than an equal share to meet those needs.
[55] *T v L* [2015] IECA 363; *QR v ST* [2016] IECA 421 and *NO v PQ* [2021] IECA 177. There are two futher cases. *AX v BX* [2022] IECA 215 deals with whether a trust set up to protect a lump sum paid to the wife ought to be unwound. The quantum of the financial orders made by the High Court was not in issue before the Court of Appeal. *CC v NC* [2016] IECA 410, involved a unique set of facts and again did not directly involve the quantum of financial orders.
[56] *A v A* [2025] IECA 9 [171].
[57] [2015] IECA 363.
[58] ibid [91].

The factors at section 20(2)(f) and (g) of the 1996 Act were not directly discussed in this case. Ancillary to the order for divorce, the wife was awarded a pension adjustment order in her favour amounting to approximately 16% of the husband's pension fund and a periodic payment order equating to just over one fifth of his gross monthly income.

In the next case, *QR v ST*,[59] the Court of Appeal rejected an appeal by a dependent wife on the quantum of a lump sum awarded to her in addition to maintenance on judicial separation. She argued that an award in her favour of approximately 12% of the husband's capital was inadequate. The Court of Appeal focused on the marital standard of living as a guide to proper provision. Irvine J noted the dicta of Murray J in *DT v CT*, that in cases where there are very substantial assets belonging to one spouse which greatly exceed any conceivable day-to-day needs of either spouse, whatever their standard of living, those assets should not, as a matter of course, remain with the spouse who owns them, with the other spouse being confined to depending on periodic payments. [60]

Despite apparently accepting the views of Murray J, she then went on to refer to Murphy J's dissent in *DT v CT* in support of the proposition that once the marital standard of living is maintained, surplus assets are beyond the reach of the court. More troublingly she repeated Murphy J's wealthy heiress/undeserving bounder trope in support of this proposition:[61]

> If there is a surplus beyond making proper provision, I see no reason why the party entitled to that surplus should not retain it. This is in no sense discriminatory. If an impoverished man were to marry a wealthy heiress and he, whether through illness or indolence, contributed little or nothing in financial contribution or social commitment to the marriage, he would still be entitled under Irish law to have proper provision made for him on the dissolution of the marriage. That having been achieved and a surplus remaining, I see no reason why it should not be retained by the heiress.[62]

Irvine J discussed the benchmark of one third at the lower end suggested in *DT*, noting Denham J's statement that 'it may have no application in many cases' such

[59] *QR* (n 12).
[60] ibid [72] (Irvine J), quoting *DT* (n 1) 407.
[61] The undeserving bounder trope is a variation on equivalent 'gold-digger' accusation often levelled at women. For a discussion of the difficulties with this type of assumption in ancillary relief cases see Sharon Thompson, 'In Defence of the "Gold-Digger"' (2016) 6(6) Oñati Socio-legal Series 1225.
[62] *QR* (n 12) [74], quoting *DT* (n 1) 399.

as 'where a party has wealth from his or her own endeavours to which the other party has no claim except under the factors set out in s. 20(2) ...'[63] She concluded:

> ...to seek to test the fairness of any proposed provision by benchmarking it as a percentage of the overall value of assets available is rarely useful. This is because each case turns on its own circumstances, and these vary hugely from case to case particularly so in cases where the parties enjoy great wealth.[64]

One of the grounds of appeal put forward by the wife was that the High Court had failed to take adequate account of her contribution as a homemaker pursuant to section 16(2)(g). The Court of Appeal noted that the High Court did make specific reference to her role as a homemaker and that this was reflected in the award made in her favour. The wife also argued that the trial judge did not give sufficient weight to the impact of her homemaking role on her future earning capacity. Irvine J rejected this claim, noting that, 'the Court was not referred to any evidence given by the wife as to the career path she would have followed but for her relationship with her husband or concerning the level or type of earning she would have expected to have earned had she not taken us such a role.'[65]

The partnership approach of the Supreme Court in *DT v CT* suggested that the wife's economic loss ought to be measured relative to her husband's gain. Although not actually valuing the contributions equally, the Supreme Court accepted that the wife's non-financial contribution had a value in the economy of that specific household. In suggesting a 'but for' test, Irvine J indicates that the wife's contribution should be measured against her economic position in an alternative life where the marriage and children did not exist. This is an impossible standard, and antithetical to a partnership view of marriage. The wife contributed through reproductive and caring work to the economy of *her* marital family and this work benefited *her* husband. Ancillary relief is not a tortious compensation scheme, it is a method for ensuring *inter-partes* fairness on marital breakdown with proper provision being made for both spouses.[66]

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[63] *QR* (n 12) [76], quoting *DT* (n 1) 384.
[64] *QR* (n 12) [104].
[65] ibid [115].
[66] Introducing tortious principles to ancillary relief law would represent a regressive step with echoes of actions like criminal conversation which assumed a wife to be her husband's property; see Maria Luddy and Mary O'Dowd, *Marriage in Ireland 1600-1925* (Cambridge University Press, 2020) 263-264. The meaning of compensation in the context of ancillary relief law is discussed in detail by the Law Commission of England and Wales in their 2014 report *Matrimonial Property, Needs and Agreements* (2014, LAW COM No 343).

The *DT v CT* partnership view of marriage was referenced by the Court of Appeal in the recent case of *NO v PQ*.[67] The family were of relatively modest means; the principal asset was an income generating farm. Whelan J referred to Murray J's dicta in *DT* that '[p]roper provision should seek to reflect the equal partnership of the spouses' and that:

> ... the Constitution and, in particular, Article 41 reflects a shared value of society concerning the status of the "family" in the social order as a natural primary and fundamental unit group in society. The State is required to protect the family inter alia, because it is indispensable to the welfare of the nation and the state.[68]

This family had approached their long marriage as a partnership, working together on a dairy farm inherited by the husband and raising three children. When the marriage broke down, the wife was provided with off-farm accommodation and the husband continued with the farm work by himself. Two of the children, although over 18, continued to live with and require support from the wife. Despite employing the rhetoric of partnership, and a lengthy marriage, the Court ordered that the family farm remain with the husband and awarded a small lump sum together with periodic payments amounting to just 20% of the farm income to the wife. This was an improvement on the High Court decision which had ordered smaller periodic payments terminating after a number of years. O'Sullivan has characterised the Court of Appeal's approach to maintenance in this case as indicating 'quite a generous basis for support.'[69] It is nonetheless some distance from recognising that this couple were equal partners in the marital relationship; the farm generated significant income, most of which remained with the husband whilst the wife was confined to a minimalist standard of living. Further, the maintenance ordered was intended to meet her needs only; there is no indication in the judgment that it could provide compensation to the wife for the relationship-generated disadvantage as envisaged by section 20(2)(g).

The Supreme Court and Court of Appeal cases thus indicate two distinct approaches to proper provision for dependent spouses: aiming to end financial ties at the point of divorce with a lump sum payment (a 'clean break') or seeking to meet ongoing needs though a mix of periodic payments and other financial orders. Whilst *DT* indicates that one third of the provider's assets is a fairness check at the lower

[67] [2021] IECA 177.
[68] ibid [70], quoting *DT* (n 1) 404.
[69] Kathryn O'Sullivan, 'Spousal Maintenance in Ireland: Past, Present and Future' (2022) 44 Journal of Social Welfare and Family Law 63, 74.

end, *QR* suggests the marital standard of living is a cap at the upper end. Crowley has pointed out some of the limitations of the 'clean break' approach, most notably that it is not actually possible to end financial ties within the legislative framework.[70] She does however see the ending of financial ties as a legitimate objective for spouses and argues that the legislative bar on clean break is paternalistic and should be amended to facilitate a clean break in appropriate cases.[71] Pointing to socio-economic changes over 30 years that have resulted in more women working outside the home, she argues that ending financial ties more accurately reflects spousal expectations following divorce.[72] The legislative failure to act in this regard, in her view, 'demonstrates that the protection of the homemaker and the retention of the inter-spousal obligations, remains a key social priority.'[73] These are important points, and previous empirical studies indicate that when spouses reach agreement, they do so on the basis that no on-going maintenance will be paid.[74] Nonetheless, care must to be taken to ensure that foregrounding a clean break will not result in undervaluing a dependent spouse's contribution. The importance of periodic payments in meeting needs, as well as their potential to compensate a dependent spouse for the loss of a career and earning potential has recently been highlighted by O'Sullivan.[75] This is of particular relevance in cases where payment of an adequate lump sum at the time of divorce is not financially possible, either because it would require the liquidation of income-generating assets or because the family's main asset is the earner's income.

Appellate decisions dealing with wealthy families seem far removed from the concerns of everyday families, and it may be difficult to feel sympathy for dependent wives for whom provision consists of many millions of euros. Nonetheless, these cases set the standard for provision in the lower courts where most orders for divorce and judicial separation are made. A true partnership approach would recognise that the wealth of both spouses at the end of marriage is the result of the joint efforts of the spouses in their respective spheres. If home caring work is of equal value to income-generating work, then it should be valued as such in making provision. A dependent wife contributes to *her* marriage and her work should be valued in that context, regardless of the sums involved.

[70] Crowley, 'Divorce Law in Ireland - Facilitating or Frustrating the Resolution Process?' (n 6) 51.
[71] ibid 55.
[72] Crowley, 'Sheltering the Homemaker in Irish Family Law: Ireland's Failure to Evolve with Shifting Social and Family Norms' (n 6) 295.
[73] ibid 293.
[74] See, for example, Buckley, 'Irish Matrimonial Property Division in Practice: A Case Study' (n 8).
[75] O'Sullivan (n 69) 72.

Ancillary relief in the High Court

The next section reports the results of an empirically focused analysis of a large sample of High Court ancillary relief decisions. It begins with a statement of methodology, explaining how the cases were selected and analysed, as well as some issues with accessing cases and interpreting outcomes. The first part of the case analysis notes the prevalence of divorce versus judicial separation among the cases and whether there were dependent children of the marriage. The final part of this section compares outcomes for cases involving dependent spouses with those in which both spouses had their own source of income during and at the end of marriage.

Methodology – the data set

Seventy-two High Court cases form the data set for the study. These cases were decided between 1 January 2000 and 31 December 2022 and all deal substantively with financial provision on divorce or judicial separation.[76] The cases were identified and selected using three sources: *JustisVlex, Westlaw,* and the judgments section of the Courts Service website. The terms 'divorce', 'judicial separation' as well as 'Family Law (Divorce) Act 1996' and 'Family Law Act 1995' were used in the search functions of *JustisVLex* and *Westlaw*. The High Court filter was used to limit the results.[77] The search term function on the Courts Service website was used with the terms 'judicial separation' and 'divorce' and a date range of 1 January 2001 to 31 December 2022.

Search results were tabulated, and duplicates and cases not in-camera were eliminated.[78] The reports for the resulting cases (n = 237) were then manually reviewed to exclude cases dealing with preliminary issues such as motions for discovery, or post-judgment issues such as costs, enforcement, or variation applications. Cases dealing with non-financial issues *only* such as custody of and access to children were removed, as were applications for provision following a foreign divorce. The 72 remaining cases are therefore all the publicly available judgments of the High Court delivered between January 2000 and December 2022 relating to a determination of proper provision on the grant of a judicial separation or divorce.

[76] I began in 2000 because the Courts Service was established in 1999 and began providing statistics on caseloads in its annual reports from 2000. Including pre-2000 cases would have added just four decisions to the data set.
[77] Cases decided before 1 January 2001 are not available on courts.ie.
[78] All divorce and judicial separation cases are heard in private and use letters rather than names for the parties. This element of review was therefore relatively straightforward.

Additional written judgments do exist. The *Irish Current Law Digest* reports very short summaries of some that are not available on any of the databases. Additionally, some judgments refer to written judgments in other cases that are not publicly available. [79] Evidence of absence can also be gleaned from appeal pathways. The judicial separation case of *MD v ND* was heard twice in the Supreme Court,[80] but the corresponding High Court decisions, from 2008 and 2011, are not available on the databases. Whilst it might be possible to track down post-2000 unreported judgments via practitioners or by physically searching specific university libraries, judgments not available on *Westlaw, JustisVlex* or *courts.ie* were excluded on the basis that they are not easily accessible to practitioners, academics, or the public. Further, although it may be possible to determine what was decided in the High Court from the judgment on an appeal (as would be the case in *MD v ND*), these cases are not included because no direct citation or document is available for the High Court decision. The search results are therefore not a fully comprehensive account of all High Court ancillary relief cases, but they do represent the largest possible reliable sample of cases decided by a judge at that level. Each of the 72 cases were read for the purposes of identifying the data points reported. No software or other assistive technology was used in analysis of the cases. The information was entered into an excel spreadsheet to facilitate sorting across the various data points.

Cases decided by the court represent just a small proportion of cases commenced in the High Court. Some settle before hearing with no court order,[81] others end with an order of the court in the terms of a settlement agreed between the parties, and others may be withdrawn without resolution. Obtaining information in relation to the terms of settlements ruled by the High Court may be possible through attendance in the court and inspection of files pursuant to section 40(3) of the Civil Liability and Courts Act 2004, but this approach has not yet been attempted in the High Court. [82] None of the judgments considered here relate to a ruling on a

[79] Prior to the routine posting of judgments on courts.ie from 2000, so called 'unreported judgments' were a standard feature of the Irish legal system. These were approved judgments circulated among practitioners and to some university libraries. There are indications that this practice continues, at least amongst practitioners. The Westlaw database also has a section of 'unreported judgments' which contains some judgments not posted on courts.ie.

[80] This case was first heard in the High Court in 2008 with a judgment by Abbott J on 22 July 2008 referred to in a subsequent Supreme Court appeal ([2011] IESC 18). It was remitted to the High Court and heard again by Abbott J, with a judgment of 27 June 2014 referred to in a further Supreme Court appeal in 2015 ([2015] IESC 66).

[81] Although both divorce and judicial separation require an order of the court.

[82] This approach has been taken in relation to cases in the Circuit Court. See for example Coulter, *Family Law in Practice* (n 8).

complete settlement, although in some cases elements of the court's order reflected an agreement between the parties. It is also not known whether the judgments posted on the Courts Service website or released to legal databases are a complete set of the judgments handed down. There may be additional *ex tempore* judgments and judgments withheld from publication as a result of the application of the in-camera rule or for resourcing reasons. In its annual reports from 2000-2022, the Courts Service reported a total of 626 divorce orders and 502 judicial separation orders granted in the High Court.[83] These 72 cases therefore represent just 6% of all divorce or judicial separation orders made over the same period. The discrepancy between the number of orders granted and the number of published judgments suggests that most couples obtain orders on consent following a period of negotiation.[84] However, it is not possible to say whether orders made without written judgments were the result of uncontested applications, rulings on settlements, or rulings following 'on the steps of the court' agreements.

Case type

The Courts Service Reports record a total of 626 divorces and 502 judicial separations granted over the period from 1 January 2000 to 31 December 2022. However, most of the reported decisions relate to divorce. Forty-seven of the 72 reported cases relate to divorce and 25 relate to judicial separation. Six cases commenced as judicial separation but resulted in a grant of divorce. The Courts Service does not report the extent to which applications for judicial separation become applications for divorce (or less plausibly, divorce applications become judicial separation). This can arise when the wait time for divorce has elapsed during judicial separation proceedings and one of the parties, with the permission of the court, makes an application for divorce.[85] Nonetheless there were, overall, more applications for judicial separation than divorce in the High Court (870 : 744) during the period, but more orders for divorce were granted (502 : 626), suggesting that this movement from judicial separation to divorce is an established pathway

[83] Total number of cases calculated using tables contained in Courts Service Annual Reports 2000-2022 are available on www.courts.ie.

[84] This mirrors the findings of previous empirical studies which identified a large proportion of divorce and judicial separation orders made on a consent basis: Buckley (n 8).

[85] Since 1 December 2019 spouses must be separated for a minimum of two years out of the previous three to obtain a divorce: Family Law Act 2019, s 3 (commenced by Family Law Act 2019 (Commencement) Order 2019, SI 2019/585). Prior to that, the wait period was four out of the previous five years. A judicial separation application can be made on fault grounds with no wait period or after one year of separation on no-fault grounds: Judicial Separation and Family Law Reform Act 1989, s 2.

through the judicial process. Same-sex marriage has been available since 2015, but none of the cases examined related to same-sex couples.

Twenty-six of the 72 cases were appeals from the Circuit Court, 44 were first instance and 2 were remitted from the Supreme Court (Figure 1).

Case type	First Instance	Appeals	Remitted from SC
Divorce	20	19	2
Judicial Separation	24	7	0
Total	44	26	2

Figure 1: First instance and appeals

Forty-five of the couples coming before the High Court had dependent children at the time of the court order and 27 did not (Figure 2).[86] Nonetheless, disputes about custody of or access to children were rare; most cases related to the distribution of assets and income between the spouses only.[87]

Number of Dependent Children	**0**	**1**	**2**	**3**	**4+**	**Total**
Divorce	16	3	12	4	6	41
Judicial Separation	11	2	7	7	4	31
Total	27	5	19	11	10	72

Figure 2: Dependent children

Dependent children, in the main, remained in the custody of the mother or occasionally custody was shared with the father.[88] *DE v FG* is an outlier in that the three children had a home mainly with the father who was also the income earner in the family.[89] The issues around ancillary relief orders and dependent children deserve a closer analysis. I have focused in this review on spousal dependency, but this is clearly closely linked to the care of children.

[86] Dependent children are those under 18 or under 23 if in full time education. Children of any age with a mental or physical disability who cannot maintain themselves are also considered dependent: the 1996 Act, s 2 and the 1995 Act, s 2.
[87] I did remove cases where a judicial separation or divorce was sought and the *only* issue in dispute was custody of or access to children were removed from the study, but this resulted in the removal of just 2 cases from more than 200 search results.
[88] In *ML v SL* [2007] IEHC 438. The older children spent equal time with mother and father.
[89] [2019] IEHC 83.

Dependent spouses

Forty-seven of the 72, or two-thirds of cases coming before the High Court, involved provision for dependent spouses, all of whom were wives. A spouse was categorised as dependent where she had either no income of her own during and/or at the end of marriage, or where her income was inadequate to meet even basic subsistence needs and she had been supported by her husband during marriage (Figure 3).

Dependency in Marriage	Dependent wife	Non-Dependent wife
Divorce	23	18
Judicial Separation	24	7
Total	47	25

Figure 3: Dependent spouses

Of the 46 first instance or remitted cases, 38 (82%) involved provision for a dependent spouse. Among the 26 appeals, nine (35%) related to couples in which the wife took on a dependent role (Figure 4). In the 38 first instance decisions involving a dependency model marriage, periodic payments for the benefit of the spouse were ordered in 26 cases (68%) whilst financial orders aiming to terminate financial obligations were made in 12 (32%) (Figure 4). In contrast, in the eight cases that did not involve a dependent spouse, spousal maintenance was ordered in just one (*MY v AA*). [90]

Dependency and periodic payments	Dependent Spouse	Periodic Payments for spouse	No Dependent Spouse	Periodic Payments for non-dependent spouse
First instance/Remitted	38	26	8	1
Appeals	9	8	17	0
Total	47	34	25	1

Figure 4: First instance and appeals

The impact of dependency in marriage on post-marriage provision is similarly striking in the Circuit Court appeals. Nine of the appeals involved a dependent spouse; periodic payment orders were made in all but one (89%). In contrast, a clean break order was made in all 17 appeals in which both spouses had an income. As an overall proposition therefore, periodic payments for the benefit of a spouse are generally made only where that spouse took a dependent role during marriage. Where both spouses had their own income, the High Court rarely ordered spousal

[90] [2017] IEHC 227.

maintenance. This was the case even where one spouse had primary care of children following divorce.[91]

An exception to this general proposition is *MY v AA*, decided in 2017. There were five children of the marriage, three of whom remained dependent and in the care of the wife at the time of divorce. Both spouses were working medical doctors. A time-limited periodic payment order in favour of the applicant wife was awarded because of 'the significant difference in income between the parties and the fact that the applicant's earning capacity has been limited or at least delayed by her focus upon the rearing of the children.'[92] This was in addition to an order for child maintenance and a pension adjustment order in favour of the wife, amounting to approximately 50% of the husband's accrued fund.

Financial outcomes – comparing dual income and dependency model marriages

As we have seen, clean break arrangements were common where both spouses had income, and dependency during marriage predicted spousal maintenance orders at the end of marriage. Otherwise, the complexity of individual cases and the broad discretion afforded to the court can make it difficult to get a sense of how, in financial terms, proper provision is achieved. Whilst this can be seen as a necessary consequence of a flexible ancillary relief jurisdiction, a lack of transparency can also mask broader patterns of decision making.

In an effort to gain some understanding of how the High Court approached the specific issue of dependency, the financial outcomes of the 72 cases were examined under four headings: [1] First, cases in which there was a dependent spouse and an order for periodic payments formed part of proper provision. [2] Second, cases in which there was a dependent spouse, and periodic payments were not awarded. [3] Third, cases with no dependent spouse where periodic payments were ordered. [4] Finally those where there was no dependent spouse and no periodic payments were ordered. The number of cases in each category is indicated in Figure 5.

Case Type	Dependent Spouse	No Dependent Spouse
Periodic Payments	34 [1]	1 [3]
No Periodic Payments	13 [2]	24 [4]

Figure 5: Case type

[91] See for example *DOC v COC* [2021] IEHC 674.
[92] *MY* (n 90) [131] (O'Hanlon J).

Although it was possible to identify when periodic payments for the benefit of a dependent spouse were ordered, it was often difficult to determine precisely how overall financial provision was made in these cases. This arose for a variety of reasons, including that no or insufficient valuations were recorded for assets in the case report, or the final orders made in the case were not clear from the judgment. In very complex cases involving significant assets and particularly where there were substantial pension assets, it was almost impossible to identify where assets were allocated from the judgment and some cases refer to the parties having liberty to apply for specific clarifications, but the clarifications are not recorded with the original judgment. A further complicating factor is the redaction of money amounts from judgments, presumably with the aim of protecting the privacy of the parties.[93] The legal basis on which orders are made was also difficult to identify, with a substantial minority of the examined cases not citing any prior case law.

Capital and income were generally treated as different categories of asset in the cases; a capital value is rarely assigned to periodic payments.[94] Capital values for assets were sometimes stated and this allowed for the calculation of proportions awarded as lump sum, property adjustment, or pension adjustment orders. However, income was often not stated, and periodic payments were rarely calculated as a proportion of the paying spouse's income. This made calculating the value of provision difficult and as a result, orders affecting capital are dealt with separately to periodic payments orders in the analysis.

[1] Dependent spouse, periodic payment order made

Of the 72 cases examined, a periodic payment order in favour of a dependent wife was made in 34 (Figure 5). In two of the 34 cases, a spousal maintenance order was the only financial order made,[95] and in an additional 16 cases, the relative value of orders affecting capital could not be determined. An attempt by the court to divide capital assets approximately equally can be identified in six cases.[96] Two cases resulted in no financial orders,[97] and the remaining eight cases resulted in a variety of approaches to capital assets. In *SMcM v MMcM*, the percentage of the available

[93] See *A v A* [2022] IEHC 340.
[94] This contrasts with the position in England and Wales where guidance known as the Duxbury calculation is used to estimate the capital value of periodic payments orders. See Emma Hitchings, 'Reconsidering the *Duxbury* "default"' (2021) 33 Child and Family Law Quarterly 275.
[95] *PK v JK* [2010] IEHC 417; *MP v AP* [2005] IEHC 326.
[96] ES v DS [2010] IEHC 474; KL v CL [2013] IEHC 644; GR v NR [2014] IEHC 648 and [2015] IEHC 856; PD v RD [2015] IEHC 174; RS v IS [2015] IEHC 837; MY (n 90. CF v CF [2022] IEHC 64.
[97] *BR v PT* [2020] IEHC 205, where each spouse retained their own assets and *PK v JK* [2010] IEHC 416, where there were no assets to share.

capital awarded to the wife was in the region of 20%.[98] In *PB v AB*, it was 22%[99] and in *SD v BD*, it was slightly higher at 25%.[100] In *JK v RK* the wife was awarded 40% of the husband's pension fund.[101] A capital award close to one third for the dependent spouse was made in *FLS v XXL*[102] without reference to any case law, whilst in *MK v JPK*, O'Neill J relied heavily on *DT v CT* in making orders amounting to one third of the available capital for the benefit of the wife.[103] The periodic payment order in all of these cases was in addition to the orders in respect of capital.

This category of case was the most difficult to analyse and epitomised the subjective, fact-based approach to decision making identified by Crowley and Joyce.[104] Where orders affecting capital assets were made, the proportion allocated to the wife could not be identified in 16 of 32 cases (50%). As the most common, and complex, type of case coming before the High Court this reflects a troubling lack of transparency.

[2] Dependent spouse, no periodic payments

The 'one third at the lower end' guidance indicated in *DT v CT* is of particular relevance to the 13 cases in which no periodic payments were ordered, thus achieving a 'clean break' situation. Of the 13 cases, five cited *DT v CT*, three cited other superior court decisions, and the remainder cited no Supreme Court or Court of Appeal decisions. The percentage split of capital assets can be identified or estimated in 9 of the 13 cases.[105] At the lower end is *CED v AD*, where the wife obtained property adjustment and lump sum orders in her favour totalling approximately 26% of the value of a farm inherited by the husband but worked on by both of them.[106] This was a 20-year marriage with three children, one of whom remained dependent. The wife had a small source of income during the marriage and intended to continue her work on lands transferred to her on divorce. De Valera J noted the orders 'would give her the capacity to lead an independent and fulfilling life and generate sufficient income to support such a lifestyle.'[107] No figures were

[98] [2006] IEHC 451.
[99] [2012] IEHC 616.
[100] [2007] IEHC 492.
[101] [2014] IEHC 451.
[102] [2014] IEHC 663.
[103] [2003] IEHC 633.
[104] Crowley and Joyce (n 4) 766.
[105] The content of financial remedies is not clear in *MS v PS* [2008] IEHC 448, *BH v PH* [2010] IEHC 425, *AOM v FOM* [2018] IEHC 805 and *M v S* [2020] IEHC 562. The latter case is particularly complex because the couple had significant debt, the wife in this case was also not fully dependent on the husband during the marriage.
[106] [2005] IEHC 412.
[107] ibid p. 5.

stated in the judgment for either spouse's income. No authorities were cited in the judgment. In *ML v SL* the wife's share was 26%,[108] and in *SA v BA* it was 40%.[109] *DT v CT* was referred to in both of these judgments. In a carefully reasoned judgment citing a number of authorities, including the England and Wales case of *White v White,*[110] the dependent wife in *BD v JD* had orders made in her favour amounting to between 40 and 50% of family assets.[111] The one third figure is adopted in the 2022 case of *T v K*, but without reference to *DT v CT*.[112]

Orders making approximately equal capital provision for the spouses were made in three of the 13 cases.[113] *DH v GH* was decided in the shadow of the 2008 financial crisis and the bulk of the family assets were in real property owned by the husband. Neither spouse had an income, and the husband had significant debts. Sheehan J noted that the wife had forgone a career to care for the children and home but did not cite any authorities in deciding that 'the interest of justice in this case are best met by ordering that all properties be sold and the net proceeds be divided equally between the parties.'[114] In *HJ v FM*, Abbot J noted that 'the wife has made a contribution to the wealth and income generat[ing] capacity of the parties by ensuring that the respondent was free to travel widely throughout the world and engage in his entrepreneurial pursuits to generate income for himself and his family.'[115] Again no authorities in relation to proper provision were cited and according to the Court, the wife was 'awarded more than 50% of the assets' because 'the court has accepted that the respondent continues his threat of leaving the applicant with nothing for either herself or her children.'[116] There was also an element of non-disclosure by the husband which likely influenced the Court's generosity in awarding slightly over 50% of the assets to the wife. Despite her career sacrifice and the husband's significant income, she was not awarded any periodic payments. The wife in *DE v FG* was also awarded slightly more than 50% of the assets reflecting her significant financial contribution in the early years of the marriage.[117] Although she was dependent at the time of divorce, both spouses had

[108] [2007] IEHC 438.
[109] [2014] IEHC 452.
[110] [2001] 1 AC 596.
[111] [2003] IEHC 106.
[112] [2022] IEHC 529.
[113] *DH v GH* [2009] IEHC 517; *HJ v FM* [2017] IEHC 772; *DE v FG* [2019] IEHC 83.
[114] [2009] IEHC 517 [8].
[115] *HJ* (n 113) [60].
[116] ibid [68].
[117] *DE* (n 113). But see also *ML v SL* [2007] IEHC 438 in which the wife was awarded a lump sum of less than 30%. Although she was dependent at the time of the divorce, she had worked throughout

contributed financially and in terms of care work throughout the marriage. The Court of Appeal decision in *QR v ST* was cited by Binchy J in relation to the scope of assets available to make provision, but no other authorities were referred to in relation to the content of proper provision.

There was more transparency here than for the previous category, with the outcome unclear in just 4 of 13 cases (30%). In the main, where a clean break was ordered, between 25% and 50% of available capital assets were transferred from husband to wife. Two cases went beyond that to recognise the wife's additional financial contribution or to compensate for lack of clear disclosure from the husband.

[3] No dependent spouse/periodic payment order made

Only one case falls into this category, *MY v AA,* already discussed above. Here, a percentage split of assets is not specified but the aim appears to be an equal split of capital and pension assets with additional compensatory, time limited, maintenance for the wife who retained primary care of the children.

[4] No dependent spouse, no periodic payments

Among the 24 cases not involving a dependent spouse and where maintenance was not ordered, there was significant variation in outcome and three of the cases had insufficient information to determine an outcome.[118] Seven of the 24 cases resulted in no financial orders or small capital transfers, mostly because financial issues had been decided in a prior separation. No financial orders were made in *WA v MA* and *A v A* because the Court was satisfied that proper provision had been made following an earlier judicial separation.[119] There were also no financial orders (other than child maintenance) made in *BR v PT.*[120] This was a claim by a husband for additional financial provision from his wife on divorce following a prior judicial separation. Both spouses here had income, and the wife had primary care of the children. In *VM v JP*[121] the wife had primary care of the children and her own income. The Court awarded a small lump sum to her, reflecting her interest in the husband's assets and made orders extending the husband's responsibilities for childcare in order to reduce her outgoings. The husband in *CC v PC* sought additional provision from the wife on divorce following an earlier judicial separation.[122] She had cared for

the marriage and contributed to acquisition of assets which were the foundation of the husband's business.

[118] *SJN v PCO'D* [2006] IEHC 452; *GS v PM* [2013] IEHC 655; *CQ v IMcG* [2014] IEHC 699.

[119] *WA v MA* [2004] IEHC 387; *A v A* [2022] IEHC 268. In both cases one spouse, unsuccessfully, sought additional provision on divorce.

[120] [2020] IEHC 205.

[121] [2015] IEHC 540.

[122] [2009] IEHC 40.

the children of the marriage since separation with little financial assistance from him. The Court ordered the transfer of the family home to the wife to satisfy arrears of maintenance, together with payment of a small lump sum to the husband. *AR v RB*[123] was also a claim for additional provision on divorce by a husband and a lump sum order was made for his benefit to reflect the uplift in value of the family home since the prior judicial separation. In *JBB v SMB* one dependent child of the marriage (who had additional needs) lived with the husband, as did three other non-dependent children.[124] The wife had left the family home when all the children were over 18. She was temporarily unemployed, and the husband had a small income. The main assets were two houses owned by the husband and wife respectively and some agricultural land inherited by the husband. The percentage split of assets cannot be ascertained, but each spouse retained their own house, and the husband was ordered to pay a small capital sum to the wife. These seven cases with no or small financial orders were all Circuit Court appeals and all involved families of modest means where both spouses were largely able to support themselves. In five of the cases, dependent children continued to reside with their mothers after separation and in a sixth (*AR v RB*)[125] care of children was not specifically mentioned.

Eight cases in this category made orders reflecting an approximate 50/50 division of assets. In the divorce case of *MB v BV,* Birmingham J was careful to state that he did not approach the case on any particular percentage, but also noted that, '[a]s it happens, the figure I am proposing here is almost 50%.' [126] The parties had been separated for a significant time and although the wife was dependent in the early stages of the marriage, she subsequently obtained employment. The parties in *MF v AF* had also been separated for a long time and their child was an adult.[127]Although it is difficult to ascertain exact percentages from the case report, the principal assets, all owned by the husband, are divided broadly equally between the spouses in recognition of the wife's housing needs and lower earning potential.[128] *LD v MA* involved the disentangling of the finances of two doctors with three dependent children for whom the wife was the primary carer. Again, determining precise values is difficult, but the Court appears to aim for each spouse being treated broadly equally, with each retaining their own income and pension and 50% of the value of

[123] [2005] IEHC 456 (available on www.courts.ie only).
[124] [2018] IEHC 146.
[125] *AR* (n 123).
[126] *MB v VB* [2007] IEHC 484, p 39.
[127] [2008] IEHC 164.
[128] ibid.

the family home.[129] The only asset in the judicial separation case of *O'C v O'C* was the family home which the Court ordered to be sold with the proceeds divided equally; both spouses were in receipt of social welfare.[130] The assets of a professional couple with no dependent children in *MC v AC* were divided approximately equally on divorce in a first instance decision by Abbott J.[131] In *TM v NM* the dependent children remained in the custody of the wife and although it is somewhat difficult to ascertain the exact split of assets, it appears that real property and savings were divided approximately equally. One point of note in this case is that the wife's pension assets were not shared with the husband but as no value is given for them, it is impossible to identify the impact of this on the percentage division of assets.[132] In *D'OC v CO'C* the family home was divided 50/50 with the sale deferred until the youngest child leaves school. Pension rights were adjusted to provide 'equity' for the wife.[133] Although the percentage share of the husband's public sector and private pensions awarded by the Circuit Court were reduced slightly, the outcome was in the range of 50/50. Jordan J specifically noted the wife's past and ongoing contribution as the primary carer for four children and that the 'weight of domestic and childcare work has always been and remains on the wife.'[134] Finally in this group is *BP v SO,*[135] a judicial separation case involving spouses with six figure incomes and three children. With the assumption of debt and payment of a lump sum by the wife to the husband, the couple's assets were divided roughly equally and, unusually, a co-parenting arrangement for the children is established. This case was slightly unusual in that the care arrangements for children were decided by the Court rather than by the couple themselves.

The remaining cases resulted in a range of outcomes. In *Z v Z* Barrett J ordered a deferred sale of the family home with a 70/30 split in favour of the wife who was to occupy the home with two children of the marriage.[136] A similar arrangement is made in *CQ v NQ*, although this had already been agreed on a prior judicial

[129] *LD v MA* [2012] IEHC 584. This was a judicial separation case, on appeal from the Circuit Court. Unusually there was a dispute about access to children, but it was accepted that they have primary residence with the mother.
[130] *O'C v O'C* [2014] IEHC 698. This was also a judicial separation case, on appeal from the Circuit Court.
[131] [2015] IEHC 492; Abbott J provides a table of assets at [17].
[132] [2017] IEHC 786. This was a Circuit Court appeal on judicial separation and there were issues of financial misconduct (non-disclosure) on the part of the husband.
[133] [2021] IEHC 674.
[134] ibid [49].
[135] [2021] IEHC 851
[136] [2022] IEHC 330.

separation.[137] In *LD v CD* the overall percentage division cannot be determined but the husband received a lump sum equivalent to 40% of the value of the jointly owned family home. The home and additional lands had been inherited by the wife from her father, and she had primary care of the children of the marriage.[138] A split of assets substantially favouring the wife was also the outcome in *PCR v GR* and the gap was exacerbated because of falling property values following the financial crash.[139] The couple in *CQ v NQ* also suffered the effects of the financial crash and sought to vary the terms of a judicial separation order on a subsequent divorce. Both had income but the wife retained primary care of five children of the marriage.[140] Abbot J ordered the sale of the family home and the division of the net proceeds, two thirds to the wife and one third to the husband.

Again, outcomes are generally clear for this category of case, with just three out of 24 (12.5%) having incomplete information. For 15 of the 21 cases where a clean break award was made for a dual income family (in which an outcome could be ascertained), the family assets were either split equally or the spouses each kept the property that they already owned as a result of their own endeavours or *via* an earlier judicial separation. The remaining seven cases tended to favour wives who retained primary care of children reflecting an attempt by the court to meet the needs of children from limited assets.

Conclusion: Valuing dependent spouses

Some important findings from the review of High Court cases highlight the difficulty which the current ancillary relief system presents for spouses seeking ancillary relief on divorce or judicial separation. First, despite the gender-neutral language of the legislation, ancillary relief is a gendered issue: all the dependent spouses in the review were women. Second, lack of clarity and consistency in decision-making was a significant difficulty, and this was particularly so in cases involving dependent spouses. Recent attempts to protect the privacy of litigants by redacting money amounts from judgments are regressive in this context. Third, there was a clear distinction in the cases between the treatment of women making a domestic contribution to marriage, and those making a financial contribution in addition to their caring role. Equal sharing of capital assets was most likely where both spouses had contributed financially, and least likely where all of the financial assets

[137] [2016] IEHC 486.
[138] [2012] IEHC 582.
[139] [2013] IEHC 635 [21] (White J): at time of grant of divorce 'the applicant [husband] received 36.5% of the net property assets and the respondent received 63.5% of the net property assets.'
[140] *CQ* (n 137).

belonged to the husband, irrespective of the allocation of domestic roles. Women who contributed both financially and through primary care of children received more than 50% of the family assets only where those assets were limited in value and the allocation was necessary to secure the welfare of children. In only one case out of 72 was a woman with income and primary care of children awarded additional compensatory periodic payments in recognition of the financial impact of past and ongoing caring responsibilities.

In *DT v CT*, the Supreme Court suggested a governing principle of partnership and non-discrimination, but this has not produced greater clarity nor a move toward equality of outcome as between caregivers and income earners. Some recent Court of Appeal decisions have even indicated a move away from the possibility of contribution-based entitlement to a paternalistic welfare driven approach. The very recent Court of Appeal decision in *A v A* offers some hope of a resurgence of the partnership approach. Flaherty J noted that the trial judge's equal sharing approach to the case (involving a long marriage in which the husband was the sole earner) '[could] not be criticized'. [141] The dependent wife 'was compensated for her substantial contribution over the years to the accumulation of the marital assets and the fact that she had lost out on employment opportunities that would have been available to her.'[142] A broad acceptance of this approach would be a welcome development. Nonetheless, more needs to be done to ensure that spouses who contribute both financially and through additional care work are also adequately compensated on divorce.

[141] *A* (n 5) [172].
[142] ibid [176].

Fundamentals of Private International Law from a Comparative Perspective: An Exploration of the Underlying Policy Considerations and their Reconciliation in Different Legal Orders

Máire Ní Shúilleabháin*

Abstract: This article explores the policy considerations shaping jurisdiction, choice-of-law and judgment-recognition in different legal orders, with a particular focus on the core values of party autonomy and proximity. The relative merits of various national approaches are evaluated and interrogated, alongside an examination of the solutions adopted in regional and international instruments. The focus of the article is on civil and commercial litigation, and family law matters are not considered. The growing influence of human rights law in international commercial disputes is also discussed.

Keywords: Jurisdiction; Party autonomy; Proximity; Foreign judgments; Applicable law; Fair trial.

Introduction

'Private international law' (also known as the 'conflict of laws') is concerned with transactions and private disputes having a cross-border element. Where, for example, a contract purports to be governed by foreign law and/or the transacting parties are based in different countries, private international law rules will come into play. Private international law ('PIL') rules will determine the appropriate location for any litigation ('jurisdiction'), the substantive law to be applied in resolving any dispute ('applicable law') and the conditions under which a foreign judgment may be recognised and enforced ('judgment-recognition'). While there has been some level of international harmonisation[1] (and, in the EU, significant

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[1] The Hague Conference on Private International Law is the leading inter-governmental organisation for PIL. As indicated below, the Hague Conference has developed multi-lateral conventions dealing with commercial aspects of PIL; however, its most successful conventions (in terms of numbers of State parties) have been in the family law sphere: see <https://www.hcch.net/> accessed 30 June 2025.

regional harmonisation),[2] PIL rules are, in the main, derived from the domestic laws of the countries involved.

As will be seen, party autonomy and proximity are core PIL values. There is a broad support for the facilitation of party-choice if they agree on where to litigate and by reference to which law. In default of consensus, proximity considerations come to the fore and factual-connectedness is used to determine jurisdiction and applicable law. Aside from party autonomy and proximity, PIL norms are also influenced by a wide variety of sometimes complementary, and other times competing, interests. Procedural and commercial efficiency are prioritised, as are equality of arms, finality, international comity and legal certainty/predictability. Considerations of justice and fairness are weighed in the balance with concerns for the upholding of reasonable expectations, for cultural tradition and regional integration, and with the need to protect the domestic economy and sovereign authority. National legal systems (and regional and international instruments) calibrate these values and interests in different ways, however, and the upshot is that the PIL rules of different countries (or blocs of countries) may produce contrasting answers to the same question of jurisdiction, or applicable law, or judgment-recognition, as the case may be. PIL rules, in reconciling the assorted interests, are often said to be influenced by the underlying legal tradition, and it has been suggested that where common law lawyers prioritise pragmatism and flexibility, civil law lawyers favour legal certainty.[3]

This article explores the specific policy considerations shaping jurisdiction, applicable law and judgment-recognition in common law systems, under EU law and in some other legal orders. The principal focus is on the accommodation of party autonomy and proximity: on the balancing of these core values inter se, and on their reconciliation with the other interests at play. While there is some criticism of jurisdiction and applicable law rules, insofar as they may sometimes fall short in supporting party autonomy and in identifying a suitably proximate forum or governing law, there is *particular* criticism of judgment-recognition laws and their very patchy accommodation of proximity considerations (although, as will be seen, international developments may soon offer a solution to these problems of judgment-recognition).

[2] See Geert van Calster, *European Private International Law: Commercial Litigation in the EU* (4th edn, Hart 2024).
[3] See David McClean and Veronica Ruiz Abou-Nigm, Morris: *The Conflict of Laws* (9th edn, Sweet & Maxwell 2016) 4, 22, 89.

The overall aim of the article is to provide a bird's eye view of relevant PIL frameworks (and of the underlying policy concerns) and to offer an evaluation of their effectiveness in protecting the core values of party autonomy and proximity, alongside other pertinent interests. The focus is on international commercial litigation. PIL norms affecting cross-border family disputes have developed separately, taking account of the best interests of the child,[4] and other constitutional and human rights values specific to the family sphere.[5] Accordingly, these family-related PIL norms are not considered in this article.

Jurisdiction

As indicated above, party autonomy and proximity are the foundational considerations in determining jurisdictional competence in civil and commercial matters.

Party Autonomy

In the European common law systems of Ireland and the UK, submission by way of voluntary appearance,[6] or by way of a forum selection clause,[7] has traditionally sufficed to confer jurisdiction even in the absence of any factual proximity. This encouragement of party autonomy is echoed in the 'Brussels I Recast' Regulation,[8] which harmonises jurisdiction and judgment-recognition in civil and commercial matters throughout the EU. Article 25 of the Regulation gives priority to contractual jurisdiction agreements (and the jurisdiction thus conferred is presumed to be exclusive) while Article 26 allows a Member State court to exercise jurisdiction on the basis of the defendant's appearance (even if that Member State would not otherwise have jurisdiction under the Regulation). Jurisdiction agreements are also supported at an international level by the Hague Convention on Choice-of-Court

[4] See *Neulinger and Shuruk v Switzerland* (2012) 54 EHRR 31; *X v Latvia* (2014) 59 EHRR 3; *In re A (a minor) and B (a minor)* [2023] IESC 6.

[5] See Máire Ní Shúilleabháin, 'Marriage, Divorce and Stagnation in the Irish Conflict of Laws' (2014) 52 Irish Jurist 68; Janeen Carruthers and Bobby Lindsay (eds), *Research Handbook on International Family Law* (Edward Elgar 2024).

[6] Hilary Biehler and others, *Delany and McGrath on Civil Procedure* (5th edn, Round Hall 2023) [1.11]; William Binchy, *Irish Conflicts of Law* (Butterworths 1988) 129-130; Paul Torremans (ed), *Cheshire, North & Fawcett: Private International Law* (15th edn, OUP 2017) 332.

[7] See Order 11(3) Rules of the Superior Courts (Ireland); Civil Procedure Rules r 6.33(2B) (England and Wales). In this article, 'forum selection' clause/agreement, 'jurisdiction' clause/agreement and 'choice-of-court' clause/agreement are used interchangeably – all three formulae have the same meaning in the context of this article.

[8] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

Agreements 2005. Under Article 5 of the Convention, a Contracting State court designated in an exclusive jurisdiction agreement shall have jurisdiction, and under Article 6, the courts of other Contracting States shall suspend or dismiss proceedings to which the agreement applies. This privileging of party autonomy is easily understood – at least in the context of an arm's-length commercial transaction.

Forum selection clauses can promote fairness and predictability insofar as they steer any dispute into an agreed, mutually advantageous forum.[9] The parties are then spared the expense and delays which accompany 'litigation as to where to litigate'.[10] Certainty as to the venue for litigation is also considered to be conducive to settlement.[11] From the perspective of the nominated forum, the economic benefits (for local lawyers and ancillary service providers) are self-evident.

There are also sound reasons for according high priority to jurisdiction by submission (or voluntary appearance). This policy safeguards against eleventh-hour jurisdictional challenges (when defendants sense that the case is not going their way), and thus against wasted costs and protracted litigation.[12] Finality and fairness (arguably) demand that the defendant object to jurisdiction at the first opportunity, or not at all.

Proximity

In the absence of a forum-selection clause, or submission, considerations of proximity become central in determining jurisdiction. For instance, under traditional common law principles, 'jurisdiction as of right' is derived from the defendant's presence within the state at the time of service.[13] In a contractual dispute, jurisdiction may also be established where the contract was concluded in the forum, or where the action concerns a breach committed in the forum, or where

[9] See the dicta cited in Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) 527. Of course, in the event of an imbalance of bargaining power, the commercially stronger party can use Article 25 Brussels I Recast (or other equivalent provision) to enforce a jurisdiction agreement which is disadvantageous to the weaker party (Pippa Rogerson, *Collier's Conflict of Laws* (4th edn, CUP 2013) 112). Certain relationships (supplier-consumer, employer-employee – see below) are excluded from Art 25 but the risk of unequal bargaining remains in non-excluded cases.
[10] See the comments of Lord Templeman in *Spiliada v Cansulex* [1987] AC 460, 464.
[11] Richard Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) 13, 35.
[12] See Rogerson (n 9) 146.
[13] *Traynor v Fegan* [1985] IR 586; *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283; Binchy (n 6) 124-125; Adrian Briggs, *The Conflict of Laws* (4th edn, OUP 2019) 99.

the contract is governed by the law of the forum (these are contract 'gateways' under the domestic Irish and English rules of jurisdiction).[14]

Under the Brussels I Recast Regulation, 'general jurisdiction' is conferred upon the Member State in which the defendant is 'domiciled' (Article 4).[15] If the dispute concerns a sale of goods, the courts for the place of delivery will have jurisdiction, while in an action on a service contract, the courts of the place of provision of the service will be competent (Article 7(1)(b)). With other contract types, Article 7(1) jurisdiction is vested in the courts for the place of performance of the obligation alleged (by the claimant) to have been breached.[16]

While proximity-based jurisdiction is ordinarily subservient to jurisdiction by agreement, proximity considerations are pre-eminent in certain cases, most notably in disputes concerning title to land. The courts of the *situs* (where the land is situated) will normally have exclusive jurisdiction in such cases.[17] This is justified by reference to the idiosyncrasy and complexity of land law, and the desirability of entrusting its application to local judges (insofar as the applicable law is also determined by reference to the 'situs').[18] Situs jurisdiction also reflects the interdependency of land-ownership and national sovereignty.[19]

Balancing Party Autonomy and Proximity with Other Considerations

Jurisdictional policy is also shaped by a concern for equality of arms. In the Brussels I Recast context, the 'general jurisdiction' of the defendant's domicile is seen as a necessary counterbalance to the claimant's power as the party initiating proceedings in a forum of their choosing.[20] Considerations of jurisdictional 'fairness' (and access to justice) are also reflected in those provisions which ensure 'weaker litigants' (including consumers and employees) can sue at home (in a reversal of

[14] See Order 11(1)(e) Rules of the Superior Courts (Ireland); Civil Procedure Rules r 6.36 and Practice Direction 6B para 3.1(6)-(7) (England and Wales).
[15] See arts 62-63 Brussels I Recast on the meaning of 'domicile'.
[16] Article 7(1)(a) as interpreted by reference to Case 14/76 *De Bloos v Bouyer* [1976] ECR 1497.
[17] Article 24(1) Brussels I Recast; (for the traditional common law view) *British South Africa Co v Companhia de Moçambique* [1893] AC 602. The 2005 Hague Choice-of-Court Convention (in art 2(2)) excludes disputes concerning rights in rem in immovable property from its remit.
[18] James Fawcett, Máire Ní Shúilleabháin and Sangeeta Shah, *Private International Law and Human Rights* (OUP 2016) 839-840.
[19] Gilles Cuniberti, *Conflict of Laws: A Comparative Approach* (2nd edn, Edward Elgar 2022) 165. Situs jurisdiction can also be justified on the basis that it simplifies enforcement (by the local authorities where the land is situate), and on grounds of the local judge's closeness to the physical evidence (see Rogerson (n 9) 106).
[20] McClean and Ruiz Abou-Nigm (n 3) 86-87.

the usual Article 4 'home advantage').[21] Such litigants are normally unconstrained by forum selection clauses[22] – and any action by a supplier or employer *must* be brought in the consumer's or employee's home state.[23]

Similar considerations of fairness and access to justice take effect through the *forum non conveniens* doctrine at common law.[24] The 'exorbitance' of jurisdiction based on the defendant's 'presence' [25] – and the breadth of the contract 'gateways' [26] - are tempered by a discretion to refuse jurisdiction (or stay proceedings) in favour of the 'natural' forum.[27] The common law court will decline to adjudicate if the case has its 'most real and substantial connection' [28] with another country, such that 'the case may be tried more suitably [there] for the interests of all the parties and the ends of justice'.[29] The doctrine of *forum non conveniens* allows for an individualised analysis of appropriateness and relative proximity, and while this may swallow up time and money,[30] it protects defendants in the event of opportunistic forum shopping by the claimant. In determining which forum is more appropriate, the common law court will take account of multiple 'connecting factors' including the parties' residences and places of business, the location of the central incident (if any), the applicable law, the location (and language) of witnesses and documentary evidence, and the location of any related proceedings.[31] The common law court will also give consideration to denial-of-

[21] Article 18(1), art 21 (confers jurisdiction on the place where the employee habitually carries out their work).
[22] Article 19 and art 23 Brussels I Recast. Agreements with employees and consumers are also excluded from the Hague Choice-of-Court Convention 2005 (art 2(1)). Similar restrictions on the enforceability of forum-selection clauses exist under Japanese and (to an extent) US law: see Cuniberti (n 19) 264-270.
[23] Article 18(2), art 22(1).
[24] The House of Lords judgment in *Spiliada* (n 10) provides a classic statement of the governing principles. The doctrine applies (in various different guises) throughout the common law world (and in the USA). See Cuniberti (n 19) 193-210; also Torremans (n 6) 393-394; also *Oceanic Sun Line v Fay* (1988) 165 CLR 197 (the Australian version requires the defendant to establish that the local forum is clearly inappropriate). In Ireland, Spiliada was cited with approval by the Supreme Court in *Intermetal Group v Worslade Trading* [1998] 2 IR 1 and in *Analog Devices v Zurich Insurance* [2002] 1 IR 272.
[25] Rogerson (n 9) 139.
[26] Rogerson (n 9) 152-155.
[27] Spiliada (n 10) 477.
[28] Spiliada (n 10) 478 (citing *The Abidin Daver* [1984] AC 398, 415).
[29] Spiliada (n 10) 476.
[30] For a critical perspective, see AG Slater, 'Forum Non Conveniens: A View from the Shop Floor' (1988) 104 LQR 554; Ardavan Arzandeh, 'Should the Spiliada Test be Revised?' (2014) 10 Journal of Private International Law 89.
[31] See Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson and Hill's Conflict of Laws* (5th edn, OUP 2016) 129-132; Biehler and others (n 6) [1.30], [1.98].

justice arguments (where, for example, there is evidence of a serious backlog in the courts of the alternative forum, or where the 'natural forum' is perceived to be ill-equipped to handle complex litigation).[32] This aspect of the *forum non conveniens* doctrine is highly controversial, particularly, insofar as the doctrine was intended to replace 'judicial chauvinism' with 'judicial comity'.[33]

The *forum non conveniens* doctrine is not a feature of civilian PIL systems,[34] and in a European common law country like Ireland, it is inapplicable where jurisdiction is based on the Brussels I Recast Regulation.[35] This has positive implications, in that it allows the parties to move straight to substantive litigation without being side-tracked into lengthy jurisdictional battles. However, the Brussels I Recast's jurisdictional rules are necessarily crude indicators of appropriateness and they can result in a sub-optimal allocation of jurisdiction. Thus, on occasion, the Regulation will deprive the most proximate and suitable forum of jurisdiction, without any possibility of remedial action for the disadvantaged party. This point can be illustrated by comparing notional applications of Article 7(1)(b) of the Brussels I Recast Regulation, which, as indicated above, confers jurisdiction on the place of delivery (favouring the buyer's home forum[36]) in sale of goods disputes. This allocation of jurisdiction will often work well in cases concerned with delivery of defective merchandise. If the dispute is essentially factual, and is focussed on the extent of the defects and their impact on the buyer's production line, then the buyer's home state – as the place of delivery – will likely provide a suitable, factually-proximate venue for the litigation. It will be convenient for many of the main witnesses of fact, who will be able to give evidence in their own language, and the judge will have easy access to the physical evidence. However, a sale of goods dispute may be of an entirely different nature. The issue may be one of non-payment rather than defective merchandise, with the seller rather than the buyer taking action. The focus may be on contractual interpretation, with the seller's home law

[32] Hill and Ní Shúilleabháin (n 31) 132-136; Rogerson (n 9) 174-177; Lawrence Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on The Conflict of Laws* (16th edn, Sweet & Maxwell 2022) 618-622.
[33] *The Abidin Daver* (n 28) 411.
[34] Cuniberti (n 19) 182.
[35] Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383. The Brussels I Recast Regulation is an extension of the Brussels Convention agreed in 1968, at a time when there were no Member States with a common law tradition. Consequently, the 'Brussels system' is framed around the civilian tradition: McClean and Ruiz Abou-Nigm (n 3) 95.
[36] See Case C-381/08 *Car Trim v KeySafety* [2010] ECR I-1255 [62] which defined art 7(1)(b) as referring to the place where the buyer obtained 'actual power of disposal' over the goods 'at the final destination of the sales transaction'.

as the governing law.[37] In such circumstances while the seller's (rather than the buyer's) home court is likely to be the most appropriate forum,[38] it may not have jurisdiction under Article 7(1)(b)[39] (and it will not have jurisdiction under Article 4). In these circumstances, the seller's jurisdictional disadvantage may result in the abandonment of a legitimate claim, or in an unfavourable settlement.[40]

While *forum non conveniens* has no place within the Brussels I Recast system, the Regulation may allow EU Member State courts, at their discretion, to defer to *third-country* courts which are *already seised* of an identical or related action. Articles 33 and 34 (and Recital 24) allow suspension of the proceedings commenced in the EU where the judgment from the non-Member State will be capable of recognition in the relevant EU Member State, and where there is factual proximity between the third country and the dispute. This power (first introduced in 2015) has been described by McClean and Ruiz Abou-Nigm as embedding 'a welcome component of discretion into a system that otherwise favours the mandatory application of hard and fast rules'.[41]

Within the EU, parallel proceedings are resolved by reference to an inflexible *lis pendens* doctrine, which emphasises the chronological order in which proceedings are commenced in two different Member States (Article 29 of the Brussels I Recast Regulation). Thus, the court second seised is required to stay its proceedings until the jurisdiction of the court first seised is established – and if the court first seised determines that it has jurisdiction, then the second seised court must decline jurisdiction, even if it has stronger factual connections to the dispute and is better placed to hear the case. The *lis pendens* doctrine has merit in that it avoids duplication and reduces the risk of irreconcilable judgments; however, it is susceptible to abuse, in particular where Member State courts *without jurisdiction* are first seised and are slow to declare their lack of jurisdiction. A strategic application for a negative declaration[42] (the so-called 'Italian torpedo') can allow the unmeritorious defendant to thwart the claimant's legitimate action, and to defer

[37] Under art 4(1)(a) of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6), the governing law is usually the 'law of the country where the seller has his habitual residence' in the absence of a choice-of-law clause.

[38] Hill and Ní Shúilleabháin (n 31) 131 (citing Lord Mance JSC in *VTB Capital v Nutritek International* [2013] UKSC 5; [2013] 2 AC 337 [46]): where a dispute centres on legal rather than factual questions, it is generally preferable that the case be tried in the country whose law applies.

[39] If the place of delivery (as per Car Trim) was in the buyer's home state.

[40] Fentiman (n 11) 28, 35.

[41] McClean and Ruiz Abou-Nigm (n 3) 150.

[42] A declaration of non-liability.

the day of reckoning for many years.[43] The Member State with jurisdiction is precluded from progressing the claimant's suit until the court first seised by the defendant has determined that it has no jurisdiction. Torpedo problems have been resolved (since 2015) in those cases where the alternative court is nominated in a forum-selection clause,[44] but not otherwise (e.g. where the court second seised has proximity-based jurisdiction under Article 7).[45] It has been suggested that where there is a severe delay before the court first seised, observance of the *lis pendens* obligation can bring the second court into conflict with the fair trial guarantee under Article 6 of the European Convention on Human Rights.[46] However, the EU Court of Justice, emphasising the 'mutual trust' between EU Member States, appears to have ruled out any delay-based exception to the *lis pendens* doctrine.[47]

Other aspects of the Brussels I Recast are also problematic. While there is an explicit prioritisation of forum selection clauses nominating EU Member State fora, it is unclear as to whether EU Member State courts can decline jurisdiction in favour of third (non-EU) countries nominated in jurisdiction agreements.[48] The 2005 Hague Choice of Court Convention empowers the EU Member State courts to defer to an agreed third country Contracting State (at present, Albania, Mexico, Moldova, Montenegro, North Macedonia, Singapore, Switzerland, Ukraine and the United Kingdom) but where the nominated third country is a non-Contracting State, the position is most unclear. In practice, there appears to be some consensus that contracting parties *should* be held to their jurisdictional agreement on a third country, and that contract-breakers should be denied access to an EU Member

[43] See Martin Gebauer, 'Lis Pendens, Negative Declaratory-Judgment Actions and the First-In-Time Principle' in Eckart Gottschalk and others (eds), *Conflict of Laws in a Globalized World* (CUP 2007) 94; Trevor Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813, 816.

[44] See art 31(2) Brussels I Recast: the nominated court is allowed to proceed even if it is second seised.

[45] Traditionally the common law would allow for an anti-suit injunction to prevent the continuance of a vexatious action abroad, but the EU Court of Justice has ruled that the issuance of anti-suit injunctions is incompatible with the Brussels system: see Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.

[46] See Hartley (n 43) 821.

[47] Case C-116/02 *Erich Gasser v MISAT* [2003] ECR I-14693 [72]. The idea of 'mutual trust' as a legal obligation has been criticised: Thomas Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' (2016) 17 German Law Journal 339.

[48] If there are no prior proceedings in the nominated third country, arts 33 and 34 are inapplicable.

State forum,[49] but there is also a strong argument that this course of action is incompatible with EU law.[50]

Commentators in third countries are also critical of those aspects of the Brussels I Recast Regulation which provide explicit protections to EU-domiciled defendants, which are denied to their third-country counterparts. Residual national rules, many of which are based on 'exorbitant' or 'long-arm' jurisdiction can be invoked against non-EU domiciled defendants (Article 6), while EU-domiciled defendants are shielded from the application of these often very tenuous grounds for jurisdiction (Article 5). Judgments issued in exercise of residual national rules still benefit from the 'free movement of judgments' policy, however, and so the third-country defendant's EU-based assets are liable to seizure in satisfaction of a judgment granted in jurisdictionally-dubious circumstances of very limited proximity.[51] This approach attracts particular opprobrium in the USA where foreign (including European) defendants enjoy jurisdictional 'due process' protection on a non-discriminatory basis – and can insist on 'minimum contacts'.[52]

Applicable Law (also known as 'Choice-of-Law')

A willingness to apply foreign law reflects an acceptance of the sovereign authority of other connected states and of the limitations on the forum's[53] own regulatory authority in a cross-border situation.[54] From a party perspective, there may be an expectation that foreign law will govern foreign activity (applying a 'when in Rome' analogy).[55] Moreover, in circumstances where the parties have agreed to be governed by the relevant foreign law, its application expresses respect for self-

[49] See Fentiman (n 11) 414-417; Alexander Kistler, 'Effect of Exclusive Choice-of-Court Agreements in Favour of Third States within the Brussels I Regulation Recast' (2018) 14 Journal of Private International Law 66; *Teva (Canada) v Panalpina World Transport (Ireland)* [2021] IEHC 304.
[50] Trevor Hartley, *International Commercial Litigation* (3rd edn, CUP 2020) 217-218; *Abama v Gama Construction Ireland* [2011] IEHC 308; *Vandever v Rainsford* [2021] IEHC 685 [135]; *Monetizead v Techads Media* [2024] IEHC 44.
[51] Rogerson (n 9) 71; Rec 27 Brussels I Recast.
[52] See Friedrich Juenger, 'Judicial Jurisdiction in the United States and in the European Communities: A Comparison' (1984) 82 Michigan Law Review 1195, 1210-1212; Ralf Michaels, 'Two Paradigms of Jurisdiction' (2005) 27 Michigan Journal of International Law 1003, 1055-1057; Cuniberti (n 19) 137 ff, 169-170; Adrian Briggs, *The Conflict of Laws* (3rd edn, OUP 2013) 95, 148; Hartley (n 50) 22-23, 191.
[53] In discussing applicable law (or choice-of-law), references to the 'forum' mean the court (or country) where the litigation is taking place – or from whose perspective the applicable law is being determined.
[54] Maria Hook, *The Choice of Law Contract* (Hart 2016) 50-51.
[55] Briggs (n 13) 247-248; Hook (n 54) 52; Hartley (n 50) 575.

determination.[56] The enforcement of agreements on applicable law ('choice-of-law contracts') is also justified by commercial needs for certainty and uniformity of outcome.[57]

Balancing Factual Proximity with Party Autonomy

As with jurisdiction, applicable law is dominated by considerations of factual proximity and party autonomy. Proximity interests hold sway in certain choice-of-law domains (property, tort) while party autonomy is prioritised in contractual disputes. Thus, while proprietary disputes tend to be resolved by reference to the law of the place where the property was situated (situs rule)[58] and torts by reference to the law of the place where the tort was committed (or, on a more refined analysis, where the damage was incurred), [59] party choice is generally determinative in contract cases.

The much more limited role for party agreement in property and tort disputes is, of course, partly due to the absence of any prior relationship in many such disputes (as Briggs observes, torts are 'the law's accidents, messy and usually unplanned'[60]) but there is also an underlying concern to promote other interests. The situs rule protects security of transacting[61] (where tangible movable property is concerned) and in disputes concerning title to land, it is seen as a pre-requisite to enforceability of the judgment.[62] Within the EU, the Rome II Regulation on applicable law for non-contractual obligations[63] allows the parties to choose the law governing the tort in advance – but this is a *qualified* freedom reserved to freely-negotiated, arm's-length, commercial agreements [64] (in contrast to the much more permissive European approach to contracts, discussed below). Further, under Rome II, this freedom of choice is entirely inapplicable to certain torts (unfair competition, restrictions of competition, intellectual property infringement).[65]

[56] Hook (n 54) 59.
[57] Hook (n 54) 50, 59; Briggs (n 9) 1-2.
[58] Hartley (n 50) 583; Rogerson (n 9) 383.
[59] See the 'Rome II' Regulation (Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40), Recitals 15-18; Cuniberti (n 19) 436-438.
[60] Briggs (n 13) 247.
[61] Torremans (n 6) 1265; Rogerson (n 9) 388.
[62] Torremans (n 6) 1256; Rogerson (n 9) 383-384.
[63] See (n 59). Since its withdrawal from the EU, the UK has retained substantially the same applicable law rules on its domestic statute-book: see The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/834, reg 11.
[64] Article 14(1)(b).
[65] See Arts. 6(4) and 8(3).

Party Autonomy in Contractual Disputes

The primacy of the choice-of-law agreement, as the source of the law governing the contract, is accepted in most countries across the globe,[66] but with varying levels of commitment.

In the USA, for example, the chosen law must have a 'substantial relationship' to the parties or the transaction, or there must be another 'reasonable basis' for the choice.[67] The desirability for a neutral governing law which gives neither party 'home advantage' is not, it appears, a sufficient 'reasonable basis'.[68]

In Europe, by contrast, under the Rome I Regulation on the law applicable to contractual obligations,[69] there is no pre-condition of connectedness – and, in principle, the parties are free to choose the law of any country as the law governing the contract.[70] Indeed, the European Commission had proposed that the Rome I Regulation go further and allow contracting parties the freedom to choose a non-state law (e.g. the UNIDROIT principles or the Principles of European Contract Law)[71] – a freedom also recommended by the Hague Principles.[72] However, in the end, Rome I only went so far as to allow the incorporation by reference of such non-state laws,[73] and the law governing the contract must be the law of a country. This restriction apparently reflected a concern that non-state laws lacked democratic sanction, since they have been drafted and agreed by working groups, and not established by legislatures.[74] However, this concern seems misplaced when one

[66] See Ulrich Magnus, 'Introduction' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Rome I Regulation* (Sellier 2017) 49; Hague Principles on Choice of Law in International Commercial Contracts, approved 19 March 2015 (see <https://www.hcch.net> accessed 30 June 2025), 'Introduction' at [I.3].

[67] See Hook (n 54) 6 and Cuniberti (n 19) 395 discussing section 187(2)(a) of the Second Restatement of Conflict of Laws (1971). The American Uniform Commercial Code (also cited by Cuniberti at 394) sets a requirement of a 'reasonable relation' to the state whose law is chosen.

[68] Cuniberti (n 19) 391-392, 395. The Hague Principles (n 66) recommend against any requirement of connectedness: art 2(4).

[69] See (n 37). The substance of Rome I remains applicable in the UK as 'retained EU law': SI 2019/834 (n 63), reg 10.

[70] Article 3(1) Rome I. Insurance and carriage of passenger contracts are the exception: in these contractual relationships, the parties may only choose from a limited menu of connected laws: see arts 5(2) and 7(3).

[71] EC Commission, Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual relations (Rome I) COM (2005) 650 final, 5, 14.

[72] Article 3 Hague Principles (n 66).

[73] Recital 13 – meaning that the provisions of any such non-state law would become terms of the contract.

[74] Ole Lando and Peter Arnt Nielsen, 'The Rome I Regulation' (2008) 45 Common Market Law Review 1687, 1697.

considers that the parties remain free to select the law of a country without a democratically-elected government.[75]

Limitations on Party Autonomy in Contractual Disputes

While European (and other non-European)[76] countries allow more freedom of choice than the US, they also recognise that contract law is regulatory and not just facilitative,[77] and that this regulatory function would be undermined by entirely untrammelled contractual autonomy. Thus, in Europe and elsewhere, the nominated foreign law is subject to the forum's 'public policy' and 'overriding mandatory provisions'.[78] 'Overriding mandatory provisions' are defined in Europe as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation'.[79] This category includes, in particular, those statutory provisions which are, by their own terms, applicable even in the event that a contract is governed by foreign law.[80] It may also include, for example, rules of competition law, commercial embargoes, measures aimed at preventing corruption or protecting the environment, and restrictions on exportation of cultural artefacts,[81] and these forum rules may apply even though the contract is governed by foreign law. In contrast to 'overriding mandatory provisions' which take *positive* effect, public policy is a *negative* doctrine which blocks the application of an objectionable rule of the governing law (for example, a rule providing for the enforceability of contracts for prostitution or slavery where such contracts are considered abhorrent under forum law).[82]

[75] Also as Lando and Arnt Nielsen (n 74) 1697 point out, the EU's decision to allow the choice of such non-state laws would have been a democratic one.
[76] See Cuniberti (n 19) 395 citing China as an example of a non-European country that allows for the nomination of an unconnected law.
[77] See Hartley (n 50) 648, 687; Hook (n 54) 12, 16-17.
[78] See Magnus (n 66) 50; Cuniberti (n 19) 17-19; arts 9 and 21 Rome I. There is some controversy as to whether the forum ought to be obliged/permitted to give effect to the overriding mandatory provisions of a law which is not forum law and not the law governing the contract but is nonetheless a closely-connected law: see Michael McParland, The Rome I Regulation on the Law Applicable to Contractual Obligations (OUP 2015) 697-712. Article 7(1) of the 1980 Rome Convention on the law applicable to contractual obligations [1998] OJ C27/36 (the predecessor to Rome I) gave a wide latitude to this idea but art 9(3) Rome I only goes so far as to confer a discretion to give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance unlawful.
[79] Article 9(1) Rome I.
[80] Cuniberti (n 19) 18.
[81] Cuniberti (n 19) 19; Rogerson (n 9) 323; Andrea Bonomi, 'Article 9' in Magnus and Mankowski (n 66) 621.
[82] Rogerson (n 9) 327.

Purely domestic contracts – and contracts with presumptively weaker parties such as consumers and employees – are also singled out for special treatment. While the Hague Principles exclude such contracts altogether,[83] Rome I allows the same freedom to choose a foreign governing law in such cases, but subject to the application of any non-derogable provisions of domestic law[84] – or of the consumer's[85] or employee's[86] home law - as the case may be.[87] In this context, *all* non-derogable provisions[88] of the relevant law take effect - not just the narrower category of provisions which qualify as 'overriding mandatory provisions'.

The enforceability of choice-of-law agreements is generally uncontroversial in circumstances where the parties negotiate on an equal footing and the agreement is a reflection of the free will of both parties;[89] however, it is sometimes argued that there is insufficient focus on the reality of that consensus, in particular insofar as the 'putative applicable law doctrine' is widely deployed in the event that an agreement is impugned.[90] The putative applicable law doctrine demands that any challenge to the validity of a choice-of-law agreement be determined by reference to the law purportedly nominated.[91] Thus, where one party is arguing that there was a valid choice-of-law agreement and the other denies this, in effect the judge begins the adjudication by taking sides,[92] and the party arguing in favour of validity may be able to pull himself up by his own bootstraps.[93] Also, a logical conundrum arises where the putative applicable law determines that there was no valid choice-of-law agreement (and therefore – arguably - no valid basis for the determination).[94] The potential unfairness of the putative applicable law doctrine (insofar as it allows one party to foist a choice-of-law on the other[95]) is mitigated under Rome I and the Hague Principles by a subsidiary clause allowing parties alleging a lack of consent

[83] Article 1(1) Hague Principles (n 66). The American Model Consumer Credit Code (adopted by 11 US States) prohibits any choice-of-law agreements in consumer contracts (see Cuniberti (n 19) 410) and this was also the approach originally advocated by the EU Commission (but subsequently abandoned in the final version of Rome I): see Lando and Arnt Nielsen (n 74) 1708.
[84] Article 3(3).
[85] Article 6(2) (the law of the consumer's habitual residence).
[86] Article 8(1) (usually the law of the country in which the employee works).
[87] Insurance and carriage of passenger contracts are also given special treatment under Rome I (in this case a restriction on freedom of choice): see (n 70) above.
[88] i.e. all provisions of the relevant national law which (as a matter of domestic law) are considered to be mandatory and incapable of being excluded by contractual agreement.
[89] See Magnus (n 66) 12.
[90] Hook (n 54) 10-12, 221.
[91] See art 3(5) Rome I; art 6(1) Hague Principles (n 66).
[92] Briggs (n 13) 234.
[93] Torremans (n 6) 756.
[94] See Rogerson (n 9) 303; Cuniberti (n 19) 409.
[95] Rogerson (n 9) 300, 303.

to rely on their home law to establish that lack of consent.[96] This derogation is, however, subject to a requirement of 'reasonableness' and its scope of application is uncertain.[97]

Factual Proximity and the Law Governing the Contract

While there is a high level of global convergence on the enforceability of choice-of-law agreements, there is much less consensus as to how to determine the law governing a contract in the absence of party choice.[98] Traditionally, the focus was on the law of the place of contracting; this made some sense in an era where merchants transacted face-to-face, but it made less sense (and became more difficult to apply) when remote contracting became the norm.[99] Thus, the common law embraced a multi-faceted, open-textured 'proper law' approach which took account of all relevant connections.[100] These were then weighed in the balance with a view to identifying the law with which the contract had its 'closest and most real connection'.[101] In practice, it seems that this test often led to the law of the place of performance.[102] This approach was (and is) criticised for its uncertainty and for requiring litigation to determine the applicable law.[103]

In the US, a somewhat different 'most significant relationship' test took hold.[104] Like the 'proper law' doctrine, this test took account of the full spectrum of contractual connections ('contacts')[105] but it also gave particular attention to the policy/regulatory interests underpinning the competing contract laws, and the extent to which those policy interests were impaired by the non-application of the relevant rule.[106] Thus, the so-called 'governmental interest analysis' infiltrated choice-of-law for contracts[107] (although its main impact was on US doctrine on

[96] Article 10(2) Rome I; art 6(2) Hague Principles (n 66).
[97] Rogerson (n 9) 300; Briggs (n 13) 234-237. Briggs also acknowledges that while the putative applicable law doctrine is easily criticised, it is difficult to identify any satisfactory alternative: see also Peter Mankowski, 'Article 3' in Magnus and Mankowski (n 66) 243 ff.
[98] Introduction to the Hague Principles (n 66) at [I.14].
[99] Rogerson (n 9) 291-292; William Richman and William Reynolds, *Understanding Conflict of Laws* (3rd edn, LexisNexis 2002) 189. This approach is, however, still followed in a number of US States: see Cuniberti (n 19) 421.
[100] McClean and Ruiz Abou-Nigm (n 3) 431.
[101] McClean and Ruiz Abou-Nigm (n 3) 431; Hartley (n 50) 651; Collins and Harris (n 32) 1784.
[102] Definitely Maybe v Lieberberg [2001] 1 WLR 1745 [7]; McClean and Ruiz Abou-Nigm (n 3) 448.
[103] McClean and Ruiz Abou-Nigm (n 3) 431; Rogerson (n 9) 292; Hartley (n 50) 652-653.
[104] Richman and Reynolds (n 99) 285; Collins and Harris (n 32) 1783-1784.
[105] Richman and Reynolds (n 99) 232 referring to the Second Restatement in Conflict of Laws.
[106] Richman and Reynolds (n 99) 208-209 referring to the influence of Brainerd Currie and the 'American Revolution' on the Second Restatement.
[107] See Cuniberti (n 19) 430-434.

choice-of-law for tort[108]). While this approach recognised the functionality of law, the identification of the relevant 'policy' often proved very challenging,[109] raising concerns of ad hoc decision-making.[110] Consequently, in recent times, there has been a partial retreat from 'governmental interest analysis'.[111]

In contrast to the common law's tendency to favour the law of the place of performance in determining the law governing the contract, the Rome I Regulation (like the Rome Convention before it) prioritises the law of the habitual residence of the characteristic performer[112] where there is no choice-of-law agreement. The characteristic performer is the party effecting the more active, complex performance which gives the contract its name (in a simple bilateral contract this is the party performing the non-payment obligation).[113] While the place of performance may often signify a stronger connection, the characteristic performer doctrine, derived from Swiss law, is arguably preferable insofar as it facilitates mass bargaining (on the consistent basis of the complex performer's home laws), thus promoting economic efficiency.[114] It also provides much more certainty insofar as the identification of the applicable law is relatively straightforward.[115]

While the characteristic performer doctrine may, on occasion, point towards an inappropriate law, or provide no answer at all, these limitations are also addressed. Rome I includes an 'escape clause' for cases where another law is manifestly more closely connected,[116] and allows for the application of the 'most closely connected' law where the characteristic performer cannot be identified[117] (e.g. in joint venture agreements or barters[118]). The escape clause has sometimes proven problematic, however, and there is a sense that some Member States may be more willing than others to have recourse to it.[119]

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[108] Hill and Ní Shúilleabháin (n 31) 13.
[109] Cuniberti (n 19) 434; Hill and Ní Shúilleabháin (n 31) 17.
[110] Richman and Reynolds (n 99) 159-160.
[111] Richman and Reynolds (n 99) 160.
[112] Article 4(1) and 4(2) Rome I (previously Art 4(2) Rome Convention (n 78)): Magnus (n 66) 12.
[113] See Mario Giuliano and Paul Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations [1980] OJ C282/1, 20-21; Ulrich Magnus, 'Article 4' in Magnus and Mankowski (n 66) 312-316; Hill and Ní Shúilleabháin (n 31) 228-229; Rogerson (n 9) 307, 309.
[114] Cuniberti (n 19) 422-424; Hill and Ní Shúilleabháin (n 31) 228-229; Rogerson (n 9) 292, 307.
[115] Giuliano and Lagarde (n 113) 21; Magnus (n 113) 312-314.
[116] Article 4(3).
[117] Article 4(4).
[118] Hill and Ní Shúilleabháin (n 31) 230.
[119] See Lando and Arnt Nielsen (n 74) 1700-1703; Rogerson (n 9) 312-316; also Definitely Maybe (n 102) [11]-[12] discussing the use of the escape clause under the Rome Convention. The Rome I Regulation has given 'rule' (as opposed to 'presumption') status to the 'characteristic performer'

Proving the Applicable Law

In the domain of choice-of-law, the starkest divergence between civil and common law countries is procedural rather than substantive. In civil law jurisdictions, foreign law is generally ascertained and applied *ex officio* and by the judge directly – whereas in common law courts, it must be pleaded and proven as fact by way of expert evidence, with the parties bearing the burden and expense.[120] If no evidence of the relevant foreign law is adduced, then the common law judge will apply forum law instead.[121] In practice, therefore, a common law court will frequently apply domestic law in resolving disputes which ought, according to domestic (or EU) choice-of-law rules, to be resolved by reference to foreign law.[122]

Judgment-Recognition

The recognition and enforcement of foreign judgments can be justified on a number of grounds: comity and respect for the adjudicatory authority of connected foreign courts;[123] the interest in finality of litigation (and in ensuring that no-one is troubled twice by the same cause);[124] the desirability of enforcing obligations voluntarily assumed;[125] and the need to support cross-border trade in a globalised world.[126]

Protection of Party Autonomy, Proximity and Other Interests: International Variability on Judgment-Recognition

In contrast to jurisdiction and choice-of-law, where there is some degree of convergence in national laws, judgment-recognition practices have tended to vary wildly across the globe. Some legal orders have taken the view that there can be no recognition and enforcement of foreign judgments outside of the confines of a

principle and has added the word 'manifestly' to the escape clause, thus emphasising its exceptionality. On the use of the escape clauses under the Rome I and Rome II Regulations in Ireland, see Máire Ní Shúilleabháin, 'Rome I and Rome II in Ireland' in Emmanuel Guinchard (ed), Rome I and Rome II in Practice (Intersentia 2020) 275-279.

[120] See Guinchard (n 119); McClean and Ruiz Abou-Nigm (n 3) 8-11; Briggs (n 13) 7-11.

[121] ibid.

[122] ibid.

[123] Re Flightlease [2012] IESC 12, [2012] 1 IR 722, O'Donnell J [78]; also Rogerson (n 9) 219; Stephen Pitel, 'Morguard Investments Ltd v De Savoye (1990)' in William Day and Louise Merrett (eds), *Landmark Cases in Private International Law* (Hart 2023) 292.

[124] Andrew Dickinson, 'Schibsby v Westenholz and the Recognition and Enforcement of Judgments in England' (2018) 134 LQR 426, 445; Adrian Briggs, 'Recognition and Enforcement of Judgments (Common Law)' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 1479.

[125] Briggs (n 13) 137.

[126] Re Flightlease (n 123) [78]-[79].

convention or treaty,[127] while at the other end of the spectrum, there are countries which sanction recognition and enforcement of a judgment where the dispute had 'a real and substantial connection'[128] or an 'actual connection'[129] to the granting state. Intermediate positions have included recognition founded on the recognising court's own (domestic) jurisdictional criteria, [130] reciprocity-based recognition ('we'll recognise your judgments if you recognise ours')[131] and, in the common law world (apart from Canada), recognition on the basis of presence or submission on the part of the judgment-debtor.[132]

A new Hague Convention on the recognition and enforcement of foreign judgments recently came into force in September 2023, so it is possible that a more uniform and satisfactory approach will take hold in the coming years. This Convention (agreed in 2019) is discussed further below.

The 2005 Hague Choice of Court Convention also provides for recognition and enforcement of judgments obtained in a Contracting State nominated in an exclusive jurisdiction clause (in Article 8). Thus, under this Convention, and under the common law criteria outlined above, there is considerable support for recognition and enforcement in circumstances of voluntary submission to and party agreement on the foreign court which granted the judgment.

Although party autonomy as a PIL value is relatively widely observed in the domain of judgment-recognition (albeit with considerable variation), proximity commands less respect, and as will be seen, the judgments of factually-proximate courts are frequently denied recognition.

Deficient Protection of Proximity Interests

Because judgment-debtors tend often to be residents of the state where recognition is sought (and the objective is normally to seize assets within that jurisdiction), a protectionist agenda frequently informs and inhibits the development of judgment-recognition laws. For example, in Switzerland, there is a general prohibition on enforcement of foreign judgments against Swiss residents unless they voluntarily submitted to the relevant foreign court[133] – and, in France, until relatively recently,

[127] See Briggs (n 124) 1483 referring to the traditional Dutch approach, and to Russian law.
[128] In Canada: Beals v Saldanha [2003] SCC 72; (2004) 234 DLR (4th) 1.
[129] In France: see Gilles Cuniberti, 'The Liberalization of the French Law of Foreign Judgments' (2007) 56 ICLQ 931, 933.
[130] In Germany and Italy: see Cuniberti (n 19) 288; Tanja Domej, 'Recognition and Enforcement of Judgments (Civil Law)' in Basedow and others (n 124) 1474.
[131] In China: Cuniberti (n 19) 279.
[132] Rogerson (n 9) 238.
[133] Domej (n 130) 1475.

French nationals were shielded from the effects of foreign judgments (again, unless they submitted to the foreign forum).[134]

Concerns for (domestic) judgment-debtors have also stymied efforts to change the existing common law criteria.[135] As indicated above, the common law view is that in the absence of the defendant's submission to the granting forum, the foreign judgment will only be recognised if the defendant was present in that forum at the time of service.[136] In this article, it is argued that 'presence' is a wholly inadequate vehicle for the protection of proximity interests in this PIL context. 'Presence' as a judgment-recognition criterion is at once too wide and too narrow[137] – too wide insofar as it sanctions recognition on the basis of the defendant's transient presence (even if there is no further connection)[138] – and too narrow insofar as it precludes recognition of judgments granted in what was clearly the natural forum (e.g. where the tort underpinning the action was committed) if the defendant was no longer present in that forum at the time of service.[139] These flaws are widely-recognised,[140] yet there has been a marked reluctance to change direction and to embrace the 'real and substantial connection' test adopted in Canada. The concern is that a more flexible proximity criterion will generate uncertainty for defendants, making it difficult for them to anticipate when a foreign judgment will or will not be entitled to recognition and enforcement – and when they can safely ignore foreign proceedings without entering a defence on the merits.[141] Consequently, there is a tendency to adhere to the existing 'presence'-based approach for fear of creating uncertainty. Indeed, the revised Canadian doctrine has been criticised for exposing

[134] See Cuniberti (n 129) 934-936. Newman argues that this kind of protectionism is self-defeating and that enlightened self-interest (in particular the interest in encouraging inward investment) demands a liberal enforcement policy – so that foreign investors can be assured of the enforceability of obligations arising: Jonathan Newman, 'Enforcement of Foreign Judgments in Non-Convention Cases' [2000] 5 Bar Review 354, 358.

[135] See Re Flightlease (n 123) [78].

[136] See Torremans (n 6) 529.

[137] David Kenny, 'Re Flightlease: the 'Real and Substantial Connection' Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland' (2014) 63 ICLQ 197, 200; Máire Ní Shúilleabháin, 'Re Flightlease and Common Law Judgment-Recognition in Ireland' in Sarah McKibbin and Anthony Kennedy (eds), *The Common Law Jurisprudence of the Conflict of Laws* (Hart 2023) 222-223.

[138] Adrian Briggs, 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments' (2004) 8 Singapore Year Book of International Law 1, 10; Hill and Ní Shuilleabháin (n 31) 179; Torremans (n 6) 529; Binchy (n 6) 589.

[139] See Hill and Ní Shuilleabháin (n 31) 179. As Cuniberti (n 19) 296 notes, the English courts deny recognition to judgments granted in circumstances where they would themselves have exercised jurisdiction (and the same is true in Ireland: see Rainford v Newell-Roberts [1962] IR 95).

[140] See Re Flightlease (n 123) [74] ff; Torremans (n 6) 529, 544.

[141] See Re Flightlease (n 123) [78]-[80]; also Rogerson (n 9) 220, 239; also Briggs (n 138) 14.

Canadian residents to nuisance lawsuits overseas.[142] Where the test is so open-textured, the (domestic) defendant may feel compelled to defend himself in almost any foreign proceedings, because the foreign court *might* ultimately be considered to have a 'real and substantial connection' even if this is highly-questionable (and even if the claimant was forum shopping abroad). While there are consequently some legitimate concerns associated with the 'real and substantial connection' test, the refusal to budge from a presence-based approach (and the refusal to recognise judgments granted by foreign courts in circumstances where they are *clearly* the most appropriate forum) is perhaps an even-greater injustice.[143] Also, as was argued by Briggs (writing in 2004), an extension of the defences to recognition could mitigate some of the concerns associated with an expansion of the recognition-criteria.[144]

2019 Hague Judgments Convention

Even if the common law remains in its 'ossified state',[145] the 2019 Hague Judgments Convention offers some hope for the future.[146] This Convention sets out a long list of judgment-recognition criteria (in Article 5) which will supplement those criteria already in existence in countries which become Contracting States (Article 15). Article 5 gives expression to a variety of circumstances of factual proximity and allows, for example, for recognition of a judgment granted in the country of the judgment-debtor's habitual residence or principal place of business, for recognition of certain tort-judgments obtained in the country of the originating event, and for recognition of contract-judgments obtained in the place of performance of the obligation in question.[147] Widespread adoption of this Convention would significantly expand the scope for recognition and enforcement of foreign judgments across the globe (and in common law countries[148] will provide a much better assurance of recognition and enforcement for claimants who acted reasonably in suing in a factually-connected forum – whilst still retaining some degree of certainty for domestic defendants insofar as recognition and enforcement is based on an exhaustive list of specific criteria).

[142] Briggs (n 138) 21 referring to the words of LeBel J. See also Janet Walker, 'The Great Canadian Comity Experiment Continues' (2004) 120 LQR 365; Simon Atrill, 'The Enforcement of Foreign Judgments in Canada' (2004) 63 Cambridge Law Journal 574.
[143] Kenny (n 137) 209.
[144] Briggs (n 138) 17 ff; also Torremans (n 6) 544.
[145] Dickinson (n 124) 439.
[146] For a broadly positive view of the 2019 Convention, see Peter Arnt Nielsen, 'The Hague 2019 Judgments Convention – from Failure to Success?' (2020) 16 Journal of Private International Law 205.
[147] Article 5(1)(a), (b), (g) and (j).
[148] Apart from Canada.

In the common law world, adoption of the 2019 Hague Judgments Convention will also bring the additional benefit of expanding the recognition criteria without the problems of retrospectivity associated with the 'real and substantial connection' test as a product of judge-made law.[149] Judicial development of the law meant that the goal-posts were shifted after the event – and a defendant who had been (correctly) advised (on the basis of the 'old' common law criteria) to sit tight and not to spend money defending a foreign action (even if there was a good defence) could then find that the foreign judgment was in the end enforceable (and that it was now too late to raise a defence on the merits).[150] By contrast with this scenario, judgments will only be entitled to recognition and enforcement under the 2019 Hague Judgments Convention if both the state of origin and the requested state were Contracting States at the date of institution of proceedings in the state of origin (and the Convention had effect between them) and so defendants are given ample notice of the change in the law.[151]

Thus, depending on the number of Contracting States, the 2019 Hague Judgments Convention could offer a satisfactory solution to the existing impasse in the common law recognition doctrine, and to problems with non-recognition of foreign judgments more generally. One should not, however, hold one's breath; while the EU has acceded, at present, the 2019 Convention only applies in two non-EU countries: Ukraine and Uruguay,[152] and the experience of the 2005 Hague Choice of Court Convention suggests that wider adoption may be a relatively slow process.[153]

In terms of Irish trading relationships, it is significant that the 2019 Hague Judgments Convention will enter into force in the United Kingdom in July 2025,[154] thus partly bridging the gap created by the UK's departure from the EU, and allowing for a higher degree of mutual judgment recognition than since 2021. The USA,

[149] See Re Flightlease (n 123) [78], [86]; Kenny (n 137) 206.
[150] ibid. See also *Moses v Shore Boat Builders* (1993) 106 DLR (4th) 654.
[151] See art 16 2019 Hague Judgments Convention; also Arnt Nielsen (n 146) 237.
[152] See<https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 > accessed 30 June 2025. Pursuant to art 23(4) the 2019 Convention does not apply to judgment-recognition between EU Member States inter se. On Irish implementation, see European Union (Hague Judgments Convention) Regulations 2023 (SI No 434/2023).
[153] As indicated above, the 2005 Hague Choice-of-Court Convention has so far been adopted in the EU and in Albania, Mexico, Moldova, Montenegro, North Macedonia, Singapore, Switzerland, Ukraine and the United Kingdom. Insofar as the 2005 Convention provides for recognition and enforcement of a judgment pronounced by a court nominated in an exclusive choice-of-court agreement, it is envisaged that the 2005 and 2019 Conventions will work together as a 'package': see Arnt Nielsen (n 146) 221, 246. On Irish implementation of the 2005 Convention, see Choice of Court (Hague Convention) Act 2015.
[154] It will also enter into force in Albania, Andorra and Montenegro in 2026.

another very important non-EU trading partner for Ireland, is currently a signatory to the 2019 Convention, and from an Irish perspective, the 2019 Convention would have particular value if the USA also became a Contracting State.[155]

Regional Recognition and Enforcement of Judgments

Aside from the USA and UK, Ireland's main trading partners are mostly EU Member States[156] and in the intra-EU context, judgment-recognition is already guaranteed under the Brussels I Recast Regulation. This reflects a wider reality that in federal and quasi-federal situations, there are, as one might perhaps expect, far fewer restrictions on judgment-recognition.[157] Thus in the US, 'sister-state' judgments are, by constitutional mandate, afforded 'full faith and credit' and jurisdictional review is confined to default judgments.[158] Within the EU, there is, in principle, *no* scope for jurisdictional review (save in limited circumstances of title disputes and imbalanced relationships).[159] This very high level of 'free movement of judgments' is achievable because, in the EU, unlike in the US, there has been harmonisation of – and agreement on - the grounds for jurisdiction to be used by the EU Member States.[160] It therefore follows that other EU Member States can dispense with the need for any check on the adequacy of the connection with the Member State court granting the judgment – because it can be assured that one of the pre-approved (agreed) jurisdictional grounds (ensuring either party consent or factual proximity) was used.[161] This logic holds true so far as EU-domiciled defendants are concerned; however, as has been seen, national (exorbitant) rules of jurisdiction can be invoked against non-EU defendants and yet there is still automatic recognition and enforcement of judgments granted in exercise of national rules based on very tenuous proximity. This practice is highly questionable.[162]

[155] Ní Shúilleabháin (n 137) 220-221.
[156] ibid.
[157] Cuniberti (n 19) 324, 326.
[158] Cuniberti (n 19) 324-325, 334.
[159] Article 45(1)(e) and art 45(3) Brussels I Recast Regulation.
[160] Cuniberti (n 19) 334.
[161] Briggs (n 124) 1481.
[162] See the closing paragraph of the discussion of jurisdiction, above; also Briggs (n 124) 1481-1482. There has also been a blurring of the distinction between third-country and intra-EU judgment-recognition following Case C-568/20 *J v H Ltd* ECLI:EU:C:2022:264 insofar as it accepts that where a Member State has issued a judgment giving effect to a third-country judgment, the Member State judgment may be entitled to recognition and enforcement under the Brussels I Recast Regulation in the usual way. For a critical perspective, see Tobias Lutzi, 'What Remains of H Limited? Recognition and Enforcement of Non-EU Judgments After Brexit' (2024) 20 Journal of Private International Law 651.

Limitations on Recognition and Enforcement of Judgments

In order to further enhance the 'free movement of judgments' between EU Member States, the EU Commission had proposed that the pre-existing 'public policy' and 'natural justice' defences to recognition be abolished under the Brussels I Recast.[163] However, the Member States resisted these proposed changes and these defences remain in place (although the judgment-creditor is no longer required to seek a declaration of enforceability as a preliminary step).[164] Similar defences exist in national judgment-recognition laws and under the 2005 and 2019 Hague Conventions, although, as one might expect, national conceptions of public policy and natural justice tend to be wider than their EU counterparts.[165] Both within the EU, and within most national legal orders and under the 2005 and 2019 Hague Conventions, substantive review of the foreign judgment ('review on the merits') is prohibited.[166]

As far as the 'defences' to judgment-recognition are concerned, human rights law and fair trial rights in particular – in Europe under the European Convention on Human Rights (ECHR) – have become very influential. This has created tensions within the EU regime. While the EU was willing to define the 'public policy' defence by reference to ECHR standards (in particular, the fair trial right under Article 6 ECHR),[167] the suggestion that recognition of a judgment must be preceded by a check on the fairness and ECHR compatibility of the underlying proceedings (an obligation articulated in *Pellegrini v Italy*[168]) was staunchly resisted.[169] Indeed, the European Court of Human Rights has since accepted that reduced supervision is justified in the intra-EU context where fundamental rights are guaranteed through the Charter of Fundamental Rights. Thus, in *Avotiņš v Latvia* it was accepted that a

[163] EU Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and recognition and enforcement of judgments in civil and commercial matters COM (2010) 748 final, 6.
[164] Cuniberti (n 19) 342; arts 39 and 45 Brussels I Recast Regulation.
[165] National and EU rules and the 2005 and 2019 Hague Conventions also provide for non-recognition where a foreign judgment is irreconcilable with a domestic judgment or an earlier foreign judgment which is entitled to recognition: see art 45 Brussels I Recast; Domej (n 130) 1477; Rogerson (n 9) 260; art 9 2005 Hague Convention; art 7 2019 Hague Convention.
[166] Article 52 Brussels I Recast; Domej (n 130) 1476; Godard v Grey (1870) LR 6 QB 139; art 8(2) 2005 Hague Convention; Art 4(2) 2019 Hague Convention.
[167] Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935.
[168] [2001] ECHR 480; (2001) 35 EHRR 44. This case concerned the recognition in Italy of a Vatican judgment (i.e. a judgment from a country which was neither an EU Member State nor an ECHR Contracting State).
[169] See the submissions of the EU Commission in *Avotiņš v Latvia* [2016] ECHR 440; (2017) 64 EHRR 76 [89]-[93].

Member State court can be presumed to be ECHR-compliant where it is simply fulfilling its recognition and enforcement obligations under the Brussels I Recast.[170]

Outside of the context of the Brussels I Recast, there is considerably less certainty as to the obligations of courts of ECHR Contracting States where they are asked to recognise a foreign judgment. *Pellegrini* laid down an obligation for the recognising court to 'duly satisfy itself' that the foreign proceedings complied with Article 6 ECHR – at least in a case where the judgment emanated from a country which is not party to the ECHR.[171] English (pre-Brexit) case-law subsequently suggested that a judgment from an ECHR Contracting State which is not an EU Member State should automatically be denied recognition where there has been a violation of Article 6 ECHR in the original proceedings[172] – and that third-country judgments should only be refused recognition where there is a 'flagrant' breach of ECHR norms.[173] There is some merit in this approach articulated in the English case-law: it is arguably unreasonable to expect third countries which are not ECHR Contracting States to behave as though they were and to comply with the detail of ECHR jurisprudence on fair trial standards – while it is arguably reasonable to expect ECHR Contracting States to fulfil the international obligations which they have assumed, and to deny recognition to any judgments granted in such Contracting States in breach of those obligations. On the other hand, however, it might be suggested that compliance should be *assumed* where the judgment emanates from an ECHR Contracting State (and that redress for non-compliance should be pursued in the courts of origin or by way of a complaint to the Strasbourg court) and that stricter scrutiny *is* warranted where a judgment emanates from outside of Europe and there can be no expectation of ECHR-compliance. Insofar as Contracting States of the ECHR are obliged to guarantee the Convention protections within their own legal orders, it is arguable that *all* incompatible judgments must be denied recognition – not just those involving 'flagrant' incompatibility.[174]

[170] Avotiņš (n 169).
[171] Pellegrini (n 168) [40]. In the more recent case *of Dolenc v Slovenia* [2022] ECHR 910, the European Court of Human Rights reiterated the test laid down in Pellegrini, and determined that the Slovenian authorities had violated art 6 ECHR in recognising an Israeli judgment without ensuring that the underlying Israeli proceeding was conducted in compliance with art 6 ECHR fair trial standards.
[172] *Aeroflot v Berezovsky* [2012] EWHC 3017 (Ch) [75].
[173] *USA v Montgomery* (No 2) [2004] UKHL 37; [2004] 1 WLR 2241.
[174] Adrian Briggs, 'Foreign Judgments and Human Rights' (2005) 121 LQR 185.

Conclusion

Jurisdiction and applicable law rules are generally designed to designate a proximate forum and a connected governing law in the absence of party agreement on these matters. This is true of national and EU law rules, although, as has been seen, with the rigidity of the EU rules (and in particular the *lis pendens* doctrine), the most connected forum may occasionally be deprived of jurisdiction. The Brussels I Recast system is also criticised for its ambiguity on the enforceability of exclusive jurisdiction clauses in favour of non-EU countries. In the main, however, the Brussels I Recast system is to be commended for its protection of defendants and weaker litigants and for its general promotion of procedural efficiency and predictability in civil litigation.

Regarding applicable law, it was noted that the Rome I Regulation gives very considerable leeway to party choice (and unlike in the USA there is no requirement that the parties choose a connected law). While this is entirely defensible in circumstances where the parties negotiate on an equal footing, it is potentially problematic in the event of an imbalance of bargaining power (especially insofar as the putative governing law is used to resolve disputes on material validity).

In the absence of agreement, the law of the habitual residence of the characteristic performer is usually applicable under Rome I. This ensures a degree of clarity and legal certainty for litigants (something which was notably lacking in the common law 'proper law' doctrine, and its US counterparts). Rome I is also commended for its flexibility in allowing for the application of a different law (using the escape clause) where that other law is factually much more proximate and its use corresponds to reasonable expectations.

There is at present far less consensus as to the treatment of foreign judgments - although, as has been seen, there is stronger support for party autonomy as a basis for recognition and enforcement, than for proximity interests, and protectionism has often stymied the recognition and enforcement of judgments obtained in the most connected forum. Such non-recognition is inimical to international comity and to the commercial interests of litigants who are deprived of the finality that they deserve. A solution is however potentially at hand, and the 2019 Hague Judgments Convention may pave the way for a much more reasonable handling of foreign judgments obtained in factually-connected courts.

While its impact on intra-EU judgment-recognition has been clarified, there remains a considerable degree of uncertainty as to the role of the ECHR and its fair trial

guarantees in determining the recognition and enforcement of judgments obtained in a non-EU context.

FRAND OR Foe? Competition Law Vs Patent Law, FRAND Obligations Vs Injunctive Relief – Part 2

Max Barrett*

Abstract: This article continues the exploration of the interaction between competition law and patent law in the field of standard-essential patents (SEPs) pledged on fair, reasonable, and non-discriminatory (FRAND) terms. Building on Part I, which addressed the Samsung, Motorola, *and* Huawei v ZTE *decisions, this second part focuses on post-*Huawei *jurisprudence of the English superior courts, most notably the* Unwired Planet *and subsequent SEP licensing disputes. The analysis traces how English courts have interpreted the contractual and competition law dimensions of FRAND undertakings, including the scope of non-discrimination, the willingness obligations on implementers, and the limits of injunctive relief. Particular attention is paid to whether the 'dance steps' outlined by the Court of Justice in* Huawei *constitute mandatory rules or flexible guidelines; how courts have approached the jurisdictional challenges posed by global licensing; and whether national courts are appropriately positioned as* de facto *pricing authorities in the absence of a supranational regime. The article also considers the tension between intellectual property rights and competition law, assessing whether FRAND undertakings operate as a form of compulsory licensing, and whether restructuring or tactical litigation strategies can undermine the FRAND regime. While English courts have sought pragmatic solutions, their reasoning sometimes diverges from* Huawei *and raises uncertainty as to the balance between rewarding innovation and preventing anti-competitive conduct. The article concludes by calling for greater clarity at the EU level, potentially through the Court of Justice or an international tribunal, to ensure that FRAND licensing preserves both innovation incentives and fair competition.*

Keywords: FRAND licensing; Standard-essential patents (SEPs); Competition law; Injunctive relief; Injunctive relief.

Introduction

This is the second of two articles in which I consider the interaction of competition law and patent law and the obtaining of injunctive relief in the context of FRAND-pledged standard essential patents (SEPs). In my last article (see (2024) 8(1) IJSJ 64)

* Judge of the High Court. This article is written in a personal capacity. I am grateful to Ms Hodel Herlihy, BL, for her comments on an earlier draft of this article. All views expressed are personal to me. The responsibility for any (if any) errors in the text is mine alone.

I focused on (i) the European Commission's decisions in the *Samsung*[1] and *Motorola*[2] cases, and (ii) the decision of the Court of Justice in *Huawei v ZTE*.[3] In this article I focus on post-*Huawei* decisions of the English superior courts (most notably, the *Unwired Planet* cases). The borderland between competition law and patent law is an area of the law which has developed an intimidating jargon and an array of acronyms; the reader will find a glossary of acronyms to the rear of this article.

Samsung Electronics v Ericsson (2016)[4]

Here, Samsung appealed a High Court decision dismissing its competition law defence in a patent infringement claim by Unwired Planet. The defence focused on transactions by which Unwired Planet acquired title to the allegedly infringed patents. Samsung contended there had been a failure to transfer a prior FRAND undertaking by Ericsson, making the agreements void under Art.101 TFEU. On appeal, Kitchin LJ made various notable observations. These are set out below with some further commentary. First, a patent obtains SEP status in return for the proprietor's irrevocable FRAND undertaking.[5] (By way of comment, FRAND undertakings are nowadays given to standard-setting organisations. Amid all the discussion of *Huawei*, etc., it can be forgotten that there is a tradition of FRAND licensing that pre-dates standard-setting organisation FRAND undertakings and remains 'relevant to today's discussion of FRAND requirements').[6] Second, a FRAND undertaking justifies imposing an obligation on a SEP owner to comply with same by not seeking a prohibitory injunction without alerting the implementer and, if the implementer has expressed its willingness to conclude a FRAND licence, presenting a specific, written offer for same.[7] (This does not clarify when a SEP owner may seek to injunct an infringing implementer despite its FRAND undertaking).[8] Third, to safeguard the effectiveness of a FRAND commitment, a SEP owner must ensure the person to whom the SEP is transferred is bound thereby.[9]

[1] *Samsung* (Case AT.39939) [2014] OJ C 350/8.
[2] *Motorola* (Case AT.39985) [2014] OJ C 344/6.
[3] Case C-170/13 *Huawei Technologies v ZTE Corp* [2015] (ECLI:EU:C:2015:477)
[4] [2016] EWCA Civ 489, [2016] 5 CMLR 11.
[5] [2016] EWCA Civ 489 [11] (echoing Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp.*, *ZTE Deutschland GmbH* [2015] 5 CMLR 14, [51]).
[6] Jorge Contreras, 'A Brief History of Frand: Analyzing Current Debates in Standard Setting and Antitrust through a Historical Lens' (2015) 80(1) Antitrust Law Journal 39, 41
[7] [2016] EWCA Civ 489 [12] (echoing *Huawei*, [59]-[64]).
[8] JG Sidak, 'The Meaning of FRAND, Part II: Injunctions' (2015) 11(1) Journal of Competition Law and Economics 201, 201.
[9] [2016] EWCA Civ 489, [2016] [13].

(This principle was included because FRAND pledges are intended 'to assure the market … [not] specific firms'.[10] Such assurance would diminish if pledges did not apply to transferees).

Fourth, a non-ETSI member is as constrained by its FRAND undertaking as a member.[11] (In the US, in *Microsoft Corp v Motorola Inc*,[12] it was contended that Microsoft's rights as third-party beneficiary *were* conditional on its applying for *and* negotiating a RAND (reasonable and non-discriminatory) licence. This was rejected by reference to applicable standard-setting organisation policies. It seems in any event impracticable, as (1) requiring potential implementers to negotiate a RAND licence could 'slow innovation', [13] (2) the notion of applying for a licence is 'problematic'[14] pointing to a contra-FRAND undertaking potential for licence refusal, (3) if implementers had to apply for and negotiate a RAND licence before a SEP-holder had an obligation to license that would weaken the SEP contractual structure).[15] Fifth, if the original owner of a SEP licenses it to a first licensee it must adopt non-discriminatory ('ND') terms when licensing it to a second licensee; otherwise competition between the licensees is likely to be distorted. [16] (This position arguably takes the view that licensees are equals whereas in fact they may be un-equals, as noted by Mellor J in *Interdigital,* as considered later below).[17] Sixth, if second SEP owners do not consider the licensing conduct of a first SEP owner, SEP owners 'could contract out [of the 'ND' element] … of FRAND by transferring their SEPs to new corporate entity shells, not bound by their original [FRAND undertakings]'. [18] (This suggests that corporate restructuring offers an avenue whereby SEP owner obligations could be avoided).

Unwired Planet v Huawei (2017-2020)

In March 2014, Unwired Planet sued Huawei/Samsung/Google for patent infringement. In 2017, Birss J, then in the High Court, granted an injunction to stop UK infringement, with a proviso that the injunction would cease if the defendant

[10] Jorge Contreras, 'A Market Reliance Theory for FRAND Commitments and Other Patent Pledges' (2015) 2 *Utah Law Review* 479, 482.
[11] [2016] EWCA Civ 489, [2016] 5 CMLR 11 [38].
[12] 864 F Supp 2d 1023 (WD Wash. 2012).
[13] Kassandra Maldonado, 'Breaching RAND and Reaching for Reasonable: *Microsoft v Motorola* and Standard-Essential Patent Litigation' (2014) 29 Berkeley Technology Law Journal 419, 434.
[14]ibid.
[15]ibid.
[16] [2016] EWCA Civ 489, [2016] 5 CMLR 11 [45].
[17] [2023] EWHC 1583 (Pat) [2023] RPC 13.[168(ii)].
[18] [2016] EWCA Civ 489, [2016] 5 CMLR 11 [45].

accepted a global FRANDL. Huawei's later appeals were unsuccessful. (The proceedings also involved an appeal in *Conversant v Huawei*.[19] There, Conversant sued Huawei/ZTE seeking a FRAND declaration/determination). Challenges to the English courts' jurisdiction were dismissed by the High Court and eventually appealed to the UK Supreme Court. The UK Supreme Court outlined ETSI's IP rights policy, then concluded with, *inter alia*, the following observations. [20]

First, that the contractual modifications to the general law of patents are designed to achieve a fair balance between SEP owners and implementers. (This, it is submitted, is a notably benign view of standard-setting organisations. In *American Society of Mechanical Engineers v Hydrolevel,*[21] the United States Supreme Court held that a non-profit trade association which promulgated engineering/industry codes could be liable for treble damages under antitrust law for antitrust violations committed by agents with apparent authority). Second, the SEP owner's undertaking, which the implementer can enforce, is a contractual derogation from a SEP owner's general right to obtain an injunction. (There is a possible logical problem with this approach in that, as Tochtermann states:

> [T]he enforcement of a patent right by an SEP owner bound by a FRAND declaration but unwilling to grant a license is not … unjustified … [in] patent law but … [as regards] contract law … [it is] a violation of the undertaking to refrain from obtaining an injunction).[22]

Third, obtaining undertakings from SEP owners will often occur when the relevant standard is being devised and before anyone may know whether the patent in question is essential and valid. (In practice, there may be good reason for this. The 'typical firm'[23] in a standard-setting organisation process owns SEP and non-SEP patents. The non-SEP patents may be 'supporting role patents', [24] i.e. complementary patents licensed with the SEP or 'starring role patents'[25] that cover differentiating technology. Supporting/starring role patents are not typically bound by FRAND commitments. By encouraging/facilitating over-declaration, standard-setting organisations reduce the risk that non-FRAND-constrained essential

[19] [2019] EWCA Civ 38 [2019] RPC 6.
[20] *Unwired Planet v Huawei* [2020] UKSC 37, [2021] All ER 1141, [7].
[21] 102 S Ct. 1935 (1982).
[22] Lea Tochtermann, 'The Fate of the ETSI FRAND Declaration in the Transfer of SEPs' (2021) 16(2) *Journal of Intellectual Property Law and Practice* 150, 159.
[23] Anne Layne-Farrar, 'Moving Past the SEP Rand Obsession: Some Thoughts on the Economic Implications of Unilateral Commitments and the Complexities of Patent Licencing' (2014) 21(4) George Mason Law Review 1093, 1101.
[24] ibid.
[25] ibid 1102.

patents would increase, increasing holdup risk).[26] Fourth, ETSI's IP rights policy envisages that the SEP owner and implementer will negotiate a FRAND licence and resolve disputes by agreement or via, e.g., national courts. (This is notable when it comes to abuse of dominant position ('AODP'), as prevention of meaningful negotiations may constitute AODP).[27]

The United Kingdom Supreme Court also addresses the 'ND' (non-discriminatory) limb of 'FRAND'.[28] Huawei canvassed for 'hard-edged' ND whereby ND is treated discretely.[29] The UK Supreme Court held 'FRAND' to be 'soft-edged' (part of a single, unitary obligation to license on FRAND terms).[30] This soft-edged approach arguably deprives ND of its true significance, though the hard-edged approach might threaten innovation. Separately, Arezzo has canvassed for a 'third way', the elements of which are as follows: '[A]nalyse whether [i] the supposed discriminated implementer is similarly situated to others … [ii] the SEP holder is treating the implementers differently; and [iii] there is … objective justification for the different treatment.'[31]

It remains to be seen which approach to ND will find favour with the CJEU. There are at least two US federal court decisions in which the hard-edged approach was favoured.[32] The UK Supreme Court next considered competition law and *Huawei*, holding as follows. First, seeking a prohibitory injunction without notice/consultation is an abuse of dominant position (assuming dominance).[33] Second, the nature of the notice/consultation required depends on the facts.[34] Third, it is not UK practice to grant final injunctions unless a court is satisfied that a patent is valid, infringed, and the court has determined a FRAND rate.[35] Fourth, it would be surprising if the *Huawei* steps were expected by the CJEU to apply in all cases, no matter what the legal and factual circumstances.[36] (However, the curial part of *Huawei* suggests it *does* apply in all instances). Fifth, there is no requirement

[26] ibid.
[27] This form of abuse was contended for in *Optis v Apple* [2021] EWHC 2564 (Pat).
[28] §§105-127.
[29] §106.
[30] ibid.
[31] Emanuela Arezzo, 'The "Non-Discrimination" Portion of the FRAND Obligation: An EU Perspective,' Orizzonti del Diritto Commerciale (2021) Rivista on Line Dell Associazione Italiana dei Professori Universitari di Diritto Commerciale 517, 538.
[32] *TCL v Ericsson*, 2017 WL 6611635 (CD Cal Dec 21, 2017) and 2018 WL4488286 (CD Cal, September 14, 2018).
[33] *Unwired Planet v Huawei* [2020] UKSC 37, [2021] All ER 1141 [150], citing *Huawei*, [60].
[35] ibid [151].
[36] ibid.
[36] ibid [152].

that an implementer offer terms which coincide with those ultimately determined as FRAND by a court.[37] Sixth, when it came to the scheme established by the CJEU in *Huawei*, the UK Supreme Court observed as follows:

> It prevents an organisation … unwittingly using a SEP … from being ambushed by injunction proceedings … [It] provides the SEP owner with a route map which … will ensure it can seek an injunction without risking infringing [Art.102] … [It] … provides a number of points of reference to assist in assessing … whether each of the parties is willing to enter … a [FRAND] licence … [I]t has sufficient flexibility … to cater for … inevitable variations.[38]

It is worth also mentioning the *Unwired Planet* decisions before the High Court ('UPHC')[39] and the Court of Appeal ('UPCA').[40] In UPHC, Birss J's conclusions concerning *Huawei v ZTE* offer useful context to the decision of the UK Supreme Court. Thus, Birss J, perhaps surprisingly, indicated that he was unpersuaded that the CJEU in *Huawei* had sought to identify 'a series of rigid predefined rules, compliance with which is never abusive whereas deviation … is always abusive … regardless of the circumstances'.[41] However it is, with respect, difficult to reconcile this with the judgment in *Huawei* which, in the curial part, states, *inter alia,* that '*Article 102* TFEU *must* be interpreted as meaning that the proprietor … which has given an irrevocable [FRAND] undertaking … *does not abuse* its dominant position'.[42] Among the principles that Birss J identified in *Huawei* were the following.[43] First, that the CJEU has set out a scheme which both SEP owners and implementers can be expected to follow in the context of a FRAND pledged patent dispute. Second, that in stating that implementers and SEP owners must express willingness to conclude a FRAND licence the CJEU is referring to willingness in general terms. Arguably, AG Wathelet, in *Huawei*, comes closer to the truth as to the nature of the willingness contemplated by the CJEU when he observed:[44]

> 50. … [I]t seems to me that … willingness on the part of the infringer to negotiate in a … vague … non-binding fashion cannot … be sufficient to limit the SEP-holder's right to … [seek] a prohibitory injunction.

[37] ibid [158].
[38] ibid [157].
[39] [2017] EWHC 2988 (Pat).
[40] [2018] EWCA Civ 2344.
[41] [2017] EWHC 2988 (Pat), §741.
[42] [Emphasis added]
[43] ibid [744].
[44] Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp, ZTE Deutschland GmbH* [2015] 5 CMLR 14 (2015), Opinion of AG Wathelet §§50, 88.

> 88. … [The alleged infringer] must respond in a diligent and serious manner to the offer made … If it does not accept that offer, it must promptly submit to the SEP-holder … a reasonable counteroffer … [T]he bringing of an action for a prohibitory injunction would not constitute an abuse of a dominant position if the infringer's conduct were purely tactical and/or dilatory and/or not serious.

In a position which is arguably difficult to reconcile with his observation that he was not persuaded that the CJEU in *Huawei* sought to establish a series of rigid predefined rules, compliance with which is never abusive, Birss J stated as follows:[45] First, that if the SEP owner complies with the scheme prior to starting a claim for infringement … bringing such a claim will not be abusive. Second, that in the circumstances contemplated by the CJEU, bringing a claim for infringement of an SEP which includes a claim for an injunction without prior notice of any kind will necessarily be an abuse of a dominant position. This seems an attempt to distinguish *Huawei* on the facts, an approach which arguably ignores the general nature of the reformulated first question that the CJEU puts to itself at para 4 and its answer at para 77.

Continuing with his iteration of the principles that he gleaned from the decision of the CJEU in *Huawei*, Birss J observes that:

> [B]ringing a claim for infringement which includes a claim for an injunction even with sufficient notice is capable of being an abuse of dominant position … However the judgment does not hold that if the circumstances diverge from the scheme set out in any way then a patentee will necessarily abuse their dominant position … by starting such a claim. In those circumstances the patentee's conduct may or may not be abusive. The scheme sets out a standard of behaviour against which … parties' behaviour can be measured to decide in all the circumstances if an abuse has taken place.[46]

Again, it is, it is submitted, difficult to reconcile this with the wording of the CJEU's judgment in *Huawei*. As to the decision of the Court of Appeal in *Unwired Planet*,[47] it is the observations of Kitchin LJ that have perhaps received the most attention concerning the nature of the FRAND undertaking and the obligations of implementers, *viz*. that 'any implementer must be able to secure a [FRAND] … licence … under all the SEPs it needs to produce and market its products which

[45] [2017] EWHC 2988 (Pat), [744].
[46] ibid.
[47] [2018] EWCA Civ 2344.

meet the standard'.[48] Presumably Kitchin LJ means to refer in this regard to declared essential patents. A FRAND undertaking, unless it expressly stated otherwise, could not extend to undeclared patents, even if essential.[49] Kitchin LJ continued:

> [J]ust as implementers need protection, so too do [SEP owners] ... They are entitled to an appropriate reward for [their industry] ... It is therefore important that implementers engage constructively in any FRAND negotiation and, where necessary, agree to submit to the outcome of an appropriate FRAND determination.[50]

In *Optis v Apple*,[51] Optis claimed that the last-quoted sentence means that two cumulative obligations arise for implementers: to negotiate constructively and to accept the FRAND determination. Meade J considered Optis' arguments to be overdone; to his mind, Kitchin LJ was reviewing general policy, was not formulating specific rules, and was not deciding how the balance to which he refers should find expression in the particular interpretation of Clause 6.1. In addition, the same ground of policy was in any event covered in the UK Supreme Court decision in *Unwired Planet*.[52] From an English-law perspective, the last-mentioned point is determinative. To an EU member state court, the observations of AG Wathelet might seem more pertinent.

Conversant Wireless Licensing v Huawei (2018)[53]

Here, Conversant had engaged in negotiations with Huawei and ZTE, claimed to have made a number of global licence offers, and accused the defendants of a 'hold-out' strategy.[54] Huawei and ZTE contended that Conversant's patents were non-essential/ invalid.[55] They also challenged the English courts' jurisdiction. The High Court (Carr J) decided that Conversant's infringement claim was justiciable in England and that England was the *forum conveniens*. Carr J found 'simple ... and ... compelling'[56] Birss J's observation in *Unwired Planet* that '[i]f a worldwide licence is FRAND then requiring Huawei to take and pay for one would not amount to

[48] ibid §53.
[49] Anne Layne-Farrar, 'Moving Past the SEP Rand Obsession: Some Thoughts on the Economic Implications of Unilateral Commitments and the Complexities of Patent Licencing' (2014) 21(4) George Mason Law Review 1093, 1101-1102.
[50] [2018] EWCA Civ 2344, [54].
[51] [2021] EWHC 2564 (Pat).
[52] ibid [113].
[53] [2018] EWHC 808, [2018] RPC 16.
[54] ibid [5], [8].
[55] ibid [6].
[56] ibid [18].

determining questions of validity in relation to which courts of other member states have exclusive jurisdiction.'[57] There is some concern as to the ability of English courts to set a global FRAND licensing rate.[58] Although their approach reduces global licensing transaction costs (because English courts are offering a potential 'one-stop, global licensing shop') 'it also increases information asymmetry with respect to extraterritorial SEPs'.[59] Contreras points to other potential dangers, e.g., 'national desires to attract [court] business'[60] and too-early litigation (with parties seeking to obtain '"first strike" advantages'[61] by suing in a preferred venue).[62]

Conversant Wireless Licensing v Huawei (2019)[63]

Carr J's decision in *Conversant* was appealed unsuccessfully to the Court of Appeal. There, only the *forum conveniens* ground was in issue. Floyd LJ observed, *inter alia*, that before an English court can decide on *forum conveniens*, a question arises as to how the dispute is to be characterised.[64] He then analysed how the Court of Appeal in *Unwired Planet* (in which *forum conveniens* went unraised) treated dispute characterisation, observing as follows.[65]

First, there is no such thing as a global portfolio right; a UK court will only determine disputes concerning infringement and validity of UK patents or European patents designating the UK; and if a UK patent is found valid and infringed the relief ordered will relate only to acts of infringement of those patents within the UK. Even so, it is submitted, the risk of a potential global 'race to the bottom'[66] in FRAND disputes 'in which legal rules are progressively diluted in an effort to attract litigation'[67] perhaps inevitably presents when multiple national courts are active in a commercially important area.

[57] *Unwired Planet v Huawei* [2017] EWHC 711 (Pat) [567].
[58] See for example, Roya Ghafele 'Global Licensing on FRAND Terms in Light of *Unwired Planet v. Huawei*' (2020) 24(2) UCLA Journal of Law and Technology 1.
[59] ibid 1.
[60] Jorge Contreras, 'The New Extraterritoriality: FRAND Royalties, Anti-Suit Injunctions and the Global Race to the Bottom in Disputes over Standards-Essential Patents' (2019) 25(2) Boston University Journal of Science and Technology Law 251, 290.
[61] ibid.
[62] ibid.
[63] [2019] EWCA Civ 38, [2019] RPC 6.
[64] ibid [95].
[65] ibid [98].
[66] Jorge Contreras, 'The New Extraterritoriality: FRAND Royalties, Anti-Suit Injunctions and the Global Race to the Bottom in Disputes over Standards-Essential Patents' (2019) 25(2) Boston University Journal of Science and Technology Law 251, 282.
[67] ibid.

Second, the territorial nature of patent rights falls to be compared with the position in relation to the FRAND undertaking given to ETSI: the undertaking, like the standard to which it relates, is of international effect. Arguably the only practicable solution to this '*inherent tension*'[68] is that FRAND rates would be set by an international court, e.g., the Unified Patent Court.[69] Third, it was necessary to protect SEP owners from the need to negotiate patent licences on a per-country basis. This is logic that 'makes sense at first glance – maybe also at second glance'.[70] However, other national courts have been hesitant to follow the UK's approach and the CJEU has yet to decide matters.[71] Fourth, it is possible that a global licence could be FRAND. This was a response to Huawei's contention that imposition of a global licence by a national court (by reference to a national finding of infringement) is wrong. However, it does not answer the question as to which court is best placed to decide global FRAND issues. And, although decisive for English-law purposes, it does not mean the points Huawei raised have gone away. What it does show is the extent to which courts consider whether an SEP licensing offer complies with FRAND is a contract law matter.[72] Fifth and sixth:

> v) Where a [SEP owner] … brings proceedings for infringement against an implementer in one jurisdiction in respect of the SEPs which it owns there and makes good its case, two outcomes might follow. First, if the evidence establishes that a willing licensor and a willing licensee in the position of the parties would agree a FRAND licence [and] … [a] the [SEP owner] … refuses to offer it … no injunction should be granted … [b] on the other hand, the implementer refuses to enter into the FRAND licence … the [SEP owner] … can properly seek an injunction … Secondly … if the evidence establishes that a willing licensor and a willing licensee in the position of the parties would agree a global FRAND licence, that such a licence would conform to industry practice and that it would not be discriminatory but [a] the SEP owner … refuses to grant [it] … it should be denied an injunction … [b] the implementer were to refuse to enter into such a licence then the SEP owner … should be entitled to an injunction …

[68] Roya Ghafele, 'Global Licensing on FRAND Terms in Light of *Unwired Planet v. Huawei*' (2020) 24(2) UCLA Journal of Law and Technology 1, 1.
[69] ibid.
[70] Stefanie Krome, 'Global FRAND-Licensing by EU National Courts: The Winner Asks Them All? - On Global SEP Disputes and International Jurisdiction' (2023) 7(1) Market and Competition Law Review 77, 79.
[71] ibid 79.
[72] JG Sidak, 'Why *Unwired Planet* Might Revolutionize the Resolution of FRAND Licensing Disputes' (2018) 3 Criterion Journal on Innovation 601, 669.

> vi) Were the position otherwise … the SEP owner … would be required to bring proceedings in every jurisdiction in which … rights subsist, which might be prohibitively expensive for it to do.[73]

These last points go back to the third point, *viz*. that a global licensing mechanism is necessary to protect SEP owners from having to negotiate patent licences on a country-by-country basis. It also points to the truism that *some* court may need to decide on some SEP/FRAND issues.

Vestel v Access Advance and Philips[74]

Here, the International Telecommunications Union required that patentees who declared SEPs to a standard should issue a FRAND undertaking. The claimants accepted they needed a licence from the defendant US company, to sell televisions in the UK. As Access Advance and Philips were outside the UK, the High Court stated that it did not have jurisdiction to hear the claim. On appeal, Vestel dropped its dominant position claim against the respondents, reframing its claim for a declaration of FRAND terms as a claim for a declaration of non-liability for infringement of UK SEPs. Vestel's appeal was unsuccessful. Birss LJ observed that: there is no freestanding FRAND claim; the legal basis for the FRAND obligation on which courts are asked to adjudicate needs to be identified; and it was hard to know how to decide whether the declarations sought could serve a purpose.[75] *Vestel* is perhaps best seen as a case in which the appellant sought to go beyond the reach of a FRAND claim, with no FRAND declaration issuing where a party cannot show, e.g., by reference to a competition/contract/patent law that it is entitled to a FRAND licence.

Optis v Apple (2021)[76]

Optis sought to restrain Apple from infringing Optis' SEP. Apple gave a 'convoluted'[77] undertaking that if found to have infringed a valid, essential patent, it would take the licence which a court later determined FRAND, unless its undertaking was unnecessary/late.[78] Among Meade J's observations of interest are the following: First, '[m]any implementers'[79] disliked UPSC because it had the result

[73] [2019] EWCA Civ 38, [2019] RPC 6, [98].
[74] [2021] EWCA Civ 440, [2021] 4 WLR 60.
[75] ibid [11]-[13], [44]-[48], [72], [78]-[79] (Birss LJ).
[76] [2021] EWHC 2564 (Pat).
[77] ibid [21].
[78] ibid [21], [23].
[79] ibid [38].

that they could be required to pay for use of equivalent technology globally or submit to a UK injunction.[80] Meade J noted that this 'overlooked the fact that a licence set by the UK Court may include a mechanism to adjust for later events in other jurisdictions'.[81] With respect, this does not answer concerns as to national courts setting global licences. The issue presenting was neatly captured in an earlier time by Wilkey J in *Laker Airways v Sabena*,[82] an antitrust case:

> Despite the ... obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws ... [and] find it difficult neutrally to balance competing foreign interests. When there is ... doubt, national interests will tend to be favored.[83]

Consistent with this and given the commercial significance of FRAND-pledged SEPs, absence of international regulation has arguably created a 'scramble of powers'[84] regarding FRAND disputes). Second, 'the parties in [Optis] agreed that when deciding FRAND rates a UK court does not simply award the SEP owner's offer if within the FRAND range. [Rather it interrogates matters, then sets the rate]'.[85] Arguably, this ignores the concern that a FRAND commitment is of limited value absent 'objective benchmarks'.[86] That said, there is a school of thought that there are objective models for determining the FRAND range.[87] Third, 'setting FRAND terms is part of the remedies for UK patent infringement, ... not the subject of a freestanding claim. The SEP owner needs to establish infringement so as to move to the assessment of remedies.'[88] This seems but a reiteration of the position post-*Vestel*. Fourth, as regards Apple's suggestion that the injunction proceedings should not proceed ahead of the infringement proceedings, Meade J held the gap between them was 'happenstance'.[89] Fifth, as regards the UK Supreme Court's observation (in *Unwired Planet*) that in the UK it is not the practice to grant a final injunction unless the court is satisfied the patent is valid and infringed, and it has

[80] ibid.
[81] ibid.
[82] 731 F 2d 909 (DC Cir 1984).
[83] ibid 951.
[84] King Fung Tsang and Jyh-An Lee, 'The Ping-Pong Olympics of Antisuit Injunction in FRAND Litigation' (2022) 28(2) Michigan Technology Law Review 305, 327.
[85] [2021] EWHC 2564 (Pat) [40].
[86] Daniel Swanson and William Baumol, 'Reasonable and Non-Discriminatory Royalties, Standards Selection, and Control of Market Power' (2005) 73(1) Antitrust Law Journal 1, 5.
[87] ibid.
[88] [2021] EWHC 2564 (Pat) [43].
[89] ibid [51].

determined a FRAND rate, Meade J concluded that the UK Supreme Court was merely making a general point that national courts would vary in how soon they considered FRAND [*quaere* whether this was so]; hence the nature of the consultation under *Huawei* had to be assessed flexibly. The fourth and fifth points, it is submitted, comprise a pragmatic application of the legal position post-*Vestel*. Sixth, as to the proper interpretation of clause 6.1 of ETSI's IP rights policy, Meade J held:

> [T]he right interpretation of clause 6.1 is that any person interested in implementing an ETSI standard must be entitled to have a licence on FRAND terms on demand to a patentee which has given the relevant undertaking … Clause 6.1. does not change the position that a party without a licence may potentially be injuncted … [It] is not … the intention of clause 6.1 for a party using the technology of a SEP to have the benefit of the patentee's FRAND undertaking in terms of immunity from being sued, without the corresponding burden of taking a licence.[90]

This seems a notable reading of clause 6.1, which provides:

> When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory ('FRAND') terms and conditions under such IPR …

There is no mention in clause 6.1 of obtaining a licence on FRAND terms upon demand. Moreover, under *Huawei*, (i) the implementer must express willingness to conclude a FRAND licence as part of its 'demand', (ii) there can be a range of FRAND terms and the terms of the licence will almost inevitably be subject to negotiation post-'demand', (iii) it is not the taking of a licence but the good faith implementation of the *Huawei* steps that leads *not* to immunity from suit but immunity as regards seeking injunctive relief regarding ongoing transgressions. Also, not to be forgotten is the second limb of *Huawei* which provides that Art.102 TFEU does not prohibit seeking relief for past infringement.] Seventh, as to when an implementer must commit to taking a licence, Meade J considered the obligation arises when infringement is established.[91] (*Quaere* whether this is correct under *Huawei*. Infringement can only conclusively be established by a court; and it is clear from the

[90] ibid [278]-[279].
[91] ibid [295],[298].

sequencing contemplated in *Huawei* that an implementer *would* be free to bring an injunction application if the implementer, after being alerted as to alleged infringement by the SEP-holder did not express its willingness to conclude a licensing agreement on FRAND terms).

Eighth, Meade J did not accept that if an implementer failed to commit at the relevant time, it permanently lost its right to a FRAND licence.[92] (What Meade J appears to be suggesting is that if an implementer proceeds other than in accordance with *Huawei* and is the subject of an injunction application, it could, perhaps post-injunction, transform its legal position by then expressing willingness to conclude a FRAND licence. *Quaere* whether the CJEU had in mind that an implementer could proceed otherwise than in accordance with *Huawei*, and possibly in breach of its good faith obligation, yet acquire a right to a FRAND licence).

Meade J had to address two specific competition law issues:[93] The first was whether Apple's/Optis' non-commitment/commitment to FRAND terms offered a complete answer in competition law? Meade J did not accept that as long as Optis committed to the court's FRAND terms while Apple had not, there could be no finding of abuse.[94] Meade J accepted it made sense that there could be an AODP even where a SEP owner was willing to abide by a court's decision. That said, under *Huawei*, seeking an injunction in circumstances where an SEP-holder had sought to follow the process identified in *Huawei* and an implementer had not, could not in itself be an AODP. The second competition law issue was whether it was the case that AODP found at a later trial could lead only to damages? Meade J considered that the effect of the UK Supreme Court decision in *Unwired Planet* was that withholding an injunction could leave the SEP owner with an inadequate remedy, and frustrate the hold-out prevention goal of the FRAND regime.[95] There appears as yet to be no CJEU case law on whether an AODP arising from or following non-conformity with *Huawei* could lead only to damages. Meade J's reasoning that the full panoply of remedies should arise in respect of the AODP is (it is submitted) convincing.

[92] ibid [299]-[302].
[93] ibid [66] and [67].
[94] ibid [310]-[313].
[95] ibid [324].

Optis v Apple (2023)[96]

Here, Marcus Smith J determined (i) the FRAND terms of a global licence for Apple's use of Optis' SEPs and ordered an amount for past infringements, and (ii) that Apple had not been excluded from the market or inhibited in its commercial activities, Optis had not committed an AODP, and Optis' contentions regarding Apple's conduct in negotiations was unfounded.

FRAND and Unfair Pricing

Marcus Smith J made a link between unfair pricing and what may be fair for FRAND purposes.[97] So, after numerous cases in which the contractual approach to FRAND was ascendant, he seems to import a competition law dimension into FRAND/SEP licensing. *Quaere* whether this is altogether welcome. First, insofar as the consideration of unfair pricing is directed towards an appraisal of what is fair, it appears to accord the 'F' of FRAND a significance it has not generally enjoyed.[98] Second, Marcus Smith J suggests that 'there is a very close alignment between a price that exceeds FRAND and a price that infringes the Chapter II prohibition.'[99] That seems close to stating that what is unfair pricing cannot be fair for FRAND purposes. While this may be so as a matter of English law, it is not an approach yet endorsed by the CJEU. Third, complicating matters is that it is clear from, e.g., *United Brands v European Commission*[100] that in assessing pricing a court will look to objective justification of pricing. Unfortunately, many principal methods of objectively assessing pricing (see *Diagram 1*) are not especially useful in the IPR domain.[101]

[96] [2023] EWHC 1095 (Ch).
[97] ibid [434] *et seq*.
[98] On the possible unimportance of the 'F' in FRAND, see JG Sidak, 'The Meaning of Frand, Part I: Royalties' (2013) 9(4) Journal of Competition Law and Economics 931, 968.
[99] [2023] EWHC 1095 (Ch) [439].
[100] Case 27/76 [1978] ECR-00207.
[101] Maurits Dolmans, 'Standards for Standards' (2002) 26(1) Fordham International Law Journal 163, 201.

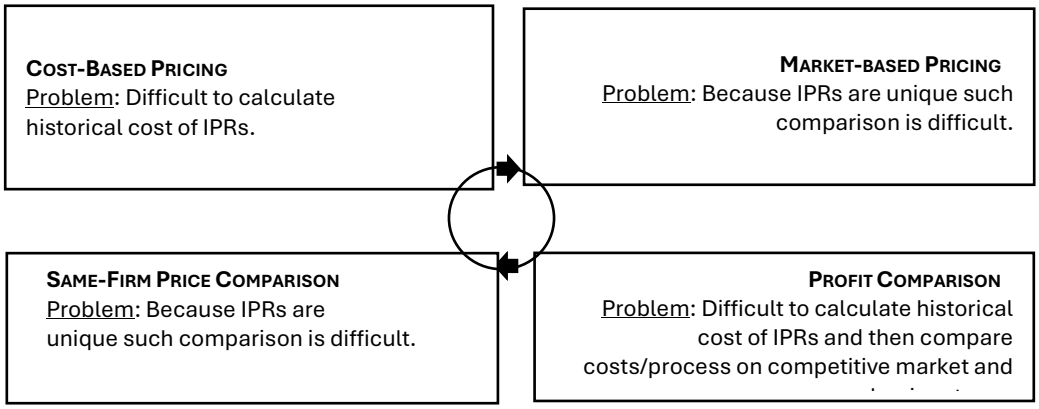


Diagram 1: Challenges with Objective Pricing of IP rights[102]

Non-Discrimination

Writing of the 'ND' limb of 'FRAND', Marcus Smith J observes:

> [A] non-discriminatory rate is one that does not differentiate in a discriminatory way between SEP Owners ... and Implementers ... But that does not mean the *same* rate will always be ... non-discriminatory ... Implementers ought to pay the same respecting all material differences; and SEP Owners ought to be paid the same respecting all material differences.[103]

There are at least three schools of economic thought as to the *normative* meaning of 'ND' in the FRAND context: [104] (1) it imposes an obligation to license all implementers; (2) it requires similarly situated licensees to be licensed similarly; (3) it only applies when the SEP holder is vertically integrated and could employ discriminatory licensing terms to distort downstream competition. Marcus Smith J appears to have opted for the second meaning coupled (it seems) with a recognition that this is a normative rule and circumstances may yield differing interpretations.

Interdigital v Lenovo (2023)[105]

This litigation involved a dispute between InterDigital and Lenovo as to the terms on which Lenovo should take a FRAND licence of InterDigital's SEPs. Mellor J made numerous observations of interest that are considered below.

First, that 'this sort of FRAND case is not well suited to adversarial litigation because there is ... very little, if any, exploration of the middle ground ... [whereas a court] is

[102] ibid 200-204.
[103] [2023] EWHC 1095 (Ch) [429] (emphasis in original).
[104] JG Sidak, 'Fair and Unfair Discrimination in Royalties for Standard-Essential Patents Encumbered by a FRAND or RAND Commitment' (2017) 2 Criterion Journal on Innovation 301, 304.
[105] [2023] EWHC 1583 (Pat), [2023] RPC 13.

likely to be … more interested in the middle ground'.[106] (Another feature occasioned, it is submitted, by the fact that individual patents are asserted in adversarial proceedings is that if the patent holder can prove the asserted patents are valid and infringed, they are then 'priced'[107] in the form of compensatory damages. As they are public, such trials/pricing are the near-exclusive source of the law on patent damages. But the focus of such trials on FRAND may lead to 'uncertain, unreliable and unjustifiable' [108] awards. Mellor J's pragmatic preference for the 'middle ground' is perhaps suggestive of a process vulnerable to such weaknesses).

Second, turning to *Optis*, Mellor J was satisfied to adopt the following general conclusions as regards clause 6.1 of ETSI's IP rights policy. First, its interpretation should not be done '*exclusively or excessively'*[109] through a UK prism.(As ETSI's IP rights policy is governed by French law,[110] it is not entirely clear what this means; surely a French prism applies?) Second, implementer 'hold-out' is to be deprecated.[111] (A question arises in the academic commentary whether 'hold-out' exists).[112]

Third, any person seeking to implement an ETSI standard was entitled to have a FRANDL '*on demand*'[113] to a FRAND-pledged patentee. (I have already considered in the context of *Optis* why this is a challenging reading of *Huawei*).

Fourth, [a] the class of a FRAND undertaking's beneficiaries is 'very broad' and [b] an implementer is not entitled to the benefit of a FRAND undertaking without accepting the licensing burden,[114] and [c] it is not the case that if an implementer fails to commit to take a FRANDL at the relevant time it permanently loses its right to same.[115] (As to [b], the undertaking precedes seeking a licence. It is submitted that it would be more correct to state (post-*Huawei*) that an implementer is entitled to immunity from injunction where it has expressed a willingness to conclude a licence and otherwise proceeded in accordance with the scheme contemplated by *Huawei*. As to [c], this mirrors Meade J's perhaps questionable observation to like

[106] ibid [53].
[107] Jonathan Putnam, 'Economic Determinations in Frand Rate-Setting: A Guide for the Perplexed' (2018) 41(4) Fordham International Law Journal 953, 955.
[108] ibid 956.
[109] [2023] EWHC 1583 (Pat), [2023] RPC 13[184(i)].
[110] See §12.
[111] [2023] EWHC 1583 (Pat), [2023] RPC 13.[184(ii)].
[112] Kalyan Dasgupta and David Teece, 'Protecting Innovation in the Mobil Wireless Ecosystem: Understanding and Addressing "Hold-Out"' (2023) 38 Berkeley Technology LJ 313, 331.
[113] [2023] EWHC 1583 (Pat) [2023] RPC 13 [184(iii)].
[114] ibid [184 iv].
[115] ibid [189].

effect in *Optis*. Fifth, as regards holdup/holdout,[116] every SEP licensing negotiation involves some degree of holdup or holdout (and probably an element of both) for as long as the two sides fail to reach agreement. However, the mere failure to reach agreement does not necessarily mean one side or the other is to blame; there may be genuine disagreement.[117] (*Quaere* whether every SEP licensing negotiation involves a degree of hold-up/hold-out, assuming both exist. Hold-up arises from an SEP-holder's potential breach of its FRAND undertaking; implementer infringement is not a *sine qua non* of a FRAND negotiation process).

Sixth, under the heading '*FRAND–General Principles*', Mellor J observes, *inter alia*, as follows. First, a willing licensor and licensee would not find themselves in the situation he had to consider.[118] (Arguably a willing licensor and licensee could so find themselves if they proved unable to agree, despite that willingness) as to what constituted FRAND pricing).

Seventh, it remained possible to consider what a willing licensor/licensee would agree in the situation confronting him.[119] (Patentee willingness is not mentioned in *Huawei*). Third, Mellor J accepted the view in *Optis*[120] that, in English proceedings, upon a finding that the implementer would be infringing a valid SEP in the absence of a FRAND licence, the implementer must undertake there and then to take a licence on FRAND terms. (I have questioned this aspect of *Optis* above). Fourth, as more FRAND determinations are decided, the approaches taken in different jurisdictions should converge/disappear.[121] (*Quaere* whether this is wishful thinking, not least as, outside of the UK and US, it may be that there is an 'increasingly used antitrust approach … as to SEPs' FRAND enforcement.[122]

Eighth, when it came to the nature of the willingness a prospective licensee must manifest, Mellor J observed, that however unwilling an implementer may have been in the past, the implementer retains the ability to change its position to that of an unconditionally willing licensee. (Meade J makes much the same point in *Optis*. For

[116] 'Hold-up' is the practice whereby implementers of a standard meet with supra-competitive royalty demands from an SEP owner. 'Hold-out' is the practice whereby a person implementing an SEP seeks to delay taking an SEP licence so as to minimise or avoid paying FRAND royalties.
[117] ibid [278].
[118] ibid [428].
[119] ibid [429].
[120] [2021] EWHC 2564 (Pat).
[121] [2023] EWHC 1583 (Pat), [2023] RPC 13[438].
[122] Wenwei Guan, 'Diversified FRAND Enforcement and TRIPS Integrity' 17(1) World Trade Review (January 2018) 91, 120.

the reasons outlined in my consideration of *Optis*, I would respectfully query whether this reasoning is consistent with *Huawei*).

***Nokia v OnePlus* (2023)**[123]

This judgment dealt with Oppo's promise to take a FRAND licence based on terms set by a Chinese court. The main question was whether Oppo's promise to take a licence meant it was licensed or entitled to a licence.

Was Oppo licensed?

Meade J dismissed this line of argument, observing:

> Under Oppo's approach, an implementer could put itself in a contractual relationship with a [SEP owner] … when they had had no previous dealings … .Everything about their relationship would be at large … .It is not an answer … to say that the implementer couples its acceptance with an agreement to have the terms determined by a court (of its choice) because the court would be making an agreement for the parties, not deciding what an agreement … means, or filling in minor gaps.[124]

It is submitted that it is challenging to reconcile this with *Optis* or *Interdigital*. In those cases, it was intimated that a person interested in implementing a standard would be entitled to a FRAND licence on demand. Such entitlement surely requires some legal and/or equitable relationship between the parties. Moreover, everything about that relationship (it is submitted) cannot properly be described as 'at large': the licence will be on FRAND terms, and determinable by a court if the parties fail to agree, the court giving informed effect to the FRAND undertaking.

Willingness

Meade J concluded: (1) Oppo was not a willing licensee. 'Its willingness is qualified because it insists on terms set in the Chongqing proceedings'. [125] (Looking for infringer willingness is consistent with the CJEU's decision in *Huawei*);[126] (2) Nokia was a willing licensor because it made an unqualified commitment to offer and (if Oppo wanted) to grant a licence on whatever terms the court decided.[127] (Patentee willingness goes unmentioned in *Huawei*).

[123] [2023] EWHC 1912 ((Pat).)
[124] ibid [248].
[125] ibid [313].
[126] ibid [77].
[127] ibid [314].

Abuse of a Dominant Position

Oppo submitted that Nokia's seeking injunctive relief from the UK courts notwithstanding Oppo's unequivocal FRAND licence commitment on terms settled in China, and whatever the outcome in China, was an abuse of a dominant position. (It was assumed Nokia held such a position).[128] Oppo asserted that a dominant undertaking had a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market and posited that abuse of a dominant position is an objective concept relating to a dominant undertaking's behaviour.[129]

Meade J agreed SEPs 'can create a particular risk of abuse because their successful assertion can shut a defendant out of a market.'[130] (This may be true of SEPs that are not FRAND-pledged; however, it is difficult to see it is true of FRAND-pledged SEPs. It may also ultimately depend on how the FRAND-pledged SEP holder actually behaves, e.g., if, despite its undertaking it engages in what seems the unlikely – and arguably contra-*Huawei* – behaviour of rushing to court to seek an interim injunction). Oppo raised various potential abuses of a dominant position: (i) leveraging market power by threatening to exclude Oppo from the UK market, (ii) negotiation disruption, (iii) seeking unfair advantage in rate-setting, (iv) seeking a FRAND rate to be set by the English court, and (v) engaging in conduct capable of restricting competition.[131] Meade J rejected these contentions. Oppo would not be excluded if it agreed to pay FRAND royalties.[132] The allegation about disrupting negotiations was not formally in play; however, past disruption could not in itself prevent an injunction for the future.[133] Rather than seeking unfair advantage, Nokia had sought a decision from a court, just not Oppo's preferred court.[134] Oppo had not indicated how the Chinese court would provide a better or better-informed result than English courts.[135] Nokia accepted the English court could take account of any decision from China if that issued first.[136] Once a SEP owner commits to a FRAND licence on court terms 'its future conduct … in relation to seeking an injunction against an infringer who will not commit to take such a licence will not without more

[128] ibid [315], [317].
[129] Extracted from *Interdigital v Lenovo* [2023] EWHC 1583 (Pat), [2023] RPC 13 [318].
[130] [2023] EWHC 1912 [Pat] [321].
[131] ibid [327]-[328].
[132] ibid [331].
[133] ibid [332].
[134] ibid [333].
[135] ibid [334].
[136] ibid.

be an abuse of a dominant position'.[137] That is not to say it would not constitute such an abuse (the facts would decide); here, however, Oppo failed to show anything that amounted to abuse.[138]

Conclusions

In 2013, Commissioner Almúnia, the then EU Commissioner for Competition, said:

> I believe ... injunctions should not be available when there is a willing licensee. Ideally, this principle should be implemented by the ... [standard-setting organisations] themselves ... .[S]ince that is not happening, I am willing to provide clarity to the market through competition enforcement.[139]

What has followed since has arguably been a 'retreat'[140] from this position, perhaps allowing for a period of '*FRAND* laws evolving into perfection'.[141] Thus, since *Samsung/Motorola/Rambus*, the Commission appears not to have enforced competition law vigorously in the FRAND/SEP context. More recently, former Commissioner Vestager (a onetime EU Commissioner for Competition) has suggested that '[t]he best way to solve ... issues [presenting in IP law] is sometimes to change the regulations, not to apply the competition rules'.[142] Podszun suggests this last remark signals 'the retreat of the most important EU enforcement agency in competition law from the battlefield'.[143] In retreating as it has, if it has, the Commission has arguably taken its lead from the CJEU which, in *Huawei*, (i) refrained from 'tough intervention',[144] (ii) essentially declining, in a 'conservative judgment',[145] to answer if, when, and on what terms access to SEPs would be

[137] ibid [337].
[138] ibid.
[139] Joaquín Almúnia, 'Intellectual Property and Competition Policy' (IP Summit, Paris, 9 December 2013 <https://m.moam.info/european-commission-europa-eu_6479ca7f097c476e028ba9fe.html> accessed: 26a November 2024, 4.
[140] Rupprecht Podszun, 'SEP Litigation and *Huawei*: Negotiations in the Shadow of Competition Law' (2017) 62(4) The Antitrust Bulletin 786, 804.
[141] Claire Guo, 'Intersection of Antitrust Laws with Evolving FRAND Terms in Standard Essential Patent Disputes' (2019) 18(3) John Marshall Review of Intellectual Property Law 260, 260.
[142] Margrethe Vestager, Restoring Trust in Our Economy, Speech at the Association of the Danish Pharmaceutical Industry New Year Conference Copenhagen (27th January 2017).
[143] Rupprecht Podszun, 'SEP Litigation and *Huawei*: Negotiations in the Shadow of Competition Law' (2017) 62(4) The Antitrust Bulletin 786, 804.
[144] ibid 803.
[145] Nicolas Petit, '*Huawei v ZTE:* Judicial Conservatism at the Patent-Antitrust Intersection' (2015) 2 CPI Antitrust Chronicle < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2681377> accessed 24 November 2024, 2.

granted under EU competition law, (iii) yielding the end-result that national courts have now (in effect) become pricing authorities'.

If in *Huawei*, the CJEU cut with the sword of justice at the issues presenting before it, other problems have since emerged Hydra-like in the form of the questions I posed at the end of my previous article. Thanks to the judgments of the superior courts of England and Wales that I have considered above, useful answers – admittedly from a purely English-law perspective – have been provided as regards many of those questions, as summarised in *Diagram 2*.

1. **ARE *HUAWEI*'S "*DANCE STEPS*"[A] MANDATORY?** They are considered a useful approach, encouraging good faith negotiations whereby FRAND undertakings are fulfilled and injunction-risk minimised.[B]

2. **WHAT DOES FRAND REQUIRE?** The UK Supreme Court in *Huawei* concludes that 'ND' is not hard-edged. But issues remain e.g., does ND require end-manufacturers to license suppliers on a priority basis?[C] does a FRAND undertaking operate on a 'license to all' basis or an 'access for all' basis (access to standard technologies but not a licence)?[D] does it suffice to engage end-manufacturers in licensing negotiations?[E]

3. **DOES A FRAND UNDERTAKING CREATE A "*DE FACTO COMPULSORY LICENSING SCHEME*"?[F]** Meade J comes close to suggesting it does in *Optis v Apple* (2021).[G]

4. **WHAT DILIGENCE/PROMPTITUDE IS REQUIRED BY AN IMPLEMENTER IN RESPONDING TO SEP OWNERS?** Cases vary. In *Sisvel v Haier* (2020),[H] the *Bundesgerichtshof* indicated that 'an implementer who did not respond...for one year did not have [an] intention to obtain a licence.'[I]

5. **DOES *HUAWEI* MERELY CREATE LIMITED POTENTIAL FOR COMPETITION LAW LIABILITY?** Podszun perhaps summarises matters best, describing *Huawei* as 'a turning point in the clash of intellectual property and competition law, the CJEU adopting 'an approach that favors...negotiation' over the 'more outspoken stance of the...Commission'.[J]

6. **DOES *HUAWEI* EXTEND TO NPES?** '[T]he fact that the SPE/FRAND system is all about licensing...reduces the weight of the practising/non practising [distinction]',[K] i.e. <u>all</u> FRAND- pledged SEP owners are committed to licensing.

7. **CAN SEP OWNER'S SIDESTEP *HUAWEI* THROUGH RESTRUCTURING?** Such machinations might be counted against the relevant party when seeking injunctive (equitable) relief.

8. **ARE INDUSTRY-STANDARD TERMS LIKELY FRAND?** This is unanswered in the caselaw considered.

9. **WHAT IS THE CJEU'S POSITION REGARDING THE EXISTENCE OF HOLDUP?** In *Huawei*, at [38], the CJEU refers to 'hold-up' and 'reverse hold-up' without caveat.

10. **WHAT IF A SEP OWNER AND IMPLEMENTER MAKE FRAND OFFERS?** This seems likely to be a factor in deciding whether to grant an injunction.

11. **HOW IS A COURT TO PROCEED WHEN AN IMPLEMENTER CLAIMS THAT A PATENT IS INVALID/ UN-USED?** The English courts have been willing (see *Optis*)[L] to consider FRAND disputes where, e.g., an infringement allegation is being challenged.

12. **IS A FRAND UNDERTAKING PURELY/FUNDAMENTALLY CONTRACTUAL?** Tripathi arguably puts matters best, stating that what 'may seem...breach of contract issues...are...complicated: ...by the enforceability of patent infringement through injunctions; and...the interference of competition law'.[M]

13. **CAN A SEP OWNER REQUIRE AN IMPLEMENTER TO ENTER A PRE-OFFER NDA?** Unanswered in the caselaw considered. A SEPO would need to act in good faith if it wishes later to obtain (equitable) injunctive relief.

[A] L Whiting and P Abbott 'The UK: a FRAND-ly Jurisdiction?' (2019) 283 Managing Intellectual Property 16, 32. [B] Japan Patent Office (JPO) *Guide to Licensing Negotiations Involving SEPs* (Tokyo: JPO, 2022), 9. [C] In Case C-182/21 *Nokia v Daimler* (OJ C252, 28.6.2021, 8-9.) this was the subject of an initial (later withdrawn) reference. [D] JPO, 30. [E] JPO, 32. [F] A Bharadwaj and S Jain, 'A Comparative Study of the Evolving Jurisprudence on Standard Essential Patent Licensing' (2020) 23(3-4) Journal of World Intellectual Property 310, 318. [G] [2021] EWHC 2564, [6.1] [H] *BGH*, *KZR* 36/17, Order of 5th May 2020. [I] JPO, 10. [J] Podszun, 786. [K] P Picht, 'German Law on Patent Injunctions: Legal Framework and Recent Developments' (2019) 19(1) Chicago-Kent Journal of Intellectual Property 213, 250. [L] [2021] EWHC 2564. [M] P Tripathi, 'Standards, FRAND and Competition Law' (2022) 5 International Journal of Law Management & Humanities 829, 839.

If *Huawei* was a conservative judgment, then the English courts can be seen, to use a metaphor, to be 'mopping up' the floor established by *Huawei,* making clearer what was less clear, sometimes providing gleaming answers, but always standing, more or less, on the *Huawei*-constructed floor. Even so, neither *Huawei* nor the English court decisions considered above fully address where the boundary properly lies between the rights of SEP owners and would-be licensees so that IP rights are optimally preserved and competition best protected. Arising from the analysis in the preceding pages, the following points might perhaps be made.

First, EU (and perhaps UK) lawyers would likely benefit from a sequel to *Huawei* in which the CJEU fully engages with if, when, and on what terms access to SEPs would be granted under EU competition law, without leaving national courts in the position of pricing authorities, a position for which they are arguably unsuited. Second, although 'IP rights are exceptions to the … Western model of free competition'[146] (rewarding innovation by conferring time-limited monopoly rights instead of leaving an innovator to earn what profits it can from a free market), as the General Court observes in *Astrazeneca v. Commission*: '[T]he existence of remedies specific to the patent system is not capable of altering the conditions of application of the prohibitions … in competition law'.[147] A question arises whether perhaps the CJEU in *Huawei* or the Commission more generally have heeded this uncontroversial point sufficiently.

Third, although in *Unwired Planet*, the UK courts hit upon a gleaming answer as to when a global FRAND licence might be set by a national court, there is (it is submitted) something objectionable about a national court deciding on global-scale pricing. The case for an international court to operate in this regard, perhaps most logically, in Europe, the Unified Patent Court, seems logically unassailable. Fourth, a number of instances have been highlighted above where the UK courts appear to have departed from *Huawei*. However, it is not always clear whether the departure is intentional. Moreover, EU-based lawyers watching on no longer have the assurance that the UK courts (operating in a non-EU member state and with no ongoing dialogue with the CJEU and no obligation to comply with CJEU judgments) are or are not departing from EU law and charting courses that may in time prove peculiar to English law.

[146] Robin Jacob, 'Competition Authorities Support Grasshoppers: Competition Law as a Threat to Innovation' (2013) 9(2) Competition Policy International 15, 15.
[147] Case T-321/05 (ECLI:EU:T:2010:266), §366.

Fifth, it strains credulity that there are no abuses of competition law arising in the context of SEPs and FRAND licensing as operated in the EU at this time. Hence a question must arise whether the best way to proceed as regards such abuses as must surely be occurring is, to borrow from former Commissioner Vestager, 'not to apply the competition rules'.[148] With respect, how could that be the best way to proceed when the Commission in its *Horizontal Guidelines* identifies that SEPs can present issues as regards restrictions of price competition, foreclosure of innovative technologies, and preventing effective access to standards?[149] Wherever the boundary properly lies between the rights of SEP owners and would-be licensees so that IP rights are optimally preserved and competition best protected, it is submitted that (1) it has not been identified in *Huawei*, and (2) it remains no clearer following on the English cases considered (albeit that those cases offer many illuminating observations), but (3) it surely cannot lie in the claimed 'retreat of the most important EU enforcement agency in competition law from the battlefield'[150] and a CJEU that, at least in *Huawei*, seemed unwilling to answer if, when, and on what terms access to SEPs would be granted under EU competition law.

Glossary

ETSI	European Telecommunications Standards Institute
FRAND	Fair, Reasonable and Non-Discriminatory
FRANDL	A FRAND licence, *i.e.* a licence on FRAND terms
Hold-out	The practice whereby a person implementing an SEP seeks to delay taking an SEP licence so as to minimise or avoid paying FRAND royalties
Hold-up	The practice whereby implementers of a standard meet with supra-competitive royalty demands from an SEP owner
NPE	Non-practising entity, i.e. a person/company that acquires a patent or associated rights and relies on the acquired IP rights without practising the patented invention
SDO	Standard Development Organization
SEP	Standard Essential Patent

[148] Margrethe Vestager, 'Restoring Trust in Our Economy', Speech at the Association of the Danish Pharmaceutical Industry New Year Conference in Copenhagen (27 January 2017).
[149] European Commission, *Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (OJ C259, 21 July 2023, 1) §441.
[150] Rupprecht Podszun, 'SEP Litigation and *Huawei*: Negotiations in the Shadow of Competition Law' (2017) 62(4) The Antitrust Bulletin 786, 804.

‘Those Bloody Books’: Are Classifications of Mental Disorders a Help or a Hindrance?

Keith Rix*

Abstract: Psychiatrists and psychologists providing expert evidence to courts and tribunals often rely on the Diagnostic and Statistical Manual of the American Psychiatric Association and the section on mental disorders in the World Health Organization’s International Classification of Injuries, Diseases and Causes of Death. This article describes and explains the difficulties that arise when such evidence is admitted, identifying the considerations which should be applied in deciding the weight to give to such evidence and it suggests an approach to be taken when experts propose to rely on such evidence.

Keywords: Classification; Diagnosis; Expert evidence; Mental disorder

‘[A]ll our diagnostic terms are simply concepts and all our definitions more or less arbitrary and … there is nothing God-given or immutable about the categories and definitions of (the) official nosology.’[1]

‘[P]sychiatry is not a science which unwaveringly yields precise and unassailable diagnoses.’[2]

Introduction

Nosology is the science of classifying diseases. Arguing against authoritative nosologies, specifically the *Diagnostic and Statistical Manual of the American Psychiatric Association* (*DSM*) and the mental disorders section in the World Health Organization’s (WHO) *International Classification of Injuries, Diseases and Causes of Death* (*ICD*), Markon asked: are such nosologies helpful or harmful to the

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[1] Robert Kendell, ‘Relationship between the *DSM-IV* and the *ICD-10*’ (1991) 100(3) Journal of Abnormal Psychology 297.
[2] *The People (DPP) v Abdi* [2022] IESC 24.

scientific process?[3] Experts in psychiatry and psychology often rely on them in legal proceedings, and a similar question may be raised in this context: are *DSM* and *ICD* helpful or harmful to the legal process?

This article does not argue for the complete abandonment of *DSM* and *ICD* in legal proceedings, even though this might be considered having regard to their scientific validity. Instead, the article identifies a need for both experts and the courts to consider carefully both the potential helpfulness and potential hindrance of such evidence, to consider relying on more appropriate authorities, and, where *DSM* or *ICD* evidence is offered or admitted, to ensure that the court is aware of the nature, scientific status, reliability and limitations of these classifications, the need to avoid the slavish application of their diagnostic criteria, and the potential risks associated with their misuse.

What are the *ICD* and *DSM?*

The WHO's objective is to achieve the highest level of health for all people through universal health care. Its *ICD* is a statistical system for facilitating diagnosis in clinical settings by a wide range of health professionals in countries of very varied sizes, cultures and resources.[4] The mental disorders section originated in 1948 when the WHO agreed to use *ICD* as 'a global common language for defining and communicating about diseases and health conditions'.[5] In 1992, the WHO described *ICD* as being 'intended for general clinical, educational, and service use'.[6] The latest version, *ICD-11*[7], was published in June 2018, adopted in May 2019 and became effective in member states in 2022.

DSM also grew out of statistical manuals, and significantly the mental disorder classification was developed for military medicine during World War II. After the war it was developed for the Veterans Administration as the *Nomenclature of psychiatric disorders and reactions*.[8] In 1948 the WHO drew heavily on this for *ICD-*

[3] Kristian E. Markon, 'Epistemological Pluralism and Scientific Development: An Argument Against Authoritative Nosologies' (2013) 27 Journal of Personality Disorders 554.
[4] Kendell (n 1).
[5] Lee Anna Clark and others, 'Three Approaches to Understanding and Classifying Mental disorder: *ICD-11*, *DSM-5*, and the National Institute of Mental Health's Research Domain Criteria (*RDoC*)' (2017) 18(2) Psychological Science in the Public Interest 72.
[6] World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines* (World Health Organization 1992) 1.
[7] World Health Organization, *Clinical descriptions and diagnostic requirements for ICD-11 mental, behavioural and neurodevelopmental disorders* (World Health Organization 2024).
[8] Office of the Surgeon General, *Nomenclature of psychiatric disorders and reactions* (Army Service Forces War Department Technical Bulletin, Medical 203, 1946).

6 and the American Psychiatric Association (APA) did likewise for its first *DSM* in 1952. *DSM* has been described as a manual designed to meet the needs of one, or perhaps two, professions – psychiatrists and psychologists – in a single country, the United States, in order for clinicians and researchers to be able to diagnose and classify mental disorders.[9] The latest version, *DSM5*[10], was published in 2013 and revised as *DSM5-TR*[11] in 2022.

ICD and *DSM* are used to classify disorders and not people. Although both are regarded as categorical systems, mental disorders are non-taxonomic. Strictly speaking they are nomenclatures of psychiatric disorders and reactions not taxonomies.

They differ mainly in their approach to diagnosis. *DSM*'s methodology is algorithmic. For each disorder there are lists of features, such as symptoms and signs, sometimes in groups. Specified numbers are required for some diagnoses (e.g., '≥ 5 symptoms'). Some features specify periods of time (e.g., 'during the same 2-week period'). There are exclusion criteria. *ICD* uses a prototypical approach, matching the person's presentation against a detailed description of the disorder's typical presentation.

The introductions to both *DSM* (Box 1) and *ICD* (Box 2) include guidance as to what they are and how they are to be used. *DSM* has a specific caution about its 'forensic' use. They are not designed or intended to answer the questions of ultimate concern to the law where psychiatric or psychological conditions are in issue. Further, expert evidence is sometimes presented with an apparent disregard for their requirements of flexibility and application of clinical judgement. Paradoxically, in *Ludlow v National Power Plc*[12], where the claimant's expert relied on *DSM* for his diagnosis of post-traumatic stress disorder (PTSD), the defendant's expert was critical of *DSM* for being too formulaic to be discriminating and said that it marginalised clinical judgment and common sense. This was an expert who appears not to have read the warnings in Box 1. The Court accepted the observation and upheld the refusal by the trial judge to accept the diagnosis of PTSD and ultimately refused the appeal by the claimant against the quantum of the judgment. The differences between the

[9] Kendell (n 1).
[10] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (American Psychiatric Association 2013).
[11] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision* (American Psychiatric Association 2022).
[12] *Ludlow v National Power Plc* [2000] EWCA Civ 289.

approaches of *DSM* and *ICD* are illustrated by the condition known as 'adjustment disorder' (Box 3).

Experts in court

The role of experts

As the late Mr Justice Hardiman stated: 'The function of the expert witness is to *assist* the tribunal of fact, whether judge or jury, in arriving at its own conclusion on the technical matter at issue'.[13] But expert evidence should only be admitted if it is 'information which is likely to be outside the experience and knowledge of a judge or jury'. [14] Furthermore, it should come with a warning. As Charleton J and Rakhmanin say 'experts present particular dangers to the process of judicial decision. But this may readily be avoided through both the application of the rules constricting and limiting admissibility of expert testimony'. [15] The purpose of this article is to assist judges in navigating these waters.

The admissibility of expert evidence

One of Lord Reed's and Lord Hodge's considerations governing the admissibility of expert or skilled evidence in *Kennedy v Cordia Services LLP*[16] was 'whether there is a reliable body of knowledge or experience to underpin the expert's opinion'. As observed in *R v Dlugosz*:[17] '[I]n determining the issue of admissibility, the court must be satisfied that there is a sufficiently scientific basis for the evidence to be admitted.' In *Duffy v McGee, (Duffy)* Collins J held that there is no general requirement that expert evidence must meet any specific threshold of reliability as a condition of admissibility, but went on: '[I]n any given case the admissibility of expert evidence may be challenged on the basis that it lacks a reliable scientific or methodological foundation.' [18]

The Rules of the Superior Courts (Ord 39, r 58(1)) states: 'Expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings.' The first of Lord Reed's and Lord Hodge's four considerations in *Kennedy v Cordia Services LLP* governing the admissibility of expert or skilled

[13] Adrian Hardiman, 'The Role of the Expert Witness' (1999) as reproduced in Mark Tottenham, Emma Jane Prendergast, Ciaran Joyce and Hugh Madden, *A Guide to Expert Witness Evidence* (Bloomsbury Professional 2019) (emphasis added).
[14] *R v Turner* [1975] QB 834, 841.
[15] Peter Charleton and Ivan Rakhmanin, 'The Safe Use of Expert Evidence' [2023] Vol 7(1) Irish Judicial Studies Journal 52, 69.
[16] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 44.
[17] *R v Dlugosz* [2013] EWCA Crim 2 11.
[18] *Duffy v McGee* [2022] IECA 254, [17].

evidence is 'whether the proposed skilled evidence will *assist* the court in its task.'[19] In order to assist, the evidence has to be relevant to a matter in issue. This means being '"*helpful"* to the Court in arriving at its conclusions'[20] or logically probative or disprobative of something which requires proof; evidence which makes the matter requiring proof more or less probable.[21] If it leaves the court no more certain as to the probability of the matter, it is not relevant and should not be admitted.[22]

The Criminal Practice Directions[23] of England and Wales on Expert Evidence clearly delineate the factors which may be taken into account in determining the reliability of expert opinion. Factors include:

(a) the validity of the methodology;
(b) if the expert's opinion relies on the results of the use of any method ... whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;
(c) the completeness of the information which was available to the expert and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);
(d) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for divergence has been properly explained.

In addition, the court must be astute to identify potential flaws in expert opinion which detract from its reliability, such as those set out in para. 7.1.3 of the Criminal Practice Directions:

(a) being based on an unjustifiable assumption;
(b) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case.

While this applies only to criminal proceedings, Collins J in *Duffy* identified parallel developments in the approach to expert evidence in civil litigation.

[19] *Kennedy v Cordia Services* (n 16), [44] (emphasis added)
[20] *Barings Plc v Coopers & Lybrand (No 2)* [2001] EWHC 17, [23].
[21] *DPP v Kilbourne* [1973] AC 729.
[22] *R v Bonython* [1984] 38 SASR 45.
[23] England and Wales Criminal Practice Directions 2023 Crim PRC(23)90(B) para. 7.1.2.

Although the Law Reform Commission's report *Consolidation and Reform of Aspects of the Law of Evidence*[24] has not been affirmed in legislation or by case law, as Tottenham and others say, it amounts to a useful summary of the expert's duty to the court and their instructing party to 'state … where relevant, any underlying scientific methodology on which his or her evidence is based …'[25] Psychiatrists and psychologists will be hard-pressed to state the underlying scientific methodology of *DSM* and *ICD*.

An imperfect fit

DSM5 refers specifically to 'the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis' (Box 2). This can manifest as: the divergence between psychopathology (i.e. symptoms and signs) (or 'label') which may bring a person within a particular category and the nature and severity of psychopathology ('harm') necessary to have legal impact, and whether the classification system addresses the legal issue in any particular case.

Two personal injury cases in which there was an issue of psychiatric injury illustrate the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.

In *Clifford v Health Service Executive*[26] the only dispute as to psychiatric diagnosis arose because the plaintiff's expert made a diagnosis of PTSD but the defendant's expert was of the opinion that, rather than suffering PTSD, she suffered the symptoms of PTSD. The Court decided that little turned on the distinction between PTSD and the symptoms of PTSD as clearly the plaintiff was greatly affected and indeed traumatised by the incident and decided that she did meet the criteria for PTSD.

It was *DSM-IV*, *DSM5* and, to a lesser extent, *ICD-10*, definitions with which the Court had to grapple in *Hibberd-Little v Carlton*[27] (*Hibberd-Little*). The claimant was the driver of a car involved in a rear-end collision with an impact speed of appreciably less than 30 mph. A diagnosis of PTSD was made by the claimant's expert relying on *DSM-IV*. The defendant's expert was not satisfied that *DSM* criteria, or those of 'the European standard' (probably *ICD-10*), were met. The important

[24] Law Reform Commission, *Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).
[25] Mark Tottenham and others, *A Guide to Expert Witness Evidence* (Bloomsbury Professional 2019).
[26] *Clifford v Health Service Executive* [2019] IEHC 896.
[27] *Hibberd-Little v Carlton* [2018] EWHC 1787 (QB).

issue, the Court held, was not which criteria applied, or what label was used, but the symptoms the claimant had been suffering, their onset and their trajectory. Damages were awarded on the basis that she suffered 'some sequelae consistent with aspects of PTSD (but not PTSD)'. The questions of ultimate concern to the law were the symptoms from which the claimant had been suffering, their onset and their trajectory, not the label put on her condition.

Similar points about labels were made in *G (Children), Re (Supervised Contact)*[28], where the Court of Appeal said that the judge rightly did not allow himself to be blinded by labels but focused on the behaviour or traits, and *RTM v Bonne Terre Ltd*, where the Collins Rice J said 'I am not concerned with labels.'[29] As Williams J said in *LKM v NPM* (*LKM*), 'I do not think that focusing on labels is of much assistance and tends to detract from the substance of the concern.'[30] Similarly in *Noble v Owens* the evidence was that the *ICD* diagnosis was PTSD and the *DSM* diagnosis was anxiety disorder, with the expert firmly of the view that, of these, PTSD was the correct diagnosis: in the Court's view 'the precise characterisation of Mr Noble's psychiatric disorder does not signify. What matters are the symptoms of Mr Noble's condition and the prognosis.'[31] This has been more colourfully described by His Honour John Cockroft who commented that there is too much emphasis on attaching a label to the claimant's condition; it is the contents of the jar, not the label, that matter.[32] And, it might be added, the price of the contents.

It is common practice in personal injury pleadings in Scotland to aver that a pursuer was or is suffering from a specified condition recognised in *DSM* or *ICD*. In *Rorrison v West Lothian College*[33], the pursuer had not pleaded any disorder recognised in *DSM-IV* and there was no suggestion that the position was any different in relation to *ICD-10***.** The Court did appreciate that what constitutes a recognised disorder is a matter for expert evidence and was prepared to proceed on the basis that *ICD* and *DSM* classifications are not necessarily conclusive. However, it found that there was no suggestion that she had ever been diagnosed by a psychiatrist as suffering from a recognised psychiatric disorder or that her condition was recognised by any psychiatrist or body of psychiatric opinion as constituting a psychiatric disorder. Her action was dismissed.

[28] *G (Children), Re (Supervised Contact)* [2023] EWCA Civ 1453.
[29] *RTM v Bonne Terre Ltd* [2025] EWHC 111 (KB), [161].
[30] *LKM v NPM* [2023] EWFC 118, [23].
[31] *Noble v Owens* [2008] EWHC 359 (QB), [35].
[32] Keith Rix, 'Reports in personal injury cases' in Keith Rix, Laurence Mynors-Wallis and Ciarán Craven SC (eds) *Rix's Expert Psychiatric Evidence,* (2nd edn, Cambridge University Press 2021).
[33] *Rorrison v West Lothian College* [1999] ScotCS 177.

In *LKM* the expert was of the opinion that the father had narcissistic personality traits but accepted that this was not a mental illness and, as it did not meet *DSM5* criteria for narcissistic personality disorder, it was not a disorder. However, the expert was clear that disturbed personality traits amounted to a diagnosis. This resulted in counsel for the father arguing that the expert's evidence should be discounted in its entirety because her approach to diagnosis was not consistent with *DSM5* diagnostic criteria for narcissistic personality disorders, a central feature being the expert's identification of narcissistic personality traits as interchangeable with the nine 'criteria' identified in *DSM5* - a minimum of five of which must be present for the diagnosis of a narcissistic personality disorder. As the Court observed, the manner in which these conclusions were explored in the expert's oral evidence generated a very considerable degree of heat but only a limited amount of light. It might have observed how this was an example of 'the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis'.

An imperfect fit is a potential obstacle to judicial decision-making. Where its basis is the reliance on *DSM* or *ICD*, its successful circumnavigation may depend on the court's understanding of the limitations of these classifications and the risks associated with their misuse.

Design and development problems with *DSM* and *ICD*

The validity and reliability of the methodology of *DSM* and ICD

The validity and reliability of the methodology of *DSM* and *ICD* are highly questionable. They are the products of committees. *DSM* committees, some of which meet in private and require signed confidentiality agreements, may include members who receive extravagant annual retainers from pharmaceutical companies that profit from the promotion of disorders treatable by the companies' products.[34] Committee members may be influenced by patient advocacy groups. Through both public and private communications, the Autistic Self Advocacy Network is reported to have substantially influenced the final autism criteria and accompanying text in *DSM5*.[35] *ICD* committees comprise representatives from nearly 200 WHO member states, so *ICD* represents international consensus as to the detailed descriptions of conditions which need to be recognisable and

[34] Paul McHugh, 'How Psychiatry Lost Its Way' (1999) 108 *Commentary* 32.
[35] Steven K. Kapp and Ari Ne'eman, 'Lobbying Autism's Diagnostic Revision in the DSM-5' in: Steven K. Kapp (eds) *Autistic Community and the Neurodiversity Movement: Stories from the Frontline* (Palgrave Macmillan 2020).

acceptable in as many member states as possible. They have to accommodate cultural variations in psychopathology, clinical judgement and diagnostic practice.[36] As Paris has observed, 'Sometimes the outcome depends on who was put on these committees'.[37] Even before *DSM5* was published, it was reported in 2010 that many people who had played a pivotal role in the research and production of previous editions had voiced concerns about the methodology and its continued unreliability.[38] One of these was Dr Robert Spitzer who helped to develop *DSM-II*, held a leadership role for *DSM-III* and was a special adviser for *DSM-IV* but expressed his concern, before *DSM-IV* was released, that professional consensus outweighed actual empirical data.[39] Further, he alleged that the APA was, to some extent, ignoring scientific research in favour of theories and hypotheses of the handful of doctors involved in *DSM*'s production.

As products of committees, *ICD* and *DSM* represent a consensus but not a scientific consensus. As Markon says:

> Scientific consensus is a distributed, emergent property of the scientific community as a whole, not something that can be discovered or created by a particular group of scientists within an institutional committee. An individual scientist or group of scientists can attempt to summarize the state of scientific discourse and propose their own model, but this is necessarily imperfect, especially in discussing something as conceptually and theoretically broad and vague as mental disorder.[40]

The validity of the classifications is questionable because they do not have a reliable scientific or methodological foundation. There is no scientific basis for basing a diagnosis on arbitrary numbers of symptoms or signs or arbitrary periods of time. For a number of diagnoses, the criteria include a minimum or maximum duration of symptoms and these often differ between *DSM* and *ICD*. It is rare to see in expert reports an acknowledgment of this arbitrariness but fortunately this did not go unnoticed by the Court in *R(B) v SS, Responsible Medical Officer*[41] (*R(B)*), a judicial review of a decision to administer compulsory treatment, where the

[36] Michael B. First and others, 'An organization- and category-level comparison of diagnostic requirements for mental disorders in ICD-11 and DSM-5', (2021) 20(1) World Psychiatry 34.
[37] Joel Paris, *The Intelligent Clinician's Guide to the DSM-5®* (2nd edn, Oxford University Press 2015), chapter 1.
[38] Roger Collier, 'DSM revision surrounded by controversy' (2010) 182(1) Canadian Medical Association Journal 16.
[39] Robert L. Spitzer, 'An outsider-insider's views about revising the *DSM*s' (1991) 100(3) Journal of Abnormal Psychology 294.
[40] Markon (n 3).
[41] *R (on the application of B) v SS, Responsible Medical Officer* [2005] EWHC 1936 (Admin).

diagnosis of bipolar affective disorder was challenged by an expert who argued that the patient did not meet *DSM-IV* or *ICD-10* criteria for hypomania or mania. The Court held that 'the setting of four days is an arbitrary minimum' therefore demonstrating a greater understanding of the use of *ICD* than the expert.

Hagan has observed:

> It is also possible for two examiners to converge on the same diagnosis without any overlap in the specific underlying criteria. In this scenario, the examiners have 100% inter-rater reliability with respect to the diagnosis but 0% validity in terms of the underlying signs and symptoms related to their conclusions[42]

The corollary is that two experts can agree that someone does not have a particular disorder but for different reasons. This happened in *Dudley Metropolitan Borough Council v Mailley*.[43] The experts agreed that the defendant's hoarding behaviour was relatively severe but they also agreed that a diagnosis of hoarding disorder (whether under *DSM5* or *ICD-10*) should not be made. The defendant's expert said that *DSM5* requires that hoarding should not be due to identifiable mental disorder; here he said that it was likely to be due to depression. The claimant's expert was unwilling to make a diagnosis of hoarding disorder as it is not universally accepted and he said that it did not appear in *ICD-10*. The Court was not impressed with either rationale.

It follows that there is no reliable scientific or methodological foundation for the finding in *Kimathi v Foreign and Commonwealth Office*[44] that '[t]here is a clear distinction between some symptoms and a diagnosis of psychiatric injury, which can only be diagnosed if a number of criteria are satisfied in accordance with *DSMV* and/or *ICD10*'. This is a far from clear distinction with no scientific basis. In this case the Court refused to accept that the claimants' pleading of a diagnosis of PTSD was not of a new injury but a mere labelling of symptoms previously pleaded.

In *M v Secretary of State for the Home Department (DR Congo)*[45], although the Tribunal acknowledged that PTSD symptoms were described with reference to the *DSM-IV* criteria, which were attached to the report, it complained that there was 'no

[42] Leigh D Hagan and Thomas J Guilmette, '*DSM-5*: Challenging Diagnostic Testimony' (2015) Sep-Dec International Journal of Law and Psychiatry 42, 128.
[43] *Dudley Metropolitan Borough Council v Mailley* [2022] EWHC 2328 (QB). This decision was later affirmed [2023] EWCA Civ 1246.
[44] *Kimathi v Foreign and Commonwealth Office* [2017] EWHC 2703 (QB).
[45] *M v Secretary of State for the Home Department (DR Congo)* [2003] UKIAT 00054.

attempt to relate each feature to any of the detailed heads of the criteria, let alone to give any score on each, or to relate the result to the normal range'. This suggests a fundamental misunderstanding of *DSM* and an assumption of a scientific basis which does not exist. Although the appellant's appeal was successful and a direction was made for a resumed hearing it was on the basis of the failure of the adjudicator to consider some matters unrelated to PTSD. Particularly when *DSM* diagnoses are supported by rigorous calculations in which criteria are summed or *ICD* diagnoses adorned with long alpha-numeric codes, the court can be given a misleading impression of scientific validity.

Normality and abnormality, continua and thresholds

The questionable validity of the methodology is also illustrated by the fact that mental disorders are not unique, discrete entities. Most exist on dimensions. Arbitrary boundaries for the categories have to be established: the 'normality-pathology' dimension, which requires a 'threshold boundary', and the dimension that requires a 'disorder boundary' to separate different disorders. *DSM* and *ICD* give a spurious impression of certainty in delineating disorder from normality and disorder from disorder. It may be necessary for courts to distinguish between normality and disorder, but most mental disorders occur on a spectrum between normality and severe psychopathology with no clear dividing line between 'normality' and 'abnormality'. With only a few exceptions, the boundary-defined categories, in *DSM* and the research version of *ICD*[46] (which uses an algorithmic process similar to *DSM*), defined according to a count of features, mislead as to the gradation between 'normality' and 'abnormality'. Over-reliance on *DSM* and *ICD* can result in a spurious distinction between one disorder and another and between disorder and normality.

Consider depressive illness. The boundary between 'pathology' and 'normality' is not a clean one. Depressive symptoms, like the core features of most mental disorders, lie on a continuum with normality. Many people just below threshold have depressive symptoms which do not qualify for the diagnosis even though they may be as unwell as others just over the threshold.[47]

The requirement so often for experts to give an opinion as to whether medical evidence is sufficient to prove a particular fact, such as a recognised mental condition, a psychiatric injury, etc. creates a temptation for the expert to place a

[46] World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic criteria for research* (World Health Organization 1993).
[47] Peter Tyrer, 'A comparison of *DSM* and *ICD* classifications of mental disorder' (2014) 20(4) *Advances in Psychiatric Treatment* 280.

reliance on threshold criteria that is inconsistent with both the purpose of the classification and the evidence for the validity of the threshold. Thresholds are pragmatically necessary for various reasons and they may also be "highly consequential" in forensic settings.[48] But it is important that if they are to be so highly consequential, the courts should know how arbitrary these thresholds can be. Evidence from psychiatrists and psychologists can determine the outcome of legal proceedings. The issue here is the *assistance* afforded by psychiatric or psychological evidence that relies on *DSM* or *ICD*.

Co-occurring mental disorders

Using the example of anaemia, Tyrer[49] illustrates graphically how there is, to use Kendell's[50] terminology, a zone of rarity between two forms of anaemia. It is obvious where the disorder boundary goes because the disorders do not overlap. However, a population study found that having a diagnosis of one form of mental disorder substantially increases the odds of being diagnosed with a second disorder and that 14% of a studied population had three or more what were termed 'comorbid disorders'.[51] But the term 'comorbid' is misleading. It is comorbidity if someone suffers from both insulin-dependent diabetes and asthma, conditions which have no common pathology and therefore largely distinctly different symptoms and signs. In the case of mental disorders, they often share symptoms and signs. Co-occurring mental disorders are rarely distinct.[52] As Kendell says about psychiatric syndromes, it has not been possible to identify points of rarity that separate individual syndromes from their neighbours.[53] There is no zone of rarity between *DSM*'s co-occurring major depressive disorder and generalized anxiety disorder.[54] This is the non-taxonomic nature of mental disorders. Overlapping as they do, mental disorders are not equivalent to species. They do not belong to the equivalent of genera, families, orders, etc.

This is illustrated by *Vernon v Bosley (No 1)*[55] (*Vernon*). Stuart-Smith LJ observed that experts sought to distinguish between 'post-traumatic stress' and 'pathological

[48] Clark (n 5).
[49] Tyrer (n 47).
[50] Kendell (n 1).
[51] R. C. Kessler and others, 'Lifetime and 12-Month Prevalence of *DSM-III-R* Psychiatric Disorders in the United States. Results from the National Comorbidity Survey' (1994) 51 Archives of General Psychiatry 8.
[52] Clark (n 5).
[53] Kendell (n 1).
[54] Yongje Zhou and others, 'Comorbid Generalized Anxiety Disorder and its Association with Quality of Life in Patients with Major Depressive Disorder' (2017) 7 Scientific Reports 40511.
[55] *Vernon v Bosley (No 1)* [1997] RTR 1.

grief disorder' as though they were universally recognised and mutually exclusive categories or, rather, labels for two such categories of mental illness, which he did not believe that they were. The difficulty of drawing firm lines between different categories, where for example one condition may fairly be said to be associated with another similar or overlapping condition, has been frequently recognised by the courts.[56]

It is the non-taxonomic nature of mental disorders which explains some of the difficulties faced by courts when experts have relied on *ICD* or *DSM*. To avoid being misled, the courts need to understand that the impression of taxonomy given by these classifications has the potential to mislead as to the complexities of mental disorder.

Navigating the gateway

For a diagnosis of PTSD, both *DSM* and *ICD* specify an initiating, threshold, or gateway criterion defined by the nature and severity of the trauma. There is no scientific basis for this. However, reliance on it has frequently caused difficulties for the courts. In *DJ v The Minister for Health*[57] (*DJ*) there was a complete conflict of opinion as to whether the appellant had suffered from PTSD or a prolonged grief reaction as a result of his mother's death. This was an appeal from a decision of the Hepatitis C Compensation Tribunal dismissing the appellant's claim brought following his mother's death from complications of hepatitis C. The respondent's expert did not consider that the appellant satisfied the threshold criterion in *DSM-IV* or *ICD-10* even though he had experienced responses seen in both PTSD and a severe grief reaction. The tribunal, unable to prefer the opinion of one expert over the other, dismissed the claim on the basis that the appellant had failed to establish that he had suffered PTSD caused by his mother's death.

Dr Cryan and Dr McQuaid, the appellant's experts, relied on *DSM5* and Dr. Sinanan, the respondent's expert, relied on *ICD-10*. Dr. Sinanan did not consider that the appellant satisfied the threshold criterion in *DSM-IV* or *ICD-10*. Accordingly, although the appellant had experienced responses seen in both PTSD and a severe grief reaction, his opinion was that he did not satisfy the initiating and essential criterion for a diagnosis of PTSD. The evidence on behalf of the appellant was that such a diagnosis was warranted as the initiating criterion in *DSM-IV* and *DSM5* was met. Dr Sinanan said that so far as *DSM* criteria were concerned, he preferred *DSM-IV* over *DSM5* because 'under the former the patient had to experience a trauma that

[56] See, for example, *XY v Nursing and Midwifery Council* [2024] EWHC 2244 (Admin).
[57] *DJ v The Minister for Health* [2017] IEHC 114.

was outside the normal experience of life'. This is puzzling. *DSM-IV* states: 'The person experienced, witnessed, or was confronted with an event that involved actual or threatened death or serious injury or a threat to the physical integrity of self or others.' *DSM5* is not significantly different: 'Exposure to actual or threatened death, serious injury, or sexual violence.' Possibly Dr Sinanan had in mind the *DSM-III* criterion: 'Exposure to a recognisable stressor trauma *outside the range of usual human experience*, which would evoke significant symptoms of distress in almost anyone' (emphasis added). This seems to be the significant difference because it was the respondent's case that the death of the appellant's mother was part of life's experience.

Dr Cryan explained that she had used *DSM5* and *ICD-10* in clinical practice. She had prepared her reports using *DSM5* as it was her understanding that *DSM* had been legally recognised in Ireland, which may have been a reference to *Mullally v Bus Éireann*[58], where Denham J accepted the *DSM-III-R* criteria for PTSD as a 'judicially acceptable' test for the condition.

Barton J adopted the views of Thorpe LJ in *Vernon*, that these classifications should not be adopted in personal injury litigation as the yardstick by which the plaintiff's success or failure is to be measured. As to a reference by Dr Sinanan to the ongoing debate between psychiatrists as evidenced in the ongoing review of *DSM5* (i.e. the 'text revision' version which is published between the successive editions, now published as *DSM5-TR*), Barton J said that psychiatric illness is too complex and insufficiently concrete to be subjected to rigid analysis. He said that *DSM* and *ICD* classifications should be approached by the court with caution: 'It is not the classifications which are the determinant of what is or is not a psychiatric illness rather that is a question which must be determined by the Court on the basis of the medical evidence before it.'

So, when considering whether a litigant has suffered a shock-induced psychiatric illness, Barton J said that the correct approach to be taken by the court was a subjective one and that what had to be considered were the particular circumstances pertinent to the appellant surrounding, at the time of and immediately following, his mother's death. Having regard to his premorbid vulnerabilities in emotional, intellectual and educational development, Barton J was quite satisfied, in the circumstances leading up to what was for the appellant an unexpected event, that the death of his mother and learning of that from his brother was a catastrophic shock which caused PTSD together with a severe

[58] *Mullally v Bus Éireann* [1992] 1 ILRM 722.

prolonged and unresolved grief reaction and ruled that he was entitled to pursue a claim for an award of compensation.

The threshold criterion was also an issue in *Hurley v An Post*[59]. The plaintiff's claim against her employer was for damages for negligence and breach of duty arising out of bullying by co-workers following an incident at her workplace. The judgment addressed the damages arising from bullying and harassment suffered following her return to work. She was referred to a consultant psychiatrist who concluded that she had PTSD following the incident at her workplace. He said that the incident caused her to feel her life was in danger. An expert for the defendant disagreed with the diagnosis of PTSD. He said that interpersonal conflict and emotional distress characterise most forms of harassment but do not reach the magnitude of a traumatic stressor that causes PTSD according to *DSM-IV* criteria. In his opinion, the plaintiff had a recurrent mixed anxiety depressive disorder. Preferring the evidence of the plaintiff's expert, the Court was satisfied that the continuing symptoms of PTSD, depression and anxiety, as diagnosed by the plaintiff's expert, were triggered initially by the incident in her workplace and were also caused and substantially contributed to by reason of the bullying and harassment to which she was subjected thereafter.

These issues are unsurprising. A Dutch population survey found that many people experience symptoms of PTSD in response to adverse events, such as divorce, and adverse circumstances, such as unemployment, but without triggers that satisfy the gateway criterion in *ICD* or *DSM*.[60] Another study found that PTSD symptoms were equally common following events defined as traumatic versus non-traumatic according to *DSM-IV*.[61] Two people have identical symptoms and signs and an identical level of impairment of functioning, one whose trigger is sub-threshold and one whose trigger is above threshold. The former does not qualify for a diagnosis of PTSD and the latter does. Some experts use the term 'sub-threshold post-traumatic stress disorder' which, technically, is correct, but potentially misleading as it may be taken to imply that their condition is less severe than that of someone with PTSD diagnosed according to *DSM* or *ICD* criteria. As observed by Bearden, if the patient has not exhibited enough *DSM* symptoms, they should not be given that diagnosis,

[59] *Hurley v An Post* [2018] IEHC 166.
[60] Saskia S L Mol and others, 'Symptoms of post-traumatic stress disorder after non-traumatic events: evidence from an open population study' (2005) 186(6) British Journal of Psychiatry 494.
[61] Sadie E. Larsen and Maria L. Pacella, 'Comparing the effect of *DSM*-congruent traumas vs. *DSM*-incongruent stressors on PTSD symptoms: A meta-analytic review' (2016) 38 Journal of Anxiety Disorders 37.

regardless of the severity of the symptoms they have experienced.[62] In their study of 16 men and women falsely accused, or convicted, of offences by the UK Post Office, it was observed: 'Just because an individual doesn't meet PTSD diagnostic criteria, doesn't mean they haven't been mentally scarred by traumatic events.'[63]

The courts need to be aware of the artificiality of the gateway or threshold criterion.

The degree of precision or margin of uncertainty

There is a natural assumption that there is an empirical basis for the precision with which the highly specific categories are defined[64] but as Paris has observed: '[I]f a typical *DSM* diagnosis requires, say, five of nine criteria, nobody knows whether four or six criteria would have been more or less valid.'[65] Unless, as occasionally happens, the medical expert has served on the relevant committee or working group, and is not bound by a confidentiality agreement, it is very unlikely that they will be able to explain how *DSM* criteria were devised or how the features in an *ICD* prototypical description were chosen. But even experts who have devised the criteria or descriptions are likely to be hard-pressed to assist as to the degree of precision or margin of uncertainty affecting the accuracy or reliability of the process, specifically to explain the scientific basis for making the requirement five rather six criteria. In *Flynn v Bus Átha Cliath*,[66] it was clarified that the entitlement of experts to express an opinion is predicated on also informing the court of the factors which make up their opinion so as to allow the court, as appropriate, to take a different view to theirs. If the court does not know why the requirement is for five criteria, it does not have the evidence on which to take a different view.

Courts must be prepared to ask experts about the degree of precision or margin of uncertainty affecting the accuracy or reliability of the process they have applied when relying on *DSM* or *ICD*.

Conflicts between *DSM* and *ICD*

There are seven *DSM5* disorder categories that are not in *ICD-11* and 19 categories in *ICD-11* that are not in *DSM5*. This sets the scene for a weaponisation of the classification(s) in adversarial proceedings. Furthermore, of the 103 disorders

[62] Cia Bearden, 'The Reality of the *DSM* in the Legal Arena: A Proposition for Curtailing Undesired Consequences of an Imperfect Tool' (2012) 13 Houston Journal of Health Law & Policy 79.
[63] Martin Deahl and Paul Foster, 'Mr Bates and the Post Office: The Implications of the UK Post Office Scandal for the Taxonomy of Trauma' (2024) 15(12) Journal of the Royal Society of Medicine Open.
[64] Clark (n 5).
[65] Paris (n 37).
[66] *Flynn v Bus Átha Cliath* [2012] IEHC 398 para [9].

appearing in both, there are major differences between 20. Of these only PTSD/complex PTSD (CPTSD) has caused significant difficulties as reflected in reported decisions but others may have caused difficulties in unreported decisions and there is the potential for difficulties where alcohol or other substance use disorders are in issue. In relation to PTSD, this is not surprising. Studies of internally displaced Ukrainians [67] and US military veterans, [68] found fewer people are diagnosed with PTSD using *ICD-11* than *DSM5*, and a World Mental Health Survey in 13 countries also found that that *ICD* and *DSM* do not identify exactly the same groups.[69]

Blackledge v London General Transport Services Ltd[70] illustrates the problems for the courts that can result from the differences between *DSM* and *ICD*. The issue was whether the appellant was disabled within the meaning of the Disability Discrimination Act 1995 in England and Wales. The appellant's expert's opinion was that he had PTSD and relied on *ICD-10*. The respondent's expert expressed the view that *ICD-10* used 'somewhat subjective and woolly definitions' and said that he used 'the more sharply defined *DSM-IV* which was the [*sic*] considered the bench-mark standard in medical research and medico legal reporting'. One distinction identified between *DSM* and *ICD* was that *DSM-IV* required the disturbance to cause clinically significant distress or impairment in social, occupational or other important areas of functioning which *ICD-10* did not. On this basis, the respondent's expert's opinion was that the appellant experienced post traumatic stress symptoms but his condition did not warrant a diagnosis of PTSD according to the *DSM-IV* criteria. Finding little evidence that the PTSD had interfered with the appellant's way of life to a marked extent, as he had held down continuous employment and once his depression had been treated, he seemed to become symptom free, the Tribunal concluded that he was not at the relevant time disabled within the meaning of the Act.

In allowing the appeal, the Employment Appeal Tribunal found that the Tribunal's failure to recognise the difference between the two sets of diagnostic criteria rendered its decision fatally flawed. Remitting the matter to a fresh tribunal, it

[67] Mark Shevlin and others, 'A comparison of DSM-5 and ICD-11 PTSD prevalence, comorbidity and disability: an analysis of the Ukrainian Internally Displaced Person's Mental Health Survey' (2018) 137 Acta Psychiatrica Scandinavica 138.
[68] Blair E Wisco and others, 'A comparison of *ICD-11* and *DSM* Criteria for posttraumatic stress disorder in two national samples of U.S. military veterans (2017) 223 Journal of Affective Disorders 17.
[69] Dan J. Stein and others, '*DSM-5* and *ICD-11* Definitions of Posttraumatic Stress Disorder: Investigating "Narrow" and "Broad" approaches' (2014) 31(6) Depression and Anxiety 494.
[70] *Blackledge v London General Transport Services Ltd* [2001] UKEAT 1073_00_0308

observed that the additional requirement in *DSM-IV* of clinically significant distress or impairment in functioning seemed to be more relevant to deciding the effect on function which a mental impairment has rather than deciding whether a mental impairment exists under the Disability Discrimination Act.

In *DE v Secretary of State for Work and Pensions (PIP) (Personal independence payment)*, a social security case in England and Wales, it was held that a tribunal 'should refer to the *DSM-5* if considering a case involving potential Alcohol Use Disorder'.[71] However, a potential for difficulties to arise as a result of differences between *ICD-11*'s substance dependence plus harmful pattern of use of substances and *DSM5*'s substance use disorder is suggested by *SD v Secretary of State for Work and Pensions (ESA)*[72] (*SD*), where the issue was entitlement to Employment and Support Allowance (ESA). It had been held in *JG v Secretary of State for Work and Pensions*[73] (*JG*) that the England and Wales Welfare Reform Act 2012, sections 15A and 18, supported the proposition that alcohol or drug dependence was capable of falling within the definition of a 'specific disease or bodily or mental disablement' in order to found a claim for ESA. However, the criteria for diagnosing alcohol dependence set out in *JG* relied on the factors listed in *DSM-IV* where the distinction between abuse and dependence was based on the concept of abuse as a mild or early phase and dependence as the more severe manifestation. By the time *SD* came to be decided, *DSM-IV* had been superseded by *DSM5* where substance use disorder in *DSM5* combines the *DSM-IV* categories of substance abuse and substance dependence into a single substance abuse disorder measured on a spectrum from mild to severe. The tribunal resolved this by concluding that a diagnosis of 'mild substance abuse [*sic*] disorder' in accordance with *DSM5* would not bring that condition within regulation 19(5) or 29(2)(b) of the Employment and Support Regulations 2008. It considered that to fall within the ambit of the relevant regulations, the substance use disorder must fall within either the moderate or severe categories. But there is no scientific basis for the distinction between mild and moderate substance use disorder.

It remains to be seen how medical evidence using the *ICD-11* classification would be treated for the purpose of an application for ESA. *ICD-11* has retained the categories of 'harmful use' and 'dependence syndrome' but many cases of *DSM5* moderate to severe substance use disorder would not meet the requirements for

[71] *DE v Secretary of State for Work and Pensions (PIP)* [2021] UKUT 226 (AAC), [32].
[72] *SD v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 100 (AAC).
[73] *JG v Secretary of State for Work and Pensions* [2013] UKUT 37 (AAC).

ICD-11 substance dependence.[74] This means that an ESA applicant might be awarded ESA on the basis of a diagnosis of moderate to severe substance if assessed against *DSM5* criteria but be at risk of a refusal on the basis of not having substance dependence if assessed using *ICD-11*. The *ICD-11* assessed applicant might still be awarded ESA provided they are diagnosed as having a harmful pattern of substance use on the basis that harm to their physical or mental health is accepted as amounting to a 'specific disease or bodily or mental disablement'.

Unsurprisingly, Bearden has asked: 'Given the concerns expressed by members of the *DSM's* own former editors and contributors in regard to its scientific validity and reliability, should it be the basis for determining whether a person is eligible to receive benefits?'[75]

It is common to see *ICD* used in cases considered under the Police Pensions Regulations 1987 and the Police (Injury Benefit) Regulations 2006 in England and Wales. This is because Home Office guidance *Medical Decisions under Regulations H1 and 30* (now archived and being updated) refers to how 'The police authority should require the … [selected medical practitioner] to describe wherever possible any disease or medical condition causing disablement by reference to internationally authoritative guides available to doctors such as *ICD* … and *DSM IV* (Diagnostic and Statistical Manual).' However, the words 'wherever possible' and 'such as' should not be overlooked.

In the case of disorders that appear in only one classification or are defined significantly differently in the two classifications, if they have not done so in their reports, experts should be asked to explain the significance, if any, of the differences in an experts' meeting or discussion.

Differences between versions

Inevitably there are differences between one version of a classification and another. In *Hibberd-Little* this was a potential issue. The claimant's expert had relied on *DSM-IV* rather than *DSM5*, so the defendant's expert was able to testify that 'the wrong classification had been used'. As set out above, the Court was able to circumvent this potential issue by finding that whichever *DSM* criteria applied (and it decided that it was *DSM5*), or whatever label was put on a diagnosis, the important issue was the symptoms from which the claimant had been suffering, their onset

[74] First (n 36).
[75] Bearden (n 62), 99.

and their trajectory. Evidence as to the claimant's symptoms, their onset and their trajectory could have been given without reliance on *DSM* (or *ICD*).

There is no 'wrong' version. Any version may assist but none may be of any real assistance.

Controversial diagnoses

In *R v Dowds*, Hughes LJ picked out *DSM*'s 'intermittent explosive disorder' (IED), which is a controversial psychiatric disorder, saying that it:

> [M]ay well be a medically useful description of something which underlies the vast majority of violent offending, but any suggestion that it could give rise to a defence, whether because it amounted to an impairment of mental functioning or otherwise, would, to say the least, demand extremely careful attention. In other words, the medical classification begs the question whether the condition is simply a description of (often criminal) behaviour, or is capable of forming a defence to an allegation of such.[76]

Around that time IED had demanded such extremely careful attention in a murder trial in the Crown Court at Luton in January 2009 (*Kumar v General Medical Council*), where the expert's evidence was anything but helpful and resulted in a complaint to the UK General Medical Council that he expressed the opinion that the defendant was 'suffering from the medical condition IED … [but] did not explain that IED was not recognised in the International Classification of Diseases, *ICD*, and was a controversial diagnosis'.[77]

Paraphilia is similarly problematic. It has been admitted that *DSM-IV*'s paraphilia section lacks 'the clarity and precision necessary for legal purposes.'[78] As observed by Bearden, in the US there have been repeated attempts since the publication of *DSM-IV* to use the 'diagnosis' of 'paraphilia not-otherwise-specified' essentially as a catch-all diagnosis for deviant sexual behaviour to justify lifetime detention in psychiatric hospitals of rapists based simply on the fact that their behaviour was supposedly listed as a mental disorder.[79] But this is a catch-all diagnosis that has been included as a result of not being generally accepted by the scientific and psychiatric community so it is not surprising that it has proved controversial in legal proceedings. Indeed, Frances, who helped revise this section of *DSM-IV*, has

[76] *R v Dowds* [2012] EWCA Crim 281, [31].
[77] *Kumar v General Medical Council* [2012] EWHC 2688 (Admin) [5] and [6].
[78] Allen Frances and Michael B. First, 'Paraphilia NOS, Nonconsent: Not Ready for the Courtroom' (2011) 39(4) Journal of the American Academy of Psychiatry and Law 555.
[79] Bearden (n 62).

admitted that the committee was 'not aware of the consequential problems that would later arise from the fact that the section lacked the clarity and precision necessary for legal purposes.'[80]

The appropriateness of reliance on *DSM* has been challenged in two cases of extradition to New York (*The Government of the United States of America v Bowen*[81] (*Bowen*)) and California (*The Government of the United States of America v Giese*[82] (*Giese*)) for alleged sexual offences. In both states, state law provides for 'civil commitment' of sexual offenders following completion of their sentences if, in New York, they are both dangerous and suffering from a mental abnormality which predisposes them to repeat sexual offending and if, in California, they have a diagnosed mental disorder which includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

In *Bowen* evidence was called on the respondent's behalf from a US lawyer whose opinion was that there was a real risk of a finding that the respondent was suffering from a mental abnormality. He said that as regards sexual behaviour, psychiatrists have improperly attached diagnostic labels which are not appropriate and do not reflect mental illness or disorder. He said that a diagnosis of paedophilia was inevitable and he was extremely sceptical about *DSM*, referring to controversy about aspects of the *DSM5* discussed in a critical article in the *New York Review of Books*. He allied himself with the view, expressed in that article, that *DSM5* is 'medically and scientifically invalid'.[83]

In *Giese* there was evidence, which the District Judge had accepted, from a clinical and forensic psychologist, that there was a risk that the respondent would be diagnosed with 'pedophilic disorder' or the 'more controversial diagnosis' of hebephilia (sexual attraction to adolescents). He also noted that, in the past, both conditions had been found to be qualifying mental disorders for civil commitment. In allowing the respondent's appeal, the Court held that:

> [T]he definition of 'diagnosed mental disorder', in the way it was put into practice as indicated by the evidence in this case, was incompatible with

[80] Frances and First (n 78), 556.
[81] *The Government of the United States of America v Bowen (Rev 1)* [2015] EWHC 1873 (Admin).
[82] *The Government of the United States of America v Giese* [2015] EWHC 2733 (Admin).
[83] *Bowen* (n 81), [35].

> Article 5(1)(e) of the European Convention on Human Rights [ECHR] which provides for the lawful civil detention of persons of 'unsound mind'.[84]

Both cases illustrate how it is necessary to be wary of a reliance on DSM diagnoses to satisfy 'legal criteria for the presence of a mental disorder or a specific legal standard' in disregard of *DSM's* caution against such use.[85]

In contrast, in *Scallon v Sunday Newspapers Ltd*[86], noting that 'paedophilic disorder' is in *DSM5* and that a sexual preference for children of pre-pubertal or early pubertal age is in *ICD-10*, the Court found that '[i]t is therefore a medical condition'. Nevertheless, in *O'Neill, Re Judicial Review*[87] the Court acknowledged the debate over the classification of paedophilia in *DSM5* and this therefore suggested that the question of whether being a paedophile is a matter of sexual orientation, and thus some 'other status' for the purpose of Article 14 ECHR, might be an open one.

It does not follow that because a condition or behaviour has been included in *DSM* or *ICD* that it is a mental disorder.

New diagnoses

Complex PTSD is problematic because it was not in *ICD-10* or *DSM-IV* and it is now in *ICD-11* but not in *DSM5*. It was first proposed as a diagnosis in 1992 by Judith Herman.[88] It was sufficiently recognised to be subjected to field trials for *DSM-IV* and the reason it did not make it into *DSM-IV* was simply that a committee decided that it did not fit neatly in the category of 'anxiety disorders'. Its validity and utility were not in issue. Nevertheless, until at least 2000, although well-known to mental health specialists working mainly or even exclusively with people who had a history of trauma, it was not a well-known or well-recognised diagnosis in mainstream psychiatry.[89]

[84] Giese (n82), [60].
[85] American Psychiatric Association (n 10).
[86] *Scallon v Sunday Newspapers Ltd (t/a Sunday World)* [2017] NIQB 140.
[87] *O'Neill, Re Judicial Review* [2015] ScotCS CSOH 93
[88] Judith Herman, 'Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma' (1992) 5(3) *Journal of Traumatic Stress* 377.
[89] I was unaware of CPTSD until I read about it in expert reports, all by psychologists, in cases of historical child abuse (HCA) between about 2000 and 2005. Otherwise, it might have been some years before I came across the diagnosis. However, I was immediately reminded of two patients for whom I had responsibility: a day patient between 1979 and 1983 and an outpatient between 1983 and 1990, both victims of HCA. Needless to say, I did not diagnose either as suffering from CPTSD but that they had a mental disorder, in both cases severe, was never in doubt.

The first textbook on CPTSD seems to have been published in 2009.[90] The foreword is written by Herman. The editors' own chapter 'Defining and understanding complex trauma and complex traumatic stress disorders'[91] references 55 papers and chapters. A number have PTSD in the title but only one CPTSD and this was in a specialist addiction journal.[92] Apart from her own seminal paper, there is only one reference in Herman's foreword which has CPTSD in the title and it is a chapter in a 2002 book on the treatment of PTSD.[93] The editors' chapter references a number of papers in the *American Journal of Psychiatry* and the American *Archives of General Psychiatry* but none published in the *British Journal of Psychiatry*, which is the journal received monthly by all members of the Royal College of Psychiatrists in Ireland and the UK.

The first reported judgment involving CPTSD in Ireland or the UK seems to have been an English one, *AN, R (on the application of) v Secretary of State for the Home Department*.[94] The issue was that CPTSD did not appear in either *DSM* or *ICD*. The Court did not find this debate of much assistance, saying that the attempt to standardise medical terminology is no doubt laudable. However, perhaps more in psychology and psychiatry than elsewhere in medicine, the descriptions of pathology are fluid and the terminology shifting. The Court said that, closely read, the expert's defence of the term CPTSD amounted to the proposition that those who have been tortured in captivity can develop psychological disorder that is more severe, more complex and more enduring than necessary to satisfy the definition of PTSD in the current *DSM*. The Court was happy to accept that proposition and also that people who have undergone other extreme stressors may also develop such complex and severe problems.

It was *ICD-11*'s status in itself, and specifically CPTSD, which were issues in *London Borough of Haringey v FZO,*[95] an appeal by an English borough council against the award of compensation to a man who had been sexually abused in its care. There were two difficulties: first, at that time, *ICD-11* had been adopted by the WHO but it

[90] Christine A. Courtois and Julian D. Ford (eds), *Treating Complex Traumatic Stress Disorders: An Evidence-Based Guide* (Guilford Press 2009).
[91] Julian D. Ford and Christine A. Courtois, 'Defining and Understanding Complex Trauma and Complex Traumatic Stress Disorders' in Courtois and Ford ibid.
[92] Julian D. Ford, Stefanie F. Smith, 'Complex Post-Traumatic Stress Disorder in Trauma-Exposed Adults Receiving Public Sector Outpatient Substance Abuse Disorder Treatment' (2008) 16(2) Addiction Research and Theory 193.
[93] Bessel A. van der Kolk, 'Assessment and Treatment of Complex PTSD' in Rachel Yehuda *Treating Trauma Survivors with PTSD* (American Psychiatric Association Press 2002).
[94] *AN, R (on the application of) v Secretary of State for the Home Department* [2009] EWHC 1921 (Admin).
[95] *London Borough of Haringey v FZO* [2020] EWCA Civ 180.

was not yet in use in the member states; secondly, there was an issue as to whether the respondent, who had been sexually assaulted on multiple occasions between the ages of 13 and 15, was suffering from CPTSD as diagnosed by the respondent's expert. The appellant's expert noted that *ICD-11* remained 'unpublished' (it had been published in 2018) and his view was that CPTSD did not appear in standard diagnostic texts, and it was an inapposite diagnosis in the present case because the abuse was not perceived as 'traumatic' by the respondent, either at the time or for years afterwards, in the required sense. On diagnosis, the trial judge preferred the opinion of the respondent's expert that he suffered from CPTSD. She found that what occurred fitted the wording of the descriptors in *ICD-11*, which in one of its forms was 'designed to cover precisely the circumstances where the events evolve over time rather than a sudden dramatic trauma which is adequately and properly covered by PTSD.'[96] She rejected the appellant's submission that the abuse had to be violent to qualify.

In the appeal, McCombe LJ considered that the Court was entitled to prefer the evidence of the respondent's expert. Simon and Nicola Davies LJJ agreed, with Nicola Davies LJ adding:

> At the time of the trial, Complex PTSD was not included within the international classification of diseases published by the World Health Organisation. Dr O'Neill stated that Complex PTSD is to be accepted as a diagnostic category within the publication in 2020. In giving evidence Dr O'Neill did not rely upon any articles in the medical literature which reference Complex PTSD, its symptoms nor the proposed classification.
>
> Further, in preferring the evidence of Dr O'Neill, the judge was accepting a diagnosis which has yet to be formally included within the World Health Organisation international classification. If that is a course which the court is minded to take, then real rigour is required in assessing the relevant evidence in respect of such a diagnosis.[97]

However, at the time of the trial in May 2019 *ICD-11* had been published for nearly a year. It was adopted by the WHO the same month as the trial, not 2020 as it seems that the expert predicted. The diagnosis had been formally included in the WHO's *ICD*. But the importance of the judgment is that if a diagnosis is not in *ICD* or *DSM*, or if it is in only one, the expert might be advised to refer to articles in the medical

[96] ibid [83].
[97] ibid [181]-[184].

literature, or textbooks (in a CPTSD case such as those above) and be prepared for such evidence to be tested rigorously.

A similar battle, or rather skirmish, occurred in *McClarnon v The Sisters of Nazareth*.[98] At the date of the plaintiff's expert report (November 2015), the current *ICD* edition was *ICD-10* and he had diagnosed with PTSD and alcohol dependence syndrome. By the time of the trial *ICD-11* had been, in his words, 'published', and he said that the same symptoms would have led him to diagnoses of CPTSD and alcohol misuse disorder (severe). When the defendant's expert began to give evidence, he was specifically asked about CPTSD. He said it was not accepted in *DSM5* and he began to say that *ICD-11* was 'not sufficiently persuasive to …' when counsel for the plaintiff objected that there had been no challenge to the diagnosis made by the plaintiff's expert, which counsel for the defendant accepted, so the Court did not hear why, in the opinion of the defendant's expert, he did not find *ICD-11* 'sufficiently persuasive'.[99]

In *McDonald v Conroy*[100] the plaintiff sought an amendment to her statement of claim to include 'complex PTSD', as a particular of injury based on expert psychiatric evidence. The defendant resisted on the grounds that CPTSD is not a recognised disorder in *DSM5*. The Court permitted the amendment but added that the complaint about CPTSD not being recognised in *DSM5* would go to the ultimate weight of the psychiatric evidence.

In understanding all of this, it is apposite to refer to Covid-19. It did not exist in 2018. CPTSD is different. It was in 2018 that CPTSD first appeared in *ICD-11*. This does not mean that it did not exist before 2018 as might be said of Covid-19, which did not seem to have appeared until 2019. People diagnosed with CPTSD after June 2018 when *ICD-11* was published had not developed the condition overnight. It is not in *DSM5*. This does not mean that people with this condition do not have a disorder. It only means that it is not named and classified with the same specificity as in *ICD*. It is the condition, its nature, onset, trajectory, severity and effects, which matter, not the name which it may be given, or which may not yet be given, or which may be taken away or changed.

In a hundred years, it is arguable that there have been no new mental disorders, except some neuropsychiatric disorders such as human immune deficiency encephalitis, but a multitude of changes of name.

[98] *McClarnon v The Sisters of Nazareth* [2024] NIKB 3.
[99] ibid 141.
[100] *McDonald v Conroy* [2024] IEHC 69.

Problems with the reliance on *DSM* and *ICD* by clinicians

Failure to take account of all relevant information and the context of any facts to which the opinion relates

As indicated above, in determining the reliability of expert opinion, it is necessary to take account of all relevant information and the context of any facts to which the opinion relates. This happened in *Fitzpatrick*[101] where McCracken J referred to the duty of the expert 'to ascertain all the surrounding facts and to give that evidence in the context of those facts'. He was concerned with facts that did not support the proposition being put forward by the expert but the point applies also to the context of any facts known to the expert. Similarly in *JL v DPP*, where *Fitzpatrick* was cited with approval, Hardiman J said that certainly, it seemed to him, 'the whole factual background, including full details of the circumstances … should … form part of a report for the purpose of a case such as this.'[102] It was a case of a person accused of sexual offences 21 years previously who sought to restrain his trial on the grounds of delay, but it is reasonable in any case to require an expert to take account of all relevant information and the context of any facts to which their opinion relates. A failure of the expert to consider context or circumstances was an issue in *DJ* (see above). The Court said that the correct approach to be taken was a subjective one and that what had to be considered were the particular circumstances pertinent to the appellant surrounding, at the time of and immediately following, his mother's death.

In a number of cases, it has been necessary for the court to ignore *DSM* or *ICD* evidence because experts have not considered the evidence in the round, disregarding psychopathology that does not fall into a *DSM* or *ICD* category. *C v D*[103] and *Lawson* v *Glaves-Smith*[104] do not refer explicitly to the use of *DSM* or *ICD*. However, they are referenced in *D v The Bishop's Conference of Scotland*[105] and the same expert gave evidence in all three. In *C v D* the Court accepted the expert's evidence that the claimant was not suffering from a diagnosed illness but nonetheless 'has suffered and continues to suffer from mental abnormality as distinct from emotional distress'.[106] In *Lawson*, where the expert's opinion was that the claimant had not suffered from PTSD, the Court concluded that there was no

[101] *Fitzpatrick v DPP* (Unreported, 5 December 1997).
[102] *JL v DPP* [2000] 3 IR 122, 151.
[103] *C v D* [2006] EWHC 166 (QB).
[104] *Lawson v Glaves-Smith* [2006] EWHC 2865 (QB).
[105] *D v The Bishop's Conference of Scotland* [2022] CSOH 46.
[106] [2006] EWHC 166, [96].

plausible explanation other than that the claimant suffered disabling trauma and psychological symptoms as a direct result of what happened to her and whether it was right to attach the label PTSD was perhaps less significant than to assess the symptoms she actually suffered (even if they did not necessarily correspond completely to those suffered by other people who have been diagnosed with PTSD). In *D* neither expert diagnosed psychiatric injury. As well as considering *C v D* and *Lawson*, the Court also drew attention to what Lord Reed said in *Rorrison* to the effect that, although what constitutes a recognised disorder is a matter for expert evidence, the *ICD* and *DSM* classifications are not necessarily conclusive. Commenting on the evidence of the claimant's expert, the Court said it was important to recognise that he was using *DSM5* as the sole basis for deciding if a 'defined or classified psychiatric injury existed' but, considering the evidence in the round, there was other evidence from the expert which pointed clearly towards psychiatric injury at that time, albeit not falling within *DSM5*. It is not clear whether the Court was applying the well-established principle outlined in *Levy v Ellis-Carr* that 'No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)'[107] or whether the Court was aware that 'Additional information about the individual being evaluated beyond that required to make a *DSM-III* diagnosis will invariably be necessary' (Box 1) or that *ICD-11* (Box 2) makes clear that 'diagnostic classification is only a part of patient assessment'.

In *Fraser v State Hospitals Board for Scotland*[108], the Court accepted as a generality the view of the expert that for there to be 'a psychiatric illness' it had to be something contained in *DSM* or *ICD*, only making an exception for the existence of a true new illness until such time as one of the works was updated. But this begs the question as to what a true new psychiatric illness is and of course generality allows for exceptions.

Practice in the field and practice in legal proceedings

Although methods are meant to follow established practice in the field, practising clinicians seldom adhere strictly to the specific diagnostic criteria, including those clinicians in the US whose *DSM* diagnoses, in the records of inpatients and outpatients, are utilised for research.[109] However, the impression many experts give, strictly counting up criteria or carefully calculating the duration of a disorder, is that this is how *DSM* and *ICD* are used in everyday clinical practice. *DSM*'s general use

[107] *Levy v Ellis-Carr* [2012] EWHC 63, [36].
[108] *Fraser v State Hospitals Board for Scotland* [2000] ScotCS 191
[109] Clark (n 5).

in the US may be the truth, but the whole truth is that only rarely is there strict adherence to the specific diagnostic criteria. Experts who apply the criteria strictly should not imply that this is how the criteria are applied in clinical practice or even in some of the research in which it is sometimes asserted that *DSM* is superior to *ICD*. Failure to make this clear may be partly to blame for the weaponisation of *ICD* or *DSM* by counsel whose strict application of the diagnostic criteria is used to undermine an expert's evidence. Experts should be able properly to explain and justify divergence from established practice.

Based on a wrong assumption

In January and February 2013, Nicola Edgington stood trial charged with murder and the issue for the Court was the partial defence of diminished responsibility manslaughter and specifically psychosis. The prosecution's expert said: 'I'll tell you one thing that won't be in *DSM5* and that's schizoaffective psychosis [...] that's going.' [110] *DSM5* was published 3 months later on 18 May 2013. Although 'schizoaffective *psychosis'* is not in *DSM5*, it had not been in *DSM-IV*. However, schizoaffective *disorder* is in *DSM5* and its criteria are unchanged from *DSM-IV*. If the trial had taken place three months later, or *DSM5* published three months earlier, the expert might have been challenged as to this statement. The verdict was one of murder. What influence this evidence had is unknown.

A method or process not properly carried out or applied

The methodology employed by many experts who rely on *DSM* and *ICD* is questionable. Both *DSM* and *ICD* describe how they are to be used (see Boxes 1 and 2). The following four cases illustrate a disregard for the guidance.

In *Vernon*, the defendant sought to weaponise *DSM* causing Thorpe LJ to observe:

> [I]t was plainly strategically attractive to [counsel for the defendant] to present PTSD as defined by *DSM-III-R* as the essential yardstick since the plaintiff was clearly in difficulty in picking up sufficient ticks within boxes B, C and D ... But psychiatric illness is too complex and insufficiently concrete to be subjected to such a rigid analysis.[111]

He also agreed with one of the plaintiff's experts that it was possible to diagnose PTSD without rigid adherence to the criteria in *DSM-III-R*. The references to

[110] Transcript of evidence 31.1.13, 42F.
[111] *Vernon* (n 55) 76.

'sufficient ticks' and a 'rigid analysis' illustrate the difficulties when, in contravention of the guidance, the process is not properly carried out.

In *Lindsay v Wood*[112] one expert expressed the opinion that 'if one *strictly* applies the *ICD-10* criteria for an Organic Personality Disorder [the claimant] does not presently meet the criteria for this condition' but in the course of the experts' meeting it was agreed that the claimant was 'suffering from … organic personality disorder'. In *DL-H v Devon Partnership NHS Trust v Secretary of State for Justice*[113] the tribunal referred to the risks in using 'over-prescriptive criteria'. In *R(B)* the Court accepted the submission that it was a fair criticism of the expert's reports that 'he adopted an over-rigid application of the DSM and ICD criteria'.

It has been observed that the *ICD-10* PTSD diagnosis is unforgiving of anyone not fitting its 'strict' diagnostic criteria[114] but they are 'general guidelines rather than strict requirements'.[115] They are not meant to be applied strictly.

The disregard of clinical judgement

Disregarding 'clinical judgement', which both *DSM* and *ICD* require, is a common example of a failure properly to carry out the required diagnostic process. In *Hibbert v Ministry of Defence*[116] it was alleged that there was a negligent failure to diagnose PTSD resulting from exposure to events in Bosnia. The Court accepted that these events satisfied the threshold criterion and that symptoms consistent with the other criteria were present. However, the Court accepted the treating psychiatrist's rejection of a diagnosis of PTSD because '[i]t was his clinical judgment that '… there was not a sufficiently serious range of experiences to amount to PTSD… I'm confident he did not have PTSD as defined [in *DSM-III-R*]' and found no negligence. As observed by Bearden, those making diagnoses using *DSM* will inherently look for symptoms by a patient to prove a diagnosis rather than looking at healthy behaviours or other factors that would tend to disprove a potential diagnosis.[117]

A similar point was made in *McTear v Imperial Tobacco Ltd*[118] where it was fortunate for the Court that an expert urged caution in the drawing of conclusions from the fact that an individual's presentation met criteria for a *DSM-IV* diagnosis. Likewise

[112] *Lindsay v Wood* [2006] EWHC 2895 (QB) (emphasis added).
[113] *DL-H v Devon Partnership NHS Trust and Secretary of State for Justice* [2010] UKUT 102 (AAC).
[114] Jaimie L. Gradus and Sandro Galea, 'Reconsidering the definition of trauma' (2022) 9(8) Lancet Psychiatry 608.
[115] World Health Organisation, *The ICD-10 Classification of Mental and Behavioural Disorders* (n 8).
[116] *Hibbert v Ministry of Defence* [2008] EWHC 1526 (QB).
[117] Bearden (n 62).
[118] *McTear v Imperial Tobacco Ltd* [2005] ScotCS CSOH 69(3).

in *Calvert v William Hill Credit Ltd*[119] (*Calvert)*, the Court indicated that it would not unquestionably accept a threshold or above threshold score as evidence of even just probable disorder. The claimant 'scored five on the *DSM-IV* diagnostic test … sufficient to justify his classification as a "probable pathological gambler"' but the Court acknowledged that there may be cases in which 'an apparent score of five on the *DSM-IV* tests may be attributable in whole or in part to special factors which, upon close analysis, lead to a contrary conclusion'.

Calvert also draws attention to a further risk associated with these classifications: their use without expert psychiatric assistance. The Court was reminded in passing that in *Foroughi v Star City Pty Ltd*[120] Jacobson J referred to how the *DSM-IV* criteria are expressed in sufficiently plain factual language to permit them to be applied to the facts as found by a judge without the need for, still less the obligation to be bound by, expert psychiatric assistance. This runs completely counter to the requirement for the proper *DSM* use of 'specialized clinical training that provides both a body of knowledge and clinical skills.'[121]

A method or process not appropriate for use in the particular case

It is no surprise that the Court in *Dowds v R*[122] did not find it appropriate to use *DSM* to decide whether acute voluntary intoxication was capable of giving rise to the partial defence of diminished responsibility manslaughter on indictment for murder on the basis that it was a 'recognised medical condition' within the English Homicide Act 1957 s 2(1)(a), as amended. After quoting from the introduction to *DSM*, Hughes LJ said:

> The particular 'imperfect fit' there under consideration is the divergence between the *level* of impairment which may bring a patient within a *DSM-IV* classification and the level necessary to have legal impact. But exactly the same considerations apply when the question is whether the doctors' classification system addresses the legal issue in any particular case. There

[119] *Calvert v William Hill Credit Ltd* [2008] EWHC 454 (Ch).
[120] *Foroughi v Star City Pty Ltd* [2007] FCA 1503.
[121] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR)* (American Psychiatric Association 2000). At a time when psychiatrists argued about which classification was to be used in legal proceedings, it was asserted that it was *DSM* of which judges have copies in their chambers. When I asked a judge about this, he said that he did not own a copy of *DSM* or *ICD* and between one case and another he forgot what the acronyms stood for. This led to his comment about the contents of the jar being more important than the label.
[122] *Dowds v R* [2012] EWCA Crim 281.

> will inevitably be considerations of legal policy which are irrelevant to the business of medical description, classification, and statistical analysis.[123]

Irrelevance is anything but relevance. It was far from 'helpful' to the court for the defence to have relied on the fact that intoxication is in *DSM* and *ICD*.

DSM-IV-TR does include this statement: 'When used appropriately, diagnoses and diagnostic information can assist decision makers in their determinations' but appropriate use is hard to find.[124] Reported cases in which diagnoses and diagnostic information have been of assistance to the court are far outnumbered by cases in which they have been a hindrance.

The baby and the bathwater

The appropriateness of *DSM* and *ICD* are also questionable because 'the majority of patients do not conform to the tidy stereotyped descriptions found in textbooks'[125] which can explain why, in general clinical practice, there are high rates of usage of *ICD* categories 'not otherwise specified' and the *DSM5* categories 'not elsewhere defined'.[126] They are currently by far the most widely used 'diagnoses' in clinical settings.[127] They are 'catch-all' categories for coding mental states that do not meet *DSM* criteria or match *ICD* descriptions. This is the problem of the baby and the bathwater.[128] There will be more babies thrown out with the bathwater than are left in the bath or, in the language of Clark,[129] more in these 'wastebasket categories' than on the desk. It may not matter to researchers that babies are getting thrown out with the bathwater if conclusions based on a sufficient number left in the bath can be confidently applied to others equally narrowly defined. But the court has to understand an individual accused, plaintiff, complainant, witness, etc whether in or out of the bath. If the diagnostic system only works in a minority of patients, its utility is in question.

Medical condition or descriptive factor

In *R (on the application of Michaelides) v Chief Constable of Merseyside Police*,[130] as well as making a diagnosis of a moderate depressive syndrome with somatic

[123] ibid [30].
[124] American Psychiatric Association (n 121).
[125] Robert E. Kendell, *The Role of Diagnosis in Psychiatry* (Blackwell Scientific Publications 1975).
[126] Clark (n 5).
[127] Markon (n 3).
[128] Keith Rix, 'Is Justice Served by Reliance on *ICD* and *DSM* Classifications of Mental Disorder in Medicolegal Reporting?' (accepted subject to revision) BJPsych Advances.
[129] Clark (n 5).
[130] *R (on the application of Michaelides) v Chief Constable of Merseyside Police* [2019] EWHC 1434 (Admin).

syndrome coded F32.1 in *ICD-10*, the psychiatrist made a 'diagnosis' of 'Problems with employment (perceived racial discrimination)' which was coded Z56.0. His opinion was that these were conditions which were likely to be permanent. They were then adopted by an occupational physician as conditions which made the claimant 'medically unfit for performing the ordinary duties of a member of the police force'. The claimant was retired. When his application for an injury award was refused, he appealed to the Police Medical Appeal Board which held that the Z56.0 'diagnosis' was not a medical condition but a descriptive factor and therefore could not lead to permanent disablement. The Court accepted this, stating that Z56.0 is not a diagnosis of a medical condition but a code which cross-references to *ICD-10*. Notwithstanding the use of the term 'condition' in the title of the Annex 'Other conditions from *ICD-10* often associated with mental or behavioural disorders', the sub-heading, for the Z codes, is 'Factors influencing health status and contact with health services'. 'Factors' or 'problems' are not 'diagnoses'. This misunderstanding could have been avoided if the expert had not confused a factor with a mental disorder. Likewise, *DSM*'s 'R' codes are for 'Symptoms, signs and abnormal clinical and laboratory findings, not elsewhere classified'. The fact that they are used when it has not been possible to make a diagnosis of a medical condition surely means that there is no recognised medical condition.

Failure to consider other sources of respected medical opinion

The England and Wales Employment Tribunal, when it is concerned with 'mental impairment' resulting from, or consisting of, a mental illness only if the illness is a 'clinically well recognised' illness (Disability Discrimination Act 1995, sch 1) applies guidance issued by the Department for Education and Employment which states that it is very likely that a respected body of medical opinion would include as clinically well-recognised those illnesses specifically mentioned in publications such as the WHO's *ICD*. However, the use of 'include' and 'such as' does allow for reliance on diagnoses that are not in *ICD*. This was recognised in *Morgan v Staffordshire University*[131], where, in addition to proof of a mental illness specifically mentioned in *ICD*, the tribunal recognised at least two other routes to establishing 'mental impairment': (a) proof of a mental illness specifically mentioned as such in a publication 'such as' *ICD* of very wide professional acceptance; (b) proof by other means of a medical illness recognised by a respected body of medical opinion.

Failure by a psychiatrist to make 'a statement to the effect of whether the recurrent depressive illness comprised (in his view) a recurrent depressive disorder (or some

[131] *Morgan v Staffordshire University* [2002] IRLR 190.

other illness) for the purposes of *ICD-10*' in *Woods v Royal College of Nursing*[132] resulted in the applicant's failure to succeed upon the issue of disability. The Tribunal did state that it might have been that, if the applicant had produced an expert's report guiding the Tribunal as to the type of illness from which she suffered (and whether it was contained within *ICD* and if so where), the Tribunal would have made a different decision. This could also have been achieved by reference to another publication of very wide professional acceptance or by proof by other means of a medical illness recognised by a respected body of medical opinion. Likewise in *Wilson v Southern Counties Fuels Ltd* there was a diagnosis of 'clinical depression' but the tribunal said that what is required is 'to bring someone who is, or has been, suffering from depression within one of the clinically well-recognised illnesses.'[133] Since 'clinical depression' is for most psychiatrists synonymous with one of the most clinically recognised forms of mental illness, in which there is so-called biological or somatic symptomology, and perhaps also an inherited basis and familial response to antidepressant drugs, it ought to have been easy to persuade the Court that it was a clinically well-recognised illness even without reference to *ICD*.

Discussion

It is not surprising that in giving evidence in the Westminster Magistrates' Court in *United States of America v Assange*, Professor Michael Kopelman, referred to *ICD* and *DSM* as 'those bloody books'.[134] He was probably speaking for countless psychiatrists, psychologists, lawyers and judges. Thomas R. Insel, Director of the US National Institute of Mental Health (NIMH), explaining why NIMH would no longer fund research based on *DSM5*, said: 'The weakness is its lack of validity. Unlike our definitions of ischemic heart disease, lymphoma, or AIDS, the *DSM* diagnoses are based on a consensus about clusters of clinical symptoms, not any objective laboratory measure'.[135] This statement is unsurprising given the fact that, whereas for the diagnosis of physical disorders there are identifiable markers, psychiatric diagnosis depends more on processes of evaluation and clinical judgment and subjectivity that can result in a range of opinion. The requirement of the law for the expert to provide evidence sufficient to prove or disprove a particular

[132] *Woods v Royal College of Nursing* [2003] All ER (D) 391.
[133] *Wilson v Southern Counties Fuels Ltd* [2004] 7 WLUK 311, [21]
[134] *United States of America v Assange* [2021] EW Misc 1 (MagC) [317].
[135] Phil Hickey, 'Transforming Diagnosis: The Thomas Insel Article' Behaviorism and Mental Health: Alternative perspective on psychiatry's so-called mental disorders, 5 May 2013. <https://www.behaviorismandmentalhealth.com/2013/05/05/transforming-diagnosis-the-thomas-insel-article/> accessed 7 April 2025.

fact, creates a challenge that is not faced, or at least not to the same extent, by other medical experts such as the radiologist with their X-rays, the obstetrician with the cardiotocograph, the neurologist with the electroencephalogram or the respiratory physician with the results of respiratory function tests. *DSM* is attractive to psychiatrists, perhaps eager to establish the scientific legitimacy of their discipline, where scoring is used to make diagnoses, but this can give a spurious impression of certainty. So psychiatrists and psychologists appear to have relied on *DSM* or *ICD* seemingly unaware of their questionable scientific legitimacy.

Even in some cases where *DSM* or *ICD* has been used to validate a condition as being 'medically recognised', matters have not been straightforward. When a classification is a quarter of a century old, as *ICD-10* was before the publication of *ICD-11*, the courts might be better assisted by an expert who relies on the recent latest edition of a reputable textbook rather than an out-of-date classification.

However, while it is clear that much blame lies at the doors of psychiatrists and psychologists for their misuse of *DSM* and *ICD*, some blame lies with the APA committee which does:

> ... not understand that the DSM is read very differently by lawyers ... the wording does not always stand up well to the technical rigor of precise legal dissection. By training and inclination, lawyers parse every phrase for meanings never foreseen by those writing primarily for a psychiatric audience.[136]

This is equally applicable to *ICD*. As a result, lawyers are able to weaponise the classifications as happened in *Assange* where the US sought to undermine an expert's evidence by suggesting that it was 'strange' that he could not recall from memory *ICD* diagnostic criteria and which suggestion the District Judge did not accept.

The weaponisation has been graphically illustrated in *LKM* where Williams J referred to counsel's skeleton as:

> [T]he forensic equivalent of a WWI artillery barrage giving plenty of notice of the full frontal infantry assault which followed in cross-examination ... Wave upon wave of criticism was launched from the father's trenches, made their way across no man's land and then became caught in the wire of [the expert] ... [and was] mown down by [the expert] ... [there were] occasional and

[136] Frances (n 80).

> limited breakthroughs … [but the expert was] not going to retreat from her primary position … any advances would be of limited effect.[137]

The result, Williams J observed, was that the critique of the expert's methodology thus far appeared to him to be too formulaic in its approach and subjected the totality of the expert's evidence to a too narrow textual analysis. It is understandable that counsel, acting in the best interests of their instructing party, should take the opportunity to weaponise *ICD* or *DSM* but the court might be better *assisted* if experts first ensure that the court is fully informed as to the limitations of *DSM* and *ICD* and the risks of relying on them in legal proceedings.

Probably the best evidence of the consequences of the misuse of *DSM* (and arguably *ICD*) in legal proceedings is the fact that forensic concerns about the potential misuse of the PTSD diagnosis in personal injury and disability cases led in part to the specificity and exclusivity of the *DSM5* requirements.[138] So instead of the courts using legal policy to limit claims to damages for psychiatric injury, psychiatrists have changed their definitions of psychiatric disorders. Is this the tail wagging the dog?

Recommendations

Psychiatrists and psychologists need to be educated about *DSM* and *ICD* so as to understand their limitations when relied upon in expert evidence. This has been addressed in a continuing professional development journal for psychiatrists.[139] The courts need similarly to be better educated and, in addition to this article, this author[140] has devised an information document which experts relying on *DSM* or *ICD* can append to their reports.

So far as the courts are concerned, unlike the US, where the 'Daubert test'[141] fulfils a 'gatekeeping' function to determine whether expert evidence should be admitted at trial, as observed in *Duffy*, there is no general requirement that expert evidence must meet any specific threshold of reliability as a condition of admissibility. However, as also observed in *Duffy*:

[137] *LKM* (n 30), [20].
[138] First (n 39).
[139] Rix (n 128).
[140] Keith Rix, '*DSM* and *ICD* Classifications in Medicolegal Reporting: Misperceptions, Misunderstandings and Misuse' *BJPsych Advances* (in press).
[141] *Daubert v Merrell Dow Pharmaceuticals* (1993) 509 US 579.

> At what stage of the proceedings, and in what manner, … a challenge (to the admissibility of expert evidence) should be determined is a matter for case-by-case assessment. Finally, even where *admissible*, issues of reliability may properly affect the *weight* to be given to expert evidence.[142]

Where an expert psychiatrist or psychologist relies on *DSM* or *ICD*, having regard to their lack of a reliable scientific or methodological foundation, the court might consider asking the expert or experts if they can *assist* the court or tribunal without relying on *DSM* or *ICD* and instead, for example, perhaps following a meeting with the adverse party's expert or experts, relying on a current textbook or authoritative paper in a medical or scientific journal. In appropriate cases, instructions might spell out that the court wants to know about the condition, its nature, onset, trajectory, severity and effects and it is not necessary to give a diagnosis. In cases where experts consider that they can only *assist* the court or tribunal by relying on *DSM* or *ICD*, or where official guidance suggests their use, this article may guide as to how such evidence can be tested.

Another question posed by Markon was: 'What consequences would there be for abandoning authoritative nosologies?'[143] The consequences of experts abandoning *DSM* and *ICD* might, other than exceptionally, be the saving of time and money and a greater likelihood of justice being administered.

Box 1: Statements as to the use of DSM

'Although this manual provides a classification of mental disorders, there is no satisfactory definition that specifies precise boundaries for the concept `mental disorder' [...] There is no assumption that each mental disorder is a discrete entity with sharp boundaries (discontinuity) between it and other mental disorders.'[144]

'Making a *DSM-III* diagnosis represents an initial step in a comprehensive evaluation leading to the formulation of a treatment plan. Additional information about the individual being evaluated beyond that required to make a *DSM-III* diagnosis will invariably be necessary.'[145]

'In most situations, the clinical diagnosis of a *DSM-IV* mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder," "mental disability," "mental disease," or "mental defect."'[146]

[142] Duffy (n 18), [17].
[143] Markon (n 3), 555.
[144] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders 3rd Edition (DSM-III)* (American Psychiatric Association 1980).
[145] American Psychiatric Association ibid.
[146] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV* (American Psychiatric Association 1994).

'The diagnostic categories, criteria and textual descriptions are meant to be employed by individuals with appropriate clinical training and experience in diagnosis ... The specific diagnostic criteria ... are meant to serve as guidelines to be informed by clinical judgement and not meant to be used in a cookbook fashion.'[147]

'When used appropriately, diagnoses and diagnostic information can assist decision makers in their determinations.'[148]

'[A] practical, functional and flexible guide for organising information ... Diagnostic criteria are offered as guidelines for making diagnoses, and their use should be informed by clinical judgment ...'[149]

'However, the use of *DSM5* should be informed by an awareness of the risks and limitations of its use in forensic settings. When *DSM5* categories, criteria and textual descriptions are employed for forensic purposes there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. ... As a result, it is important to note that the definition of mental disorder included in *DSM*-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals. ... and does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder.'[150]

Box 2: Statements as to the use of ICD.

'These descriptions and guidelines carry no theoretical implications, and they do not pretend to be comprehensive statements about the current knowledge of the disorders. They are simply a set of symptoms and comments that have been agreed, by a large number of advisors and consultants in many different countries, to be a reasonable basis for defining the limits of categories in the classification of mental disorders.'[151]

'Statements about the duration of symptoms are also intended as general guidelines rather than strict requirements; clinicians should use their own judgement about the appropriateness of choosing diagnoses when the duration of particular symptoms is slightly longer or shorter than that specified.'[152]

'The [Clinical Descriptions and Diagnostic Requirements] (CDDR) are written to allow for the exercise of clinical judgement, and it is the diagnosing health professional who is responsible for

[147] American Psychiatric Association ibid.
[148] American Psychiatric Association (n 121).
[149] American Psychiatric Association (n 10)
[150] American Psychiatric Association (n 10).
[151] World Health Organization (n 6).
[152] World Health Organization (n 6).

developing a diagnostic formulation appropriate for an individual patient, considering the patient's individual, social and cultural context as well as the characteristics of the health system. It is equally important to note that diagnostic classification is only a part of patient assessment. The CDDR are not a guide to patient care, nor a comprehensive textbook of psychiatry, nor a manual of how to conduct clinical assessments and differential diagnoses. The focus of the CDDR is on the classification of disorders and not the assessment and treatment of people, who are frequently characterized by multiple disorders and diverse needs.'[153]

Box 3: DSM5-TR[154] and ICD-11[155] entries for adjustment disorder

DSM5-TR	**ICD-11**
A. The development of emotional or behavioral symptoms in response to an identifiable stressor(s) occurring within 3 months of the onset of the stressor(s). B. These symptoms or behaviors are clinically significant, as evidenced by one or both of the following: Marked distress that is out of proportion to the severity or intensity of the stressor, taking into account the external context and the cultural factors that might influence symptom severity and presentation. Significant impairment in social, occupational, or other important areas of functioning. C. The stress-related disturbance does not meet the criteria for another mental disorder and is not merely an exacerbation of a pre-existing mental disorder. D. The symptoms do not represent normal bereavement. E. Once the stressor (or its consequences) has terminated, the symptoms do not persist for more than an additional 6 months.	Adjustment disorder is a maladaptive reaction to an identifiable psychosocial stressor or multiple stressors (e.g. divorce, illness or disability, socio-economic problems, conflicts at home or work) that usually emerges within a month of the stressor. The disorder is characterised by preoccupation with the stressor or its consequences, including excessive worry, recurrent and distressing thoughts about the stressor, or constant rumination about its implications, as well as by failure to adapt to the stressor that causes significant impairment in personal, family, social, educational, occupational or other important areas of functioning. The symptoms are not better explained by another mental disorder (e.g., Mood Disorder, another Disorder Specifically Associated with Stress) and typically resolve within 6 months, unless the stressor persists for a longer duration.

[153] World Health Organization (n 7).
[154] American Psychiatric Association (n 11).
[155] World Health Organization (n 7).

Acknowledgments

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Constitutional Interpretation in Ireland and the *Heneghan* case

Laura Cahillane*

Abstract: The question of how to interpret the Constitution has occupied the minds of Irish judges since the promulgation of the first Irish Constitution. While different approaches have been in vogue at various points over the years, the primary approach to be taken is usually accepted as being based on a textual or literal method. In fact, in recent judgments, the Supreme Court emphasised that the literal approach must always have primacy. However, in the Heneghan case, the Court seemed to develop a new approach that moves away from the strictly literal method in favour of a more flexible, harmonious approach. The case, which centres on the electoral franchise of the upper House of the Oireachtas, is significant for a number of reasons and so this article proposes to examine the judgment in order to consider how it has changed the approach to constitutional interpretation in Ireland.

Keywords: Constitutional interpretation; Irish Supreme Court; Harmonious interpretation; Popular sovereignty; Interpretative method.

Introduction

The Irish Constitution, Bunreacht na hÉireann, is a broad and sometimes ambiguous document, which requires courts to balance respect for its foundational principles with the need to address contemporary issues not explicitly foreseen by its framers. The evolving nature of rights, particularly in areas such as privacy and social policy for example, necessitates a fluid, interpretive approach to ensure that the Constitution remains relevant in addressing modern concerns while preserving its integrity. Because of this, constitutional interpretation in Ireland involves various methods that seek to reconcile the text of the Constitution with contemporary legal, social, and political realities. The methods can sometimes intersect, leading to debates over the balance between judicial activism and restraint in shaping Ireland's constitutional landscape. It is one area where individual philosophies and ideas about the proper role of the judge can have a major impact. Different methods have come to the fore over the years. For example, natural law had its heyday as a method of constitutional interpretation during the 1970s but is rarely, if ever,

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invoked now as an interpretative method. In recent years, the Supreme Court has attempted to put forward a standard approach to interpreting the Constitution and in cases such as *Curtin v Dáil Éireann*[1] and *Bacik v An Taoiseach*,[2] the Court emphasised that the literal approach must always have primacy. However, in a more recent case, the Court appears to have developed a new approach that moves away from the strictly literal method in favour of a more flexible harmonious approach.

This article will first outline the developmental context to constitutional interpretation in Ireland before going on to examine in detail the judgment in that decision, *Heneghan v Minister for Housing*,[3] to consider how this judgment has changed the approach to constitutional interpretation in Ireland.

Constitutional Interpretation in Ireland

In *Kelly: The Irish Constitution*, five different interpretative methods are discussed in the Irish context: the literal approach; the doctrine of harmonious interpretation; the broad or purposive approach; the historical approach; and the natural law approach. It is also noted that sometimes these approaches can overlap and that the courts have 'shown no consistency with regard to any particular approach and this gives rise to the suspicion that individual judges are willing to rely on any such approach that will offer adventitious support for a conclusion which they have already reached'.[4]

The literal approach is usually the first approach to which the court will turn when questions of constitutional interpretation arise and it is often said to be of most use when interpreting the more technical provisions of the Constitution, as opposed to the fundamental rights provisions. In *People (DPP) v O'Shea*,[5] O'Higgins CJ outlined the approach to be taken, stressing the primacy of the literal approach:

> The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their

[1] [2006] IESC 14, [2006] 2 IR 556.
[2] [2020] IEHC 313, [2021] 3 IR 283.
[3] *Tomás Heneghan v Minister for Housing, Planning and Local Government* [2023] IESC 7.
[4] Gerard Hogan and others, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) 9.
[5] [1982] IR 384.

> literal meaning. … Plain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself.[6]

This approach has advantages in that it allows the courts to follow the actual language of the text of the Constitution, which guards against a high degree of judicial subjectivity; but it also has disadvantages: first, it means that the court will sometimes fall back on the standard common law principles of statutory interpretation, which are not appropriate in a constitutional context; second, a meaning which might be plain to one judge might not be so plain to another judge; and third, a document designed to be flexible in its interpretation does not always lend itself to a literal reading.[7]

Because of difficulties with the literal method, the court has sometimes embraced a more broadly-based or purposive approach. This approach allows judges to be guided by the text but avoids the excessive literalism of the literal approach by seeking to identify the purpose and the objective of the provision. Costello J explained this in *Attorney General v Paperlink Ltd:*

> [T]he Constitution is a political instrument as well as a legal document and in its interpretation the courts should not place the same significance on differences of language used in two succeeding sub-paragraphs as would, for example, be placed on differently drafted sub-sections of a Finance Act. A purposive, rather than a strictly literal, approach to the interpretation of the sub-paragraphs is appropriate.[8]

The doctrine of harmonious interpretation assumes, as the authors of *Kelly* have put it, 'that the people who enacted the Constitution had a single scale of values and wished those values to permeate their character evenly and without internal discordance.'[9] The idea is that the Constitution should be construed as a whole and that the provisions are related to each other. While this approach has been endorsed and has proved useful in a number of cases,[10] it is sometimes criticised as creating excessive judicial subjectivity and opening the door to judicial policy-

[6] ibid 397.
[7] See Aileen Kavanagh, 'The Quest for Legitimacy in Constitutional Interpretation' (1997) 32(1) Irish Jurist 195.
[8] [1984] ILRM 373.
[9] Hogan and others (n 4) 19.
[10] See *Re Ansbacher (Cayman) Ltd* [2002] 2 IR 517; *O'B v S* [1984] IR 316; *Tormey v Ireland* [1985] IR 289.

making, particularly where the court relies on general principles rather than another provision of the Constitution when applying this approach.[11]

At times, the courts have used extra-constitutional principles in interpreting the text of the Constitution, sometimes referencing 'higher law' or 'natural law'. However, this natural law approach has not been consistent and while in the past, this method played a pivotal role in the development of the fundamental rights provisions in the Constitution,[12] today it has fallen out of favour, mostly due to recognition that this approach is not reliable as the standards and opinions involved are necessarily subjective.[13]

It can sometimes be helpful to the court, in interpreting the Constitution, to have regard to the history of the Constitution or the state of affairs and public opinion at the time of its enactment. However, historical considerations are not always helpful or suitable and can sometimes even lead to confusion, as in the *Sinnott v Minister for Education* case,[14] where it was held that the words 'primary education' must be interpreted by reference to the practice in 1937 even though it was also held that the word 'child' must be given its modern meaning (ie under the age of 18). While this approach has been used from time to time, it is not generally resorted to, and in particular, it has been recognised that it is not an appropriate method when interpreting fundamental rights provisions. The historical approach also raises difficult questions such as what sources can be used to determine historical meaning. As such, it has mostly been seen to have limited practical benefit.

While Casey concluded a number of years ago that '[n]one of the techniques… [could] be said to be the dominant – much less the "correct" approach',[15] recent cases have seemed to prioritise the literal approach, unless the meaning of the provision is not clear. In *Curtin v Dáil Éireann*,[16] Murray CJ, for the Court, set out the approaches to constitutional interpretation that have been taken. Citing *The People (DPP) v O'Shea*,[17] he laid out the majority view in that case that '[p]lain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself'.[18] Murray CJ stated the applicable law as follows:

[11] Hogan and others (n 4) 23.
[12] See Richard Humphreys, 'Constitutional Interpretation' (1993) 15(1) DULJ 59.
[13] See for example *IRM v Minister for Justice* [2018] IESC 14.
[14] [2001] IESC 63, [2001] 2 IR 545.
[15] James Casey, *Constitutional Law in Ireland* (3rd edn, Round Hall 2000) 383.
[16] *Curtin* (n 1).
[17] *O'Shea* (n 5).
[18] *Curtin* (n 1) [73].

> Where words are found to be plain and unambiguous, the courts must apply them in their literal sense. Where the text is silent or the meaning of words is not totally plain, resort may be had to principles, such as the obligation to respect personal rights, derived from other parts of the Constitution.[19]

He allowed for the use of the historical context of constitutional provisions where such information is helpful, but stressed that this approach does not exclude the consideration of provisions in the contemporary context.[20] More recently in Bacik v An Taoiseach, [21] a Divisional High Court (Irvine P, McDonald and Hyland JJ) considered the existing case law on constitutional interpretation, placing particular emphasis on the Supreme Court decision in Curtin (and the precedents cited therein) as a relatively recent binding authority on the appropriate approach to take.[22] The Court summarised the principles by which it considered itself bound as follows:

1. Interpretation of a provision must begin with the words used;
2. It may be necessary to consider the meaning of the Irish version of the provision, which has precedence over the English version if they conflict;
3. Where words are clear and unambiguous, they should be given their literal meaning (e.g. numbers, places or identified people cannot be interpreted in any other way);
4. The provision must be construed in the context of the wider Constitution;
5. Harmonious interpretation of a provision is permitted only when its literal interpretation appears to create a conflict with the literal interpretation of some other constitutional provision;
6. Other factors, such as the historical context, can legitimately be used where there is doubt, ambiguity, inconsistency or silence.[23]

These authorities created an expectation that the literal approach should always be used except in cases of ambiguity, when recourse to one of the other approaches could then be had. Thus, the Court appeared to entrench the literal approach as the primary method and side-lined the harmonious approach, which was only to be used in very limited circumstances. The *Heneghan* case delves into many of the issues regarding interpretative methods, including which approach should be used as a starting point, how the harmonious method should be used, issues around historical sources, and even proposes a new approach to be taken. Before

[19] ibid [76].
[20] ibid [77].
[21] *Bacik* (n 2).
[22] ibid [78].
[23] ibid [80].

examining how these issues are treated in *Heneghan*, it is worth looking in some detail at the background and facts of the case itself, in order to understand how the Court came to the conclusions in the case, and why they are significant for the future of constitutional interpretation in Ireland.[24]

Background to *Heneghan* and Arguments in the Case

The *Heneghan* case centres on the complex method of election for Seanad Éireann. There are 60 members of the Seanad: 11 are nominated by the Taoiseach, six are elected by the Universities panel, and the remaining 43 are selected from a series of panels by an electorate which includes the members of the new lower House, the outgoing upper House, and county councillors.[25] While many aspects of the Seanad are problematic,[26] one curiosity or historical hangover relates to the university constituency. When the Constitution was drafted, the only universities in the State were Dublin University (Trinity College Dublin) and the National University of Ireland (NUI), and Constitution allocated three Seanad seats to each. In 1979, the Seventh Amendment of the Constitution allowed for the addition of further institutions by statute. However, no such legislation was passed, which resulted in the rather strange situation that graduates from Trinity and any of the NUI institutions could

[24] Hickey has already published a very useful analysis of the case but whereas that article concludes that Murray J ultimately went too far – arguably surpassing his role under the separation of powers ('[I]it went beyond the "logical interpretative endpoint" … And they went further in their interpretation than the text of the provision could carry, reshaping it so as to avoid the necessity for that further amendment.' See Tom Hickey, 'How to Interpret the Irish Constitution: *Heneghan v Minister for Housing*' (2024) 6 Irish Supreme Court Review 53, 79), this piece will conclude that the Murray J approach is a welcome clarification to the approach to constitutional interpretation and will provide a workable model for the future.

[25] Local government. See Government guide on Seanad elections <https://assets.gov.ie/130328/7319b9fa-9e70-4874-b58d-004918685654.pdf> accessed 18 June 2025.

[26] In 2013, a referendum to abolish the institution failed. In December 2014, then Taoiseach Enda Kenny set up an independent working group on Seanad reform chaired by former senator Dr Maurice Manning. This group published a comprehensive report in 2015, which the current government has committed to implement. In 2014, then Minister for the Environment Phil Hogan published a general scheme of a Bill which proposed to remedy the situation and provide for a single six-seat constituency and extend the franchise to all qualifying third level institutions. He opened the process to public consultation and expected to publish a final bill before the summer recess of 2014 but this never came about. In February 2018, in his first appearance in the Seanad as Taoiseach, Leo Varadkar announced the establishment of further committee to consider implementation of the 2015 report. The report of the Seanad Reform Implementation Group, chaired by Senator Michael McDowell, was published in December 2018. This report was the 14th such report in 40 years but still no action has been taken. A Private Members Bill was introduced in 2020 but was not supported: Seanad Electoral (University Members) (Amendment) Bill 2020 (Bill 11 of 2020). A further Private Members Bill suffered the same fate: Seanad Bill 2020 (Bill 47 of 2020).

vote in Seanad elections, but those from other universities or third-level institutions could not.[27]

This has long been recognised as unfair[28] but there had not been an appetite to address the issue. Tired of waiting for change, Tomás Heneghan, a graduate of the University of Limerick (not one of the institutions mentioned in the Constitution), applied to be included on the register of electors for the Seanad. On being refused, since he was not a graduate of one of the qualifying institutions, he decided to take a case challenging the constitutionality of this exclusion.

Heneghan, represented by the Free Legal Advice Centre (FLAC), made two main arguments. The first was that once the People voted to insert the Seventh Amendment in 1979 to allow for the franchise in Article 18 to be extended, there was a duty on the State to act on foot of that referendum result and excessive delay or failure on the part of the State to respond to the Seventh Amendment was unconstitutional. The second argument was that the principles of equality and equal participation in the democratic process were infringed since the decision in the referendum of 1979 should have allowed all third-level graduates to vote in Seanad elections, but because the implementing legislation had not been passed a discriminatory situation arose wherein certain third-level graduates were being excluded from the electorate due to the happenstance of where they obtained their degrees. Heneghan also relied on historical evidence to argue that the purpose of the original provision was to give representation to all university graduates, and that the intent of the People in passing the Seventh Amendment, was to extend the franchise to ensure equality of representation amongst third-level graduates.[29]

[27] Even more unusual is the fact that certain Trinity students who have reached the age of 21 but have not yet even graduated may vote (Scholars of Trinity College). Northern Irish graduates of TCD and the NUI institutions can also vote.

[28] This is referenced in the judgment: '[R]eform of the university constituencies had been suggested some time before this: in its important 1967 Report, the Committee on the Constitution (Pr. 9817) had recommended a change to these constituencies, suggesting that the six representatives 'shall be elected from the Irish Universities in a manner prescribed by law without any specific reference to particular Universities (para. 82).' *Heneghan* (n 3) [19] (Murray J).

[29] Initially in the High Court, Heneghan also made arguments concerning the constitutionality of the panels system whereby the other Seanad seats are allocated, (it was argued that s. 44 of the Seanad Electoral (Panel Members) Act 1947 is unconstitutional in that excluding citizens who are not members of the Oireachtas or local government disproportionately interfered with rights under various Articles of the Constitution). But given that this aspect was not retained on appeal to the Supreme Court it is not proposed to deal with it here. Arguments were also made in relation to the European Convention on Human Rights (it was argued that composition of the university seats constitutes a breach of Article 3 of the First Protocol to the European Convention on Human Rights, namely the right to free elections) but again, as these were not concentrated upon by the Courts, they will not be addressed here.

The State counter-argued that first, the extension of the franchise was not the purpose of the 1979 Amendment, since the reason the referendum was mooted in the first place related to discussions on the possible dissolution of the NUI into its constituent colleges and it was thus necessary to amend the Constitution to allow for that process to happen. The franchise issue, it was argued, was a secondary, minor element. Second, the State argued that because the language in the amendment is permissive – the Oireachtas 'may' pass legislation – there can be no 'duty' implied, and thus a choice was given to the Oireachtas as to whether to act or not. On the equality issue, it was argued that the case did not reach the standard of review for breach of the equality guarantee. Regarding the issue of constitutional interpretation, the literal approach was advanced, and it was argued that the intent of the People in ratifying the Seventh Amendment may only be identified from within the four corners of Article 18.4 itself, and external considerations may not be considered. The High Court agreed with the State and dismissed Heneghan's arguments.

The Supreme Court Majority Judgment

The case was granted a "leapfrog" appeal from the High Court to the Supreme Court, and the judgment of the seven-judge Court was delivered on 31 March 2023. The majority judgment was delivered by Murray J, with O'Donnell CJ, Dunne, O'Malley, Baker and Hogan JJ concurring. Hogan J also produced an additional concurring judgment and Charleton J partially dissented.

The 'May' vs 'Shall' Issue

The first issue that Murray J tackled in the majority judgment is the question of how to interpret Article 18.4, the provision at issue in the case. It is worth reproducing it here:

> 4 1° The elected members of Seanad Éireann shall be elected as follows:—
>
> i Three shall be elected by the National University of Ireland.
>
> ii Three shall be elected by the University of Dublin.
>
> iii Forty-three shall be elected from panels of candidates constituted as hereinafter provided.
>
> 2° Provision may be made by law for the election, on a franchise and in the manner to be provided by law, by one or more of the following institutions, namely:

> i the universities mentioned in subsection 1° of this section,
>
> ii any other institutions of higher education in the State,
>
> of so many members of Seanad Éireann as may be fixed by law in substitution for an equal number of the members to be elected pursuant to paragraphs i and ii of the said subsection 1°.
>
> A member or members of Seanad Éireann may be elected under this subsection by institutions grouped together or by a single institution.
>
> 3° Nothing in this Article shall be invoked to prohibit the dissolution by law of a university mentioned in subsection 1° of this section.

Murray J begins by noting that on first glance, the provision appears to be straightforward and that Article 18.4.2° seems to be framed in a 'permissive rather than mandatory'[30] fashion, as asserted by the State. This would mean that the franchise is limited to TCD and NUI and that the Oireachtas has discretion to change this or not. However, he then clarifies that in fact, the provision 'is in no sense as simple as this suggested reading implies.'[31] The traditional principles of interpretation dictate that it is always necessary to start with the words of a provision and consider their literal meaning but as Murray J goes on to demonstrate, 'a close examination of the text shows that the relationship between 18.4.1° and 18.4.2° cannot be understood by reference only to a literal reading of the words in each provision.'[32] This is because there is a contradiction in the language. Murray J explains this as follows:

> Article 18.4.1 (i) and (ii) state that three of the elected members of Seanad Éireann '*shall*' be elected by NUI and that three '*shall*' be elected by TCD. Article 18.4.2 provides that the Oireachtas '*may*' by law change this. Clearly, it cannot *both* be the case that six Senators *must* be elected by TCD and NUI *and* that those same members *can* be elected by other institutions of higher education.[33]

The intention of the provision is stated to be that the first two subsections of Article 18.4 are subject to the enactment of legislation in accordance with Article 18.4.2°, but this requires words to be read into those provisions for them to make sense. Because of this, he says, Article 18.4.1° is not useful in resolving the issues of

[30] *Heneghan* (n 3) [38].
[31] ibid [39].
[32] ibid [41].
[33] ibid [44].

construction since it 'prescribes *pro tempore* the composition of the university panels unless and until the Oireachtas legislates.'[34] Here, Murray J is setting up the approach to interpretation elaborated on later in the judgment by making it clear that a literal approach is not helpful in this case.

In relation to the question of whether the word 'may' confers a power or a duty, Murray J points out that at least in one scenario, it confers a duty – if the NUI had been dissolved (which was the original reason for proposing the amendment), then the Oireachtas would have had to legislate; there would have been no choice. But Article 18 did not provide for this situation and if it occurred, Article 18.4.1° would have been 'inoperable' as it stood. As Murray J comments, 'the failure to make provision for what would happen in that event (which is clearly envisaged by Article 18.4.3°) is one of the many surprising features of the provision.'[35] In this analysis, Murray J demonstrates that since the text of Article 18.4.1° would make no sense on the dissolution of the NUI, we should not expect it to make sense on a potential extension of the franchise either.

This conclusion seems to devastate the State's strongest argument in the case. The submission, which was accepted in the High Court, was that no duty was conferred on the Oireachtas to legislate since the wording of Article 18 uses the word 'may' instead of 'shall' and so, based on a literal interpretation, it was intended to be discretionary. However, this argument is expertly deconstructed in this passage of the judgment by the logical reasoning that, in order to ensure there would still be 49 members elected to the Seanad following the dissolution of the NUI, the Oireachtas would have been under a duty to legislate and so 'may' has to mean 'must' in these circumstances. Given that 'may' has become obligatory in that circumstance, it is also possible to read it as conferring a duty in relation to extension of the franchise.

Both the majority decision and the concurring judgment of Hogan J make it quite clear that the various problems of construction all relate to the very poor drafting of the Amendment and the fact that these scenarios were not adequately provided for in the wording. Because the wording is unhelpful, this means that in interpreting the provision, a more refined approach is required.

Constitutional Interpretation

Murray J then moves on to consider the principles of interpretation more broadly, and states that the duty of the Court in interpreting the Constitution is to 'strive to achieve an interpretation that resolves as many of these interpretative issues as

[34] ibid [45].
[35] ibid [47].

possible in a manner that is coherent, and workable while at the same time giving effect to the intent of the People in adopting the provision.'[36] He comes back to the idea that, at first glance, the issues in this case can be answered easily by reference to the text of the provisions. Instead, he explains that they 'cannot be divorced from the wholly ambiguous context in which they appear.'[37] This is crucial since it is the context that gives rise to the final decision in the case. First, Murray J addresses the assumed idea that a literal interpretation must always be given to a provision that appears to be clear on its face, and he concludes instead that such provisions must always be considered in light of the Constitution as a whole, since:

> a provision of the Constitution that, although clear on its face, is in conflict with another such provision cannot be said to have a '*plain meaning*' and it will be necessary to at least consider whether – having regard to their respective objects – they can be reconciled. An Article that although seemingly unambiguous in its terms but which conflicts with fundamental principles underlying the Constitution, on closer analysis, bear a meaning – and require a construction – that is more consistent with those underpinning principles than that yielded by the constraints of narrow literalism.[38]

Crucially, he then states that 'no provision can be understood without some reference to its background and purpose'.[39] This is an important point in the judgment where Murray J starts to diverge subtly from the approach previously supported by most of the authorities on constitutional interpretation. He also quotes with approval a statement from Casey's *Constitutional Law in Ireland* that sometimes it is only when a provision is read 'in the wider context may an ambiguity emerge.'[40] He stresses that it is not only where some tension exists between the text of specific provisions, and an ambiguity in one, that the interpretative approach can be taken.[41] It is enough for two provisions to 'sit uneasily together'.[42] This is somewhat of a change in direction in how the courts have previously spoken about the interpretation of constitutional provisions, where the literal approach is almost always taken as the dominant approach.[43]

[36] ibid [58].
[37] ibid.
[38] ibid [61].
[39] ibid.
[40] Casey (n 15) 377.
[41] *Heneghan* (n 3) [71].
[42] ibid [76]
[43] See for example, *O'Shea* (n 5); *Curtin* (n 1); *Bacik* (n 2).

A survey of the case law is conducted, with particular attention given to *Curtin*, since this was heavily relied upon by the State in its argument that the Articles had to be read in their literal sense. Murray J concludes that even though *Curtin* appears to promote the literal approach, the conclusion to the case actually demonstrates that constitutional principles are necessary for constitutional interpretation:

> *Curtin* thus, if anything, shows precisely how – and why – there will be circumstances in which a seemingly clear constitutional provision must be supplemented by reference to broader but clearly ascertainable constitutional principles, and how these may combine to produce an interpretation of a provision that is radically different from that suggested by a clinical analysis of only the bare text.[44]

The State also relied on the principles of constitutional interpretation outlined in the *Bacik* case[45] to support its position and Murray J takes the opportunity to qualify the so-called *Bacik*-principles, which had seemed to row back on the doctrine of harmonious interpretation, first articulated by Henchy J in *Dillane v Ireland*[46] and developed in Henchy J's well-known dissent in *The People v O'Shea*.[47] Murray J takes issue with paras (c) and (e) of those principles which, he says, 'are liable to mislead' if read in isolation:

> (c) Where the words used are clear and unambiguous, they are to be construed in their literal sense. Thus, for example, words denoting numbers, places or identified persons admit of no debate.
>
> (e) If a literal interpretation of one provision might bring it into conflict with the literal meaning of another provision, then it is legitimate to resort to the harmonious approach with a view to interpreting both provisions in a way which avoids inconsistency. … it seems to us that the harmonious approach will only be taken in cases of apparent inconsistency. It will not be necessary to go beyond a literal interpretation of a constitutional provision unless such an interpretation gives rise to an apparent conflict with some other provision of the Constitution.

Murray J clarifies that the statement in para (c), that words should be construed literally where their meaning is clear, is only true 'once it is appreciated that seemingly clear and unambiguous language may not actually be clear and

[44] *Heneghan* (n 3) [78].
[45] *Bacik* (n 2).
[46] *Dillane v Ireland* [1980] ILRM 167.
[47] *O'Shea* (n 5).

unambiguous at all once understood in the light of other provisions of the Constitution, the general principles that underlie the document … and the overall context and purpose of the provision'.[48] He also notes that the statement in (e), that resort may be had to the harmonious approach where there is a conflict between the literal interpretation of two provisions, is not the only instance where this approach can be used. And thus, as Hickey colourfully notes, Murray J proceeds to put 'a Henchy-based rinse through the *Bacik* principles'.[49] Emphasising the importance of context, he declares:

> [T]here is no case, and no provision – no matter how clear it may be – in which it is other than appropriate to understand and have regard to the overall context in which that provision was adopted. That context will often be indivisible from the purpose of the provision.[50]

Going even further he then sets out an approach that would appear to adopt a version of the harmonious approach as the primary approach to be used:

> The Constitution, as the basic law of the State, is animated by a number of fundamental principles and is intended to achieve its various purposes through a sequence of provisions intended to be read as one, and designed to function collectively. That understanding dictates the proper approach to the interpretation of any individual part of the instrument.[51]

Thus, in one of the key passages in the judgment he executes a reversal of the *Bacik* position and highlights that context will almost always be necessary in interpreting constitutional provisions and such provisions will almost always have to be read in light of the document as a whole:

> [T]he exercise of interpreting that language involves not merely deducing the meaning of the words appearing in the provision in question, but also reconciling the text of the Article with the document in its entirety while at the same time ensuring that both are analysed in the light of their underlying purpose. The predominant importance of that purpose, and the fundamental principles that inform it, means that in undertaking the exercise of constitutional interpretation the courts must incline more to flexibility in subordinating the strictly literal interpretation of the text in order to attain a construction that is both internally harmonious, and that achieves a clearly

[48] *Heneghan* (n 3) [83].
[49] Hickey (n 24) 67.
[50] *Heneghan* (n 3) [84].
[51] ibid [85].

> ascertainable purpose, than might be the case when conducting the exercise of interpreting ordinary legislation.[52]

This is a subtle but significant change in approach to the interpretation of the Constitution. While Murray J frames his approach as a clarification of the older authorities rather than a change, the common understanding of those more recent authorities was that the literal approach was always to be preferred unless some conflict or inconsistency was immediately apparent. In fact, Henchy J's famous judgment in *O'Shea* on the harmonious approach seemed to have been sidelined by the likes of *Curtin* and *Bacik* discussed above. However, Murray J effects a re-incarnation of the *O'Shea* doctrine by declaring that Henchy J's analysis cannot now be seriously questioned 'as *the* authoritative explanation of how a court should view *any* issue of interpretation presented by *any* Article of the Constitution.'[53]

The new approach promoted by Murray J and based on Henchy J's original doctrine, seems to discard the narrow literalist approach, given that a harmonious reading will almost always be necessary, since, to repeat a phrase cited above, 'no provision can be understood without some reference to its background and purpose'.[54] Furthermore, it appears to merge what we might have called a purposive approach – which looks at the reason why a provision might have been included in the first place and what it aimed to achieve – and the harmonious approach – which considers provisions of the Constitution in light of the document as a whole and the principles which underpin it. This is a sophisticated yet practically useful approach in that it allows the Court to avoid the excessive literalism that previous authorities may have demanded in favour of a sensible method that considers the words used but also looks at the purpose as well as the wider context. This latter approach also examines what those words might mean in light of the fundamental principles which inform the document. The only danger here is that it may not be entirely clear what those fundamental principles are and so this could lead to a level of judicial subjectivity in future cases in interpreting these.[55] The question of what kind of extrinsic evidence is permissible is then addressed.

Extrinsic Evidence and Expert Opinion

Next, Murray J considers the issue of how to construe the 'context', 'purpose' or 'historical purpose' of a text. Sometimes, he notes, the text will completely explain the purpose but other times some contextual material may be useful to illuminate

[52] ibid .
[53] ibid [70], emphasis in original.
[54] ibid [61].
[55] For more see below.

the context or purpose. However, he emphasised that the type of contextual material that can be relied on is limited. According to Murray J, this may include pre-existing common law or established pre-independence constitutional practice, or reliable accounts in authoritative legal or historical texts. Material that is considered less useful includes material preparatory to the drafting of the Constitution and he cites some cases where this material was used. However, he warns that this material may not always be useful, since the general public may not have been aware of it, and so in that instance, it is of limited assistance when determining the purpose according to those who would have voted for the text.

Murray J then makes an important distinction between the process of interpreting the text of the Constitution and of amendments to the Constitution. He points out that the People did not have any insight into the drafting process of the Constitution and so we cannot assume they would have been aware of any 'mooted interpretations or effects attributed to it'. This is why, he explains, we often see reference instead to the intent of the framers and this, he decides, 'does not often significantly advance the interpretative process.'[56] However, when it comes to amendments, he notes that contemporary discussion may provide 'a useful guide to what [the People] understood they were adopting.'[57] So for that reason, Murray J cannot see why, in a case where an amendment text is unclear, reliable evidence as to what the Oireachtas 'believed they were proposing, or what the People might reasonably have understood they were adopting, cannot be taken into account'.[58] But he urges caution here where evidence of purpose is deployed to 'expand or reduce the literal meaning of an Article where the text is otherwise clear.'[59]

On the evidence presented in this particular case, Murray J decides that there was no need for expert evidence on the purpose or meaning of a constitutional provision – this was particularly so given that the evidence of both sides was contradictory. He emphasises that this sort of material should be clear enough without the need for experts to disagree.[60] Having made that point, Murray J then proceeds to decide the case on the basis of evidence which had been presented by Heneghan[61] – the explanatory statement which had been included on the ballot paper and which, according to the Referendum (Amendment) Act 1979 ("the 1979 Act"), was required

[56] *Heneghan* (n 3) [88].
[57] ibid [89].
[58] ibid.
[59] ibid [90].
[60] ibid [98].
[61] This was referred to in the expert evidence report (Dr Laura Cahillane) for the applicant in the High Court.

to be displayed by the presiding officer in polling stations and to be read out to any incapacitated voter who might need such assistance. This statement was as follows:

> THE SEVENTH AMENDMENT OF THE CONSTITUTION (ELECTION OF MEMBERS OF SEANAD ÉIREANN BY INSTITUTIONS OF HIGHER EDUCATION) BILL, 1979, proposes the election by universities and other institutions of higher education specified by law of such number of members of Seanad Éireann, not exceeding 6, as may be specified by law. Those so elected would be in substitution for an equal number of the members elected at present (3 each) by the National University of Ireland and the University of Dublin. The Bill also proposes that nothing in Article 18 of the Constitution shall prohibit the dissolution by law of those Universities.

Murray J also looks at the title of the 1979 Act – 'Election of Members of Seanad Éireann by Institutions of Higher Education' which, he notes, mirrors the title of the Referendum Bill itself, which appeared on the ballot papers, together with the words 'Seanad Representation'. All of this 'suggests without qualification an intention to broaden the franchise beyond the universities [already referred to].'[62] He further notes that the 1979 Act does 'not relate the proposal in any way to the dissolution of NUI. What is proposed is not conditional, but seemingly definite'.[63] And on any reasonable reading, he says this 'promises a change'.[64]

In terms of construing evidence of purpose or context, this, according to Murray J, is 'as reliable an account of what the People might reasonably have believed they were voting for, as one could conceive'[65] and it also reflects the understanding of the Oireachtas as to what was proposed. Indeed, the judges were in a unique position to understand the context of this referendum given that for many, it would have been the first referendum in which they were eligible to vote. Murray J puts the issue of purpose and context beyond doubt in the following passage:

> That solemn understanding as communicated by the text of the provision is one of proposed extension of the franchise, not of a legislative *carte blanche* to maintain, or not to maintain, the then status quo. It affords a strong indication that what was intended when the Seventh Amendment was adopted, was that the Oireachtas would proceed to legislate so as to enable

[62] *Heneghan* (n 3) [104].
[63] ibid [105].
[64] ibid [105].
[65] ibid [107].

> graduates of institutions of higher education *other than* TCD and NUI to participate in the Seanad university panel. It is only a strained interpretation of the statement appended to s. 1 of this Act that would point to a belief that Article 18.4.2 was purely permissive. Nor can it be easily squared with an interpretation by which the Oireachtas could legislate so as to preserve the then *status quo*.[66] [emphasis added]

Finally, on the evidential point, he emphasises that the Court is entitled to have regard to evidence of this kind in order to determine context and purpose, particularly where there are two possible constructions of an Article adopted following an amendment.

The Equality Issue

The approach of the Court on the equality argument is not surprising and is along the lines of the restricted reading the Court has given to Article 40.1 over the years.[67] While Murray J accepts that in the earlier part of the judgment, he had outlined that fundamental principles can be taken into account when interpreting provisions of the Constitution, and while there is plenty of authority for the concept of 'equality in the electoral process', he stresses that 'principles of this kind will only be of assistance in elucidating the meaning of a constitutional Article where their application can be accommodated within the text and intendment of the provision in question.'[68] The main hurdle here, it seems, is that the Seanad, as an institution, was not designed to be representative of the electorate as a whole and does not mandate a system of universal suffrage. Murray J refers to the fact that many second houses in bicameral legislatures follow this pattern of having a limited franchise and considers the statement made by the respondents that differences of franchise and representation are '*woven into the fibre of the Seanad itself*'.[69] Acceding to the applicant's argument here, he says, would mean 'the courts would be drawn into a radical redesign of the Seanad' and would involve the court in what are 'essentially political judgements'.[70] Murray J also points out that, in light of the *Donnelly v Minister for Social Protection* decision,[71] to succeed, an applicant would have to advance a case 'to establish that the exclusion of their institution in the light of the

[66] ibid [108]. (Emphasis added)
[67] On the Court's poor record on equality, see generally Oran Doyle, *Constitutional Equality Law* (Round Hall 2004).
[68] *Heneghan* (n 3) [114].
[69] ibid [118].
[70] ibid [119].
[71] [2022] IESC 31, [2022] 2 ILRM 185.

inclusion of others was based on arbitrary, capricious or irrational considerations' and this, he emphasises, would be an 'extraordinarily heavy burden.'[72]

One issue which is not addressed in the judgment is the question of equality within a particular class. The approach of looking at equality in terms of a more restricted group has been used by the Court in the past to narrow the scope of Article 40.1,[73] but arguably here it could be used to counter the argument that the Seanad is not designed to be generally representative. In other words, it could be argued that within the particular franchise mentioned in the Constitution – the University franchise – there should be equality within this particular class of persons. However, given the trend of Supreme Court decisions on the equality issue, it is unlikely that such an argument would have been entertained.[74]

The Decision

In Part IV of the judgment, Murray J starts to tie all the threads together. First, he clarifies that the word 'may' is not always permissive and depending on the context, it can be used to describe a mandatory obligation. He goes even further to say that sometimes even when it is permissive, circumstances can arise in which, in a particular situation, a power becomes a duty.[75] He concludes that Article 18.4.2° is one of those examples where the word 'may' should be 'construed as imposing a duty rather than as providing for a discretionary power.'[76] He explains that the consequence of the amendment, the construction of which was already highly criticised throughout the judgment, rendered Article 18.4 as a whole a 'uniquely difficult and opaque provision of the Constitution' and far from being capable of a literal interpretation, it requires 'implication, interpolation and reconstruction to make it work.'[77]

On the issue of interpretation, he stresses that the primary obligation of the Court in 'seeking to construe any such provision is to afford it a meaning that reflects the intention of the People as evident by the language they have adopted having regard to the reason they adopted it', and here he clarifies that 'context is key.'[78] He also

[72] *Heneghan* (n 3) [126].
[73] See for example Casey (n 5) 468 et seq. See also *People (DPP) v Quilligan [1993] 2 IR 305; The State (Hartley) v Governor of Mountjoy Prison* (Supreme Court, 21 December 1967).
[74] Although, for a change in dynamic on this, see O'Meara v The Minister for Social *Protection* [2024] IESC 1.
[75] *Heneghan* (n 3) [130].
[76] ibid [133].
[77] ibid [134].
[78] ibid [137].

makes an important statement that in cases where an amendment to the Constitution requires legislative intervention to make it effective (rather than being self-executing) the Court should resolve any ambiguity in the provision 'in favour of an obligation to bring about that change, not to allow it to be postponed indefinitely.'[79]

As a result of the contextual, historical evidence – in particular the explanatory statement referred to earlier – Murray J finds that Article 18.4.2° was 'intended to do more than to vest in the Oireachtas a temporally open-ended and substantively unbounded discretion whether to extend the university constituencies.' He further maintains that the amendment was presented to the People as one that would be followed up by legislation, stating very logically that 'it communicated an intention to change, not to amend the Constitution so that everything could stay as it was.'[80] In a further important clarifying statement, he explains that the context of this provision being an amendment is fundamental to this finding since, if this text had been in the Constitution as originally enacted, it would have had to have been 'analogised' to Article 19. But instead, it must be judged as an amendment introduced 'to enable a particular purpose'[81] and it follows that this involved an 'obligation to legislate … through an extension of the franchise.'[82]

In a passage that seems to criticise the High Court's conclusion – that since the People did not replace Article 18.4.1° as part of the amendment, its continued operation had effectively been ratified[83] – Murray J points out that the People cannot themselves propose an amendment to the Constitution, nor can they change the wording so proposed, rather, they can only accept or reject it. Therefore, when the Oireachtas tells the People what the proposal means and what is intended to follow, the Court should hold the Oireachtas to that construction.[84]

His conclusion, therefore, is that Article 18.4.2° required the Oireachtas to legislate to extend the franchise as this is the 'only interpretation of the provision which implements the purpose of the Amendment as represented to the People while at the same time accommodating the constitutional text'[85] and that it is a matter for the Oireachtas to determine the allocation of seats accordingly.

[79] ibid [138].
[80] ibid [140].
[81] ibid [141].
[82] ibid [142].
[83] [2021] IEHC 716 [152].
[84] *Heneghan* (n 3) [154].
[85] ibid [156].

Perhaps to the surprise of everyone that day, the judgment of the Court resulted in a declaration of unconstitutionality and a requirement that the situation be remedied by extension of the franchise, as envisaged by the Seventh Amendment.[86] But, as courts have done in other judgments in recent years, this was suspended in order to allow for arrangements to be put in place to remedy the situation.[87] It was also made clear that the constitutionality of the existing Seanad, or any iteration since 1979, was beyond doubt and could not be questioned.

Hogan J's Concurring Judgment

The main question addressed in Hogan J's judgment is whether Article 18.4.2° is purely permissive in character. He first compares the wording of the original Article, which he describes as 'clear, precise, parsimonious and elegant' with the Amendment, which is labelled 'hapless, incoherent and confused'.[88] With his customary linguistic flair, he depicts the Amendment as being the legal equivalent of 'the attempted cleaning of an old master by a careless restoration artist who then proceeded to leave an ink-stain on a Rembrandt.'[89] He criticises the 'complete discordance' between the wording of Article 18.4.1° on the one hand, which provides 'in mandatory terms' that three Senators shall be elected by the institutions mentioned, and the consequences of the Amendment on the other hand, given that it purports to change this arrangement but does not specify what should happen to this express wording if such a change takes place. In a similar way to the majority judgment, he delves further into the contradictions in the wording of the Amendment and the fact that it does not sit comfortably with the existing wording – or at least the fact that very little thought seems to have been put into the consequences of the Amendment for the existing text on either the basis of the dissolution of the NUI or the addition of other institutions to the franchise.

He then turns to what he terms the 'critical question' of whether the phrase 'provision *may* be made by law' is purely permissive. Having surveyed the authorities on statutory interpretation and provided examples of clearly permissive and self-executing provisions, he comes to the conclusion that there must be a

[86] This was sought by Heneghan but lesser remedies were also sought in the event that it may have been felt that a declaration of unconstitutionality was a step too far.
[87] The decision suspended the effect of the declaration until 31 July 2023 initially, inviting submissions from the parties as to the precise length of time that that suspension would apply. Then four months later, just before the expiration of that initial suspension, O'Donnell CJ delivered a judgment on behalf of a Court comprising the same seven judges in which he suspended the declaration until 31 May 2025: [2023] IESC 7.
[88] *Heneghan* (n 3) [4] (Hogan J).
[89] ibid.

presumption that 'every constitutional amendment was intended to be effective and to produce legal or political or symbolic consequences.'[90] He refers here to the decision in *Re JJ*, where it was held that the People must have intended to enhance the protection of children's rights by amending Article 42A, notwithstanding the similarity in wording to the old Article 42.5.[91] Hogan J says a similar approach must be taken here and just as Murray J did, points to the fact that 'all the *official* documentation attending the passage and enactment of the Amendment conveyed the unambiguous message to the electorate that the University franchise would in fact be extended to other institutions of higher education.'[92]

Just as in the majority judgment, Hogan J attempts to clarify when contextual or extrinsic material can be used in constitutional interpretation by specifying that it can be employed to ascertain the context where the wording of a subsequent constitutional amendment is unclear. However, he warns that the subjective beliefs or statements of members of the Oireachtas are irrelevant for this purpose. In any case, Hogan J observes that to argue that the Amendment did no more than permit the Oireachtas to extend or vary the franchise at some future point seems 'implausible', and so Article 18.4.2 must be interpreted as requiring the Oireachtas to revise the University constituencies.[93]

Charleton J's Dissenting Judgment

Charleton J describes his dissenting judgment as a 'partial' dissent, since his main objection relates to the remedy proposed by the majority. However, he also takes issue with the method of constitutional interpretation adopted by the majority. He describes the Amendment as a 'serious defect in the operation of our constitutional architecture' and the 'complete failure' of the Government and Oireachtas to take action is termed a 'negation of fundamental democracy'.[94] He also agrees with his colleagues that most electors 'would have expected a change on a positive vote'.[95] However, Charleton J feels that the appropriate response to this is a declaration that a basic democratic obligation has been ignored. Ultimately, Charleton J disagrees that 'may' can mean 'must' and that any contextual material can be taken into account in interpreting the Constitution. On the basis of a textual reading, and

[90] ibid [31].
[91] *Re JJ* [2021] IESC 1.
[92] *Heneghan* (n 3) [33] (Hogan J).
[93] ibid [36] - [37].
[94] *Heneghan* (n 3) [1] (Charleton J).
[95] ibid [14].

taking the Irish language version into account, he cannot accede to the arguments proffered by Heneghan or indeed those decided by the majority:

> This would be destructive to the integrity of the text of the Constitution and would change the existing order and careful selection of particular words into a random stew of meanings where what something was to declare becomes dependent not on an analysis of the entire body of the Constitution but on side notes as to what the people might have meant in passing a proposal.[96]

However, Charleton J agrees that there was an obligation on the part of the Government to respond to the vote of the People. A result in a referendum, he says, cannot be ignored: '[d]isregarding the result of a referendum undermines the fundamental workings of the Constitution.'[97] He notes that it is incumbent on the Government to take action and that a declaratory order should be made to that effect. He disagrees with the 'mandatory' order made by the majority since, he feels, it 'risks undermining the integrity of the precisely constructed text of the Constitution and the limits set in the separation of powers within.'[98]

Potential Impact of the Case

While many may have been surprised or even sceptical of the result in the case, Murray J's judgment leaves little room for dispute. His careful, methodical journey through the issues is both logical and satisfying, and he also raises some interesting questions for the future of constitutional interpretation. It is submitted that this judgment impacts the landscape of constitutional interpretation in two major ways.

The New Contextual Harmonious Approach

In *Kelly*: *The Irish Constitution*, it is argued that the doctrine of harmonious interpretation should 'in logic, probably be the first canon of interpretation'.[99] The majority in this case clearly agree and Murray J has formulated a more developed version of Henchy J's doctrine by combining a purposive approach and the idea of context alongside the aim of reading the Constitution in harmony with its overall values and the principles that underlie it. This contextual harmonious approach may be criticised by those who fear it will open the door to excessive judicial creativity in constitutional interpretation. However, taking refuge in the 'four

[96] ibid [19].
[97] ibid [34].
[98] ibid [36].
[99] Hogan and others (n 4) 19.

corners' approach[100] risks minimising the complexity of constitutional provisions, which cannot always be accurately interpreted by simply concentrating on the individual words without having regard to the document as a whole or the context within which it was created. Indeed, it has been accepted by the courts on many occasions that the Constitution cannot be treated like an ordinary statute for interpretative purposes. For this reason, Murray J's intervention on this issue is to be welcomed as providing a more suitable approach to considering the basic law of the State, which allows for flexibility but is a more careful version of its predecessor, which avoids some of its major pitfalls.

Murray J acknowledges in the judgment that there have been criticisms of Henchy J's harmonious approach in the past,[101] and he appears to attempt to counter this in his revitalised version of the doctrine. One of these criticisms was by Doyle, who argued that: 'An approach that minimises the differences between different constitutional provisions may overlook the fact that different provisions might quite legitimately be trying to achieve different things.'[102] This is where the 'contextual' part of Murray J's approach comes into play to answer that criticism. Further critiquing Henchy J's doctrine in *O'Shea*, Doyle quite correctly contends that 'it is not permissible to over-write one clear provision in favour of an amorphous spirit that has no particular textual foundation.'[103] But again Murray J's doctrine avoids this issue by linking the approach more directly to the text: 'the text of any given Article both marks the proper starting point for, and delineates the finishing line of, the process of construction.'[104] In fact, Doyle has suggested that the best approach to constitutional interpretation should lie somewhere between the majority and minority approaches in *O'Shea* given that a 'narrowly literal approach ought never be the end-point' but also that 'determinative weight must be attached to what (all) the provisions actually say'.[105] This, it seems, is exactly what Murray J is proposing with his new approach, which even goes a little further in that it begins with the text, and then looks at it in its overall context, considering the purpose of the provision, as well as the fundamental principles linked to the text and permeating the Constitution as a whole. This approach was crucial to the outcome of the case since,

[100] *State (Ryan) v Lennon* [1935] IR 170, 179 (Meredith J).
[101] *Heneghan* (n 3) [70]. Murray J references here *Kelly* (n 4) para 1.1.36; Oran Doyle, 'Interpretation: the unrealisable ideal of judicial constraint' in Carolan (ed) *Judicial Power in Ireland* (Institute of Public Administration 2018) 110, 119-120; Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2019) para 4-11.
[102] Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008) 459.
[103] ibid 461.
[104] *Heneghan* (n 3) [70] (Murray J).
[105] Doyle (n 102) 459.

if just relying on the text, one could argue the referendum was simply about giving the Oireachtas permission to make changes at some unspecified point in the future. It was the context that made it clear that, in actuality, this referendum had been presented as something which would bring about change and therefore, the People understood that this change would occur. As Murray J reasoned: 'What is proposed is not conditional, but seemingly definite … [this] promises a change'.[106]

As Casey and Doyle have noted, Murray J's approach is in line with many recent decisions by the Supreme Court which have focused on the 'broader textual context' in constitutional cases, such as *Gorry v Minister for Justice,*[107] *The People (DPP) v JC*,[108] and *Burke v Minister for Education*.[109] The authors explain that these cases:

> … while not formally presented in terms of the appropriate method for constitutional interpretation, can be best understood as motivated by a similar concern to interpret constitutional provisions in the broader constitutional context, a variant of Henchy J's harmonious approach.[110]

As with all approaches to interpretation however, there are dangers, and the main risk apparent here is one the original Henchy-doctrine also fell foul of – that is, the idea of using 'fundamental constitutional principles'[111] without any elaboration on what those specific principles are or how they can be used. Murray J's version is arguably less problematic in this regard since he specifically references 'fundamental principles that can be located in or clearly related to the text of the Constitution',[112] and so again, there is the textual link which is missing from the earlier doctrine. He is also at pains to point out that 'principles of this kind will only be of assistance in elucidating the meaning of a constitutional Article where their application can be accommodated within the text and intendment of the provision in question.'[113] Murray J also gives some examples of such principles, including fair procedures, judicial independence, and separation of powers. He also mentions the principle of equality as being relevant to interpretation but determined that it

[106] *Heneghan* (n 3) [105] (Murray J).
[107] [2020] IESC 55.
[108] [2015] IESC 50, [2017] 3 IR 417.
[109] [2022] IESC 1, [2022] 1 ILRM 73.
[110] Conor Casey and Oran Doyle, 'Higher Law or Great Charter of the Irish People? The Constitution under the New Supreme Court' (2024) 44(1) DULJ 1, 48-50.
[111] *Heneghan* (n 3) [70] (Murray J).
[112] ibid [114]
[113] ibid.

could not be used in this case.[114] Casey and Doyle have also commented that: 'Murray J's qualified endorsement of the harmonious approach is actually quite a significant restriction of Henchy J's position [and is] … much more closely tethered to the constitutional text than Henchy J may have envisaged.'[115] It remains to be seen whether this is enough to anchor the doctrine and avoid claims of excessive judicial subjectivity, but it would certainly seem to be less likely to 'open the door to judicial policy-making'.[116]

It will be interesting to see whether the reference to fundamental principles will be linked to the idea of constitutional identity, first alluded to by Hogan J in *Costello v Government of Ireland*.[117] Hogan J also mentioned the concept in his judgment *in Heneghan* when making the point that 'the will of the People' was 'perhaps the most fundamental and core feature of our constitutional identity as a State'[118] but he did not elaborate on this. He has also mentioned the concept in subsequent cases[119] and it was referenced by the Court in the recent *Re Article 26* judgment[120] but has not been developed further as of yet.[121]

'The People'

The second notable phenomenon in the judgment is the reliance on the intention or understanding of 'the People'. Both the majority and Hogan J judgments place reliance on this idea and Murray J allows for the acceptance of what is referred to as extrinsic evidence, in order to determine the understanding of the People:

> Where the text inserted by an Amendment is unclear or gives rise to a doubt in the sense, or for any of the reasons, to which I have referred earlier, I can see no reason why reliable evidence as to what the Houses of the Oireachtas as institutions (as opposed to the stated positions of individual members)

[114] See limited discussion of the equality issue above. It is beyond the scope of this article to analyse whether the decision made on the equality point can be squared with the doctrine of interpretation set out.
[115] Casey and Doyle (n 110) 50.
[116] This was the criticism made of the Henchy Doctrine in Hogan and others, *Kelly: The Irish Constitution* (n 4) 23.
[117] [2022] IESC 44.
[118] *Heneghan* (n 3) [38] (Hogan J).
[119] *Corcoran v Commission of An Garda Síochána* [2023] IESC 15 [63] (Hogan J); *Adoption Authority of Ireland v C* [2023] IESC 6 [28] (Hogan J).
[120] [2023] IESC 34 [11].
[121] For more on constitutional identity, see Seán Rainford, 'Costello v Ireland and an Irish Constitutional Identity' (2023) 7 IJSJ 70; Ruairi O'Neill, 'National Constitutional Identity as a Tool for Protecting the Autonomy of the EU Legal Order: *Costello v. The Government of Ireland*' (2023) 60 CMLR 1453; Oran Doyle, 'Constitutional Identity, Legal Autonomy, and Sovereignty: *Costello v Government of Ireland* [2022] IESC 44' (2023) 19 Common Market Law Review 715.

> believed they were proposing, or what the People might reasonably have understood they were adopting, cannot be taken into account in the construction of the provision.[122]

Indeed, Murray J concludes that the People's understanding is the crucial issue in constitutional interpretation: 'the primary obligation of the Court in seeking to construe any such provision is to afford it a meaning that reflects the intention of the People'.[123] This is what enables him to consider the context and purpose of the amendment in interpreting its text. Hogan J's judgment also places great emphasis on the People:

> The referendum provisions give practical effect to the statement of popular sovereignty in Article 6, namely, that it is right of the People "in final appeal" to decide all questions of national policy. In this respect popular sovereignty is the ultimate *Grundnorm* of the Irish constitutional system.[124]

Hogan J spends time discussing issues around the power of the People in amending the Constitution and given that, as noted earlier, he decides there is a presumption that every amendment must have been intended to effect change, he examines the evidence to determine what the People would most likely have intended. Coming to the same conclusion as the majority he comments as follows:

> Any other conclusion would effectively mean that the sovereign will of the People as democratically expressed through the referendum process in the manner envisaged by Article 46 and Article 47 – perhaps the most fundamental and core feature of our constitutional identity as a State – would be thwarted by an obvious failure of legislative inertia.[125]

This is a very interesting development, particularly as the People's intention is not commonly used in Irish law as an aid to interpretation. But while some may fear such a device may allow for excessive judicial creativity in interpreting provisions in the future, it is likely to be used only in a very limited way. The majority judgment, in particular, seems to assume such an approach will mainly only be used to interpret constitutional amendments, since the relevant contextual material providing evidence of the People's understanding of the original text will not usually be

[122] *Heneghan* (n 3) [89] (Murray J).
[123] ibid [137].
[124] *Heneghan* (n 3) [31] (Hogan J).
[125] ibid [38].

available. Nonetheless, it will be worth observing whether this focus on the People's understanding of constitutional amendments will develop further in the future.

Future Questions

There are a number of other interesting points that emerge from the judgment that are worth considering. One point that stands out is that criticism of the wording of the constitutional amendment appears in all three judgments,[126] and a clear point is made by the Court that the drafting of constitutional amendments needs to be a very careful and considered process. The provisions will not be considered in isolation once they are approved, and so it is necessary to think about what effect a proposed amendment may have, in the context of the overall scheme of the Constitution. This amendment appears to have been formulated without sufficient deliberation or careful consideration of its implications for the existing text if the proposals were carried out. This is not good enough. Given that the People have only a limited choice to either accept or reject a proposal – something noted in the judgment – the wording of a constitutional amendment needs to both accurately represent the proposal and to sit well with the existing text. It is a lesson and a warning for those who draft such amendments and, given the problems which have arisen both in the past and in more recent times with amendments to the Constitution, one which requires careful reflection.[127]

The issue of allowing historical contextual material to be used in determining evidence of the People's understanding or intention, mentioned above, is a remarkable one. It will be interesting to see if questions arise in the future over what sort of material is and is not permitted in practice and whether this material can only be used in the context of amendments, as advised by Murray J, or whether it could be argued that similar arguments could be made in looking at the original text. In justifying the distinction he makes here, Murray J points out that because the People passed the Constitution as one document, it is difficult to determine what their understanding of individual elements may have been.[128] This is a fair point, but if there exists 'reliable evidence as to what the Houses of the Oireachtas … believed

[126] *Heneghan* (n 3) [45], [55] and [57] (Murray J).
[127] Past problems include issues with the Irish language text, including when the draft marriage-equality text in Irish neglected to mention marriage between a man and a woman. See Harry McGee, 'Experts say constitutional changes should look at subtlety of Irish translation' (*Irish Times*, 21 February 2015) <https://www.irishtimes.com/news/politics/experts-say-constitutional-changes-should-look-at-subtlety-of-irish-translation-1.2111749> accessed 19 June 2025. A more recent example is the failed referendums in March 2024 when there were many issues surrounding the wording including questions around the implications of the wording and exact meanings.
[128] *Heneghan* (n 3) [88] (Murray J).

they were proposing, or what the People might reasonably have understood they were adopting'[129] in relation to aspects of the original text, it is unclear why this should not be allowed if it is permitted in the case of constitutional amendments.

A related issue on the contextual material that may arise again in a future case is whether the type of material permissible is sufficiently clear and whether the distinction between official material and subjective statements holds up. In this case, the evidence relied on was a particularly good example given that it was an explanatory memorandum, specifically designed to explain to the People what the amendment would do, and it unambiguously explained the purpose as being an extension of the franchise. Statements made by members of the Oireachtas to this effect were said to be inadmissible on this point. However, questions may arise in the future as to what sort of material constitutes 'official material' such that it would be permissible as evidence of the People's understanding. Would a leaflet from An Coimisiún Toghcháin (the Electoral Commission) be admissible? Or an official statement from the Minister for Justice? Presumably the latter example would be regarded as a subjective statement from an individual Minister and so not permissible according to the judgment. But would the first example be any more 'official' or capable of demonstrating the People's intention in a more obviously accurate way than an official statement from the Department of Justice? These are all questions that may need to be revisited.

Conclusion

Charleton J's reading of the interpretive issues in the case is reminiscent of judgments such as *Curtin* and *Bacik*, which emphasised the primacy of the text above all else. Both the majority and Hogan J judgments suggest a more nuanced approach, which is not quite a sea-change but is significant nonetheless, even though it will likely impact in only limited circumstances. In both judgments, the fact that the text under consideration was an amendment was key – this allowed for the issue of context and the intention of the People to be considered and allowed for the particular extrinsic evidence to be taken into account. This will not be the case in every consideration of a constitutional provision. Indeed, Murray J sounds a note of caution on more than one occasion on issues such as the use of context and evidence of purpose: 'general evidence of such purpose must be treated cautiously where it is deployed to expand or reduce the literal meaning of an Article where the text is otherwise clear and capable of functioning without evident absurdity.'[130]

[129] ibid [89].
[130] *Heneghan* (n 3) [90] (Murray J).

However, it is undeniable that the majority judgment is attempting to usher in a new phase and a new approach to how we interpret the Constitution.

This case follows a trend recently identifiable in Supreme Court jurisprudence of clarifying and tidying approaches and reasoning adopted by earlier authorities. This activity is not 'activist' in the sense that there is no attempt to uproot or substantively depart from existing precedent, but is certainly indicative of a desire to, as Casey and Doyle have put it, 'establish more soundly based doctrinal frameworks for results perhaps not so different from those that might have been reached in earlier decades.' [131] We also see a break with the conservatism witnessed from around the early 90s on in the form of remedy issued in the case. It seems unlikely that the Supreme Court of, say, 15 years ago would have made such a declaration. Charleton J, who was elevated to the Court just after that time,[132] was clearly uncomfortable with the order, making reference to the separation of powers in his objections.[133] Hickey, who has referred to the *Heneghan* judgment as 'a judgment too far', also criticised the remedy given:

> [T]he 'least worst' thing for the judges to do in *Heneghan*, in my view, would have been to effectively do nothing. Because at least then there would have been no obvious and direct conflict with the text and language of any constitutional provision … I am not sure that the judges should have gone quite as far as even Charleton J was prepared to go … Because to my mind the wording was so hapless and confused as to preclude even that mild-looking conclusion, insofar as any 'change' – no matter what kind – would have brought about an obvious and direct conflict with the plain text of Article 18.4.1º(i) and/or (ii).[134]

Charleton J's objection seems to stem from a worry about judges overstepping their role and becoming too creative in interpretation. Hickey's view is similar in that he feels the amendment wording was so poor it failed to achieve the obvious intention but this should not give creative license to remedy that error through subjective interpretation. However, it is difficult to find any fault with the reasoning on this point in either the majority or the Hogan J judgments. While the remedy may have been surprising when considered in the context of the Supreme Court's approach

[131] Casey and Doyle (n 110) 1.
[132] Charleton J was appointed in 2014. O'Donnell CJ (2010) and Dunne J (2013) were both elevated to the Court around that period.
[133] *Heneghan* (n 3) [36] (Charleton J).
[134] Tom Hickey, 'How to Interpret the Irish Constitution: *Heneghan v Minister for Housing*' (2024) 6 Irish Supreme Court Review 53, 77.

more generally to such orders, recent years have seen an increase in such intercessions and indeed a willingness to be more interventionist when necessary to vindicate fundamental rights and uphold key constitutional principles such as popular sovereignty.[135] The majority's declaration was the only one which would not make a mockery of the voice of the People in a referendum – something described by Barrington J in *Coughlan v Broadcasting Complaints Commission* as the 'ultimate act of sovereignty'.[136] Indeed, as both the majority and Hogan J judgments skilfully demonstrate, any other conclusion would have made the voice of the People meaningless. Once the Court had decided what the purpose of the Amendment was, based on the interpretation taken – and there seems to be no objection to the reasoning here – it made sense that this should be implemented. Surely it is within the bailiwick of judicial power to uphold such a crucial constitutional principle as popular sovereignty. Opinions on what the judicial role should encompass tend to vary over the years, even amongst those on the bench. While current attitudes might not endorse the approaches of judges such as Walsh, Kenny, or Ó Dálaigh JJ in the activist-era, the willingness to go beyond a strict textualist approach to interpretation and to be more flexible concerning remedies, amongst other things, demonstrates that we have moved beyond the conservatism of the 90s and 2000s.[137]

This landmark judgment will no doubt go down in Irish legal history for a number of reasons, not only because the Court ordered the Oireachtas to re-construe the University Constituencies in accordance with the original intention of the Seventh Amendment, but also because of the emphasis on a more careful and nuanced approach to constitutional interpretation which prizes a purposeful, contextual and harmonious interpretation and looks to the understanding of what the People intended in amending the Constitution. It remains to be seen whether this approach will now be more widely adopted, but given that *Heneghan* has already been cited

[135] See Casey and Doyle (n 110).
[136] *Coughlan v Broadcasting Complaints Commission* [2000] IESC 44, [2000] 3 IR 1, 46.
[137] See Casey and Doyle (n 110).

in a couple of subsequent cases – albeit without any significant discussion and not on key elements of those cases – there are signs of tentative support for the approach.[138]

[138] *Heneghan* (n 3) has been cited in *Angela Kerins v Dail Eireann, Ireland and the Attorney General* [2024] IESC 24; *O'Meara v Minister for Social Protection* [2024] IESC 1; *BM & JM v Chief Appeals Officer* [2024] IESC 51; *Conway v An Bord Pleanala* [2024] IESC 34. In *O'Meara*, Hogan J cited *Heneghan* in support of his conclusion that the words 'woman' and 'mother' should be given their ordinary meaning. However, while Hogan J relies on *Heneghan* to evidence his argument that words must always be given their objective meaning, the passage he cites in *Heneghan* relates to Murray J's warning that while context is important, subjective interpretations of individual politicians for example cannot be used as evidence of meaning of a constitutional provision, rather than any more general discussion around objective meaning. In fact, Hogan J's comments seem discordant with the approach taken in *Heneghan* where Murray J explicitly authorises the use of extrinsic evidence to determine the understanding of the people in interpreting the text.

The Potential of 'Administrative Justice' for Irish Public Law

Aisling Ryan*

Abstract: Irish public law has a thriving body of scholarly work on judgments of the superior courts, but a focus on doctrinal and theoretical research fails to develop knowledge on how administrative law is understood and applied within public bodies. This is a missed opportunity to engage with different ways of conceptualising public law. The vast number of decisions being made about rights and entitlements across the administrative state and the ongoing Law Reform Commission project on Non-Court Adjudicative Bodies present a timely opportunity to research 'internal' administrative law. This paper demonstrates how the field of administrative justice provides a useful and transposable conceptual framework to enhance the study of public law outside the courts.

Keywords: Administrative justice; Bureaucratic justice; Public law; Administrative law

Introduction

Thousands of decisions are made across the administrative state every day in areas including social welfare, housing, planning, immigration, and health. As Raso observes 'the largest set of decisions that affect individuals' rights are made by administrative officials at and behind the front lines of executive agencies'. [1] McKeever outlines how intellectual, emotional, and practical barriers contribute to many of these first instance decisions going unchallenged[2] - thus the decision at first instance stands and is a generative point in time in the relationship between individual and state. Irish scholarship tends to focus on judgments of the superior courts in research on administrative law concepts. There are many limitations of researching administrative law through doctrinal or theoretical study centred on case law. As Thomas points out, we risk missing 'much of the action, not least the

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[1] Jennifer Raso, 'The In-Between Space of Administrative Justice: Reconciling Norms at the Front Lines of Social Assistance Agencies' in Jason Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing 2019).

[2] Gráinne McKeever, 'Access to Justice through Better Decision Making' Northern Ireland Assembly Knowledge Exchange Seminar Series (2013) <https://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series3/mckeever141113.pdf> accessed 13 June 2025.

basic nuts and bolts of how administrative systems operate in practice and develop over time.'[3]

Daly describes how, traditionally, the legal academy has treated methodology with a certain degree of 'disdain'[4], but a change is afoot. Across the literature, there is a move towards challenging a monist understanding of constitutionalism, instead relying on a pluralistic approach,[5] for example, Barry's study involving the views of representatives of Workplace Relations Commission service users,[6] Ryan's study on application forms,[7] and Daly on how administrative officials should give effect to the law.[8] There are many reasons behind this shift in approach, but ultimately much of the change has come about through interdisciplinary research and an opening out of what counts as 'legal' scholarship. As Samuel sets out, 'there is no single idea of what it is to have legal knowledge.'[9] Daly notes that a range of methodological approaches to public law can only enrich the field, but cautions that proponents of different approaches must be 'epistemically modest enough to recognize that they probably will not be able to generate a unified field theory of public law and be sensitive to the legal system's requirements of doctrinal rigour and coherence'.[10]

This paper argues that in order to develop a holistic, considered body of work on administrative law, Irish public law scholars must engage with the field of administrative justice, part of a growing body of work which challenges the idea that law is the preserve of the courts.[11] Individuals interact with the state in 'small

[3] Robert Thomas, *Administrative Law in Action: Immigration Administration* (Hart Publishing 2022) 3.
[4] Paul Daly, 'Plural Public Law' (2020) 51(2*)* Ottawa Law Review 395, 411.
[5] Jiří Přibáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge 2022) 128-129.
[6] Brian Barry, 'Workplace Dispute Resolution in Ireland at a Crossroads: Challenges and Opportunities' (2021) 66 Irish Jurist 44.
[7] Aisling Ryan, 'The Form of Forms: Everyday Enablers of Access to Justice' (2023) 32(5) Social & Legal Studies 690.
[8] Paul Daly, 'The Inevitability of Discretion and Judgement in Front-Line Decision-Making in the Administrative State' (2020) 2 Journal of Commonwealth Law 100.
[9] Geoffrey Samuel, *Epistemology and Method in Law* (Routledge 2003), 16.
[10] Daly (n4) 396.
[11] Margaret Doyle and Nick O'Brien, *Reimagining Administrative Justice: Human Rights in Small Places* (Palgrave Pivot 2020), 37; Joanne Murray, 'Administrative and Citizen Interpretations of Unwritten Constitutional Principles and Constitutional Silences', (*VerfBlog,* 22 July 2024*),* https://verfassungsblog.de/administrative-and-citizen-interpretations-of-unwritten-constitutional-principles-and-constitutional-silences/; *Zalewski v Workplace Relations Commission* [2021] IESC 24.

places'[12] and 'architectures'[13] of everyday administration – in waiting rooms,[14] at public counters,[15] through application forms,[16] or digital interfaces[17]: what happens in these small places is important.

This paper is laid out in three sections. The first section details the epistemological problem Irish public law currently has in that there is a dearth of research that uses an administrative justice lens. The second section details a way forward, introducing administrative justice as a framework suitable for transposition into Irish legal scholarship, but noting the particularities of the Irish administrative state that will require consideration in developing a research agenda for administrative justice research. Finally, the third section points to potential barriers to this work, as well as highlighting the administrative and societal challenges presented by technological developments.

Section One: The problem

Administrative law in context

The relationship between judicial review judgments and public administration practices is poorly understood. Yet, the relationship between judicial review and administrative decision-making is an important phenomenon that speaks to the rule of law, government practices, and the protection of individual rights. The question of what happens within public bodies following a successful judicial review is a concern of the judiciary. We can feel a sense of frustration from the High Court at times as to how cases are handled when they are remitted for fresh determination. The observations of Mac Eochaidh J in *AAS v Refugee Appeals Tribunal & anor*[18] are illustrative in this regard:

> It is regrettable that the decision maker in this case does not appear to have had access to the decision of Birmingham J. or to an account of it. It seems to me that in any case which is remitted to a decision maker from the High

[12] Doyle O'Brien (n 11).
[13] Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2011).
[14] Ruth Ayaß, 'Doing Waiting: An Ethnomethodological Analysis' (2020) 49(4) Journal of Contemporary Ethnography 419.
[15] Bernardo Zacka, *When the State Meets the Street: Public Service and Moral Agency* (The Belknap Press of Harvard University Press 2017).
[16] Ryan (n 7).
[17] Jed Meers, Simon Halliday and Joe Tomlinson, 'An 'interface first' bureaucracy: Interface design, universal credit and the digital welfare state' (2025) 59(1) Social Policy & Administration 119-134; Jennifer Raso, 'Smooth Operators, Predictable Glitches: The Interface Governance of Benefits and Borders' (2023) 38(2) Canadian Journal of Law and Society 158.
[18] *AAS v Refugee Appeals Tribunal & anor* [2013] IEHC 44.

> Court, the decision maker ought to be concerned with the views of the High Court on how the matter was first handled. Unless this happens, the mistake or error which led to the first set of proceedings might be repeated. This appears to be what has happened in this case.[19]

Similarly, following successful judicial review of an immigration decision, Clark J sets out in *AHEH & anor v Refugee Appeals Tribunal and Minister for Justice and Equality*[20] that the new decision-maker 'ought to be made aware of the Court's reasons for quashing the decision'.[21] Yet there is no closed communication circle between the judiciary and administrative decision-makers following judicial review. The extent to which legal information is received and disseminated within public bodies is heavily dependent on managerial practices. Writing in relation to the dissemination of guidance within the Home Office, Thomas outlines the 'uncoordinated and unsystematic dissemination within the department's internal structure, and how this in turn prompts judicial correction'.[22] In order to develop a fuller and richer understanding of administrative law (and administrative justice) we need to look more closely at wider administrative systems and processes – beyond what we can learn from the text of judicial review judgments. This in turn will lead to both a richer understanding of judicial review, and a deeper understanding of how the administrative state operates in practice.[23]

Halliday notes that the task of measuring the 'impact' of judicial review on government agencies is 'fraught with difficulty'. [24] He notes that through a combination of sociological and doctrinal study we can build a framework,

> for hypothesising about whether and to what extent judicial review may secure compliance with administrative law. Neither the doctrinal study of administrative law, nor the sociological study of administration in isolation is sufficient to tell us enough about the relationship between the two.[25]

Thus, there is a need for socio-legal approaches that are open to different ways of knowing, measuring, and understanding the reality of law in context.

[19] ibid [21].
[20] *AHEH & anor v Refugee Appeals Tribunal and Minister for Justice and Equality* [2013] IEHC 163.
[21] ibid [22].
[22] Thomas (n 3) 85.
[23] Thank you to the anonymous peer reviewer for their feedback on this point.
[24] Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart Publishing 2004) 3.
[25] ibid 4.

Martin sketches out different lines of inquiry into frontline decision-making that may be pursued by socio-legal scholars of administrative law or administrative justice.[26] This paper closely follows the first classification he offers – as lawyers we are different to other social scientists in that we tend to foreground the law making is well-placed to ask and answer: questions such as '[h]ow do administrative law standards, legislative duties, formal procedures, and informal rules actually interact on the frontline?'[27] Donson and O'Donovan argue that public law research in Ireland has prioritised constitutional values, without sufficient consideration of administrative justice:

> While there have been extensive constitutional convention debates proposing referenda to reform the state's constitutional framework, these have largely failed to address questions of administrative justice. This emphasis on the constitutional to the detriment of the administrative is extremely disappointing, as while it may be said that we have a constitutional vocabulary of rights and values, we have not yet formed an effective administrative and inter-institutional grammar for their delivery.[28]

To reinforce the extent of this literature gap, a search of 'administrative justice' on the Westlaw.ie database free text box brings up 22 results. By contrast, a search for 'administration of justice' brings up 2227 results.[29] While there is an absence of research that is grounded in an 'administrative justice' framework, a wide reading of the literature points to rich bodies of work in closely related fields. Much of this scholarship tends to be situated within a 'rights-based' framework – for example, Thorton on immigration[30]; Rogan and van der Valk on prison management and prisoner rights[31]; Gallen, Enright, Ring, McGettrick, and O'Rourke on state

[26] Richard Martin, 'Administrative Decision-Making on the Frontline' in Marc Hertogh, Richard Kirkham, Robert Thomas and Joe Tomlinson (eds) *The Oxford Handbook of Administrative Justice* (Oxford University Press 2022) 7-8.
[27] ibid 16.
[28] Fiona Donson and Darren O'Donovan, *Law and Public Administration in Ireland* (Clarus Press 2015) [16-09].
[29] As of 22 August 2024 (date of last check before article submission). Due to the interchangeable terminology, 'bureaucratic justice' was also searched and returned 2 hits.
[30] Liam Thornton, 'Augmenting social welfare for asylum seekers in Ireland' (2020) 42(4) Journal of Social Welfare and Family Law 441; Muireann Ní Raghallaigh and Liam Thornton, 'Vulnerable childhood, vulnerable adulthood: Direct provision as aftercare for aged-out separated children seeking asylum in Ireland' (2017) 37(3) Critical Social Policy 386.
[31] Mary Rogan, 'Examining the Role of Legal Culture as a Protective Factor Against High Rates of Pre-trial Detention: the Case of Ireland' (2022) 28 European Journal on Criminal Policy and Research 425; Sophie van der Valk and Mary Rogan, 'Complaining in prison: 'I suppose it's a good idea but is there any point in it?' (2023) 264 Prison Service Journal 3.

responses to historical abuse and restorative justice[32]; and Donson and Morgan-Williams on access to justice for members of the Traveller Community.[33] Similarly, constitutional law scholars engage with issues that arise in relation to how law is experienced outside the courts but without explicitly engaging with administrative justice frameworks – for example Casey and Kenny on the role of the executive[34]; Cahillane on the 'administration of justice'[35]; Cahillane and Kenny on the judiciary[36]; and Brady on administrative decision-making and human rights.[37] The challenge this paper engages with is how we might use the framework of administrative justice to reconceptualise constitutional or rights issues as administrative issues. This is not to say a rights-based lens or constitutional lens are not valuable – both most certainly are – but that an administrative lens is lacking and represents a missed opportunity for an important dialogue.

There is also relevant work on how people experience or navigate administrative systems that would be useful for Irish legal scholarship to engage with more deeply because they shed light on the lived experience of different systems. From the perspective of applicants, particularly relevant here is Whelan's work on how people engage with welfare administrators, and the 'fear' of negative consequences based on their interactions with administrators and experience of the welfare system.[38] From the perspective of administrators, Ryan and Powers' study captures evidence on the extent to which some decision-makers are happy to make discretionary social welfare decisions whereas others would prefer to work within

[32] James Gallen, *Transitional Justice and the Historic Abuses of Church and State* (Cambridge University Press 2023); Máiréad Enright and Sinéad Ring 'State legal responses to historical institutional abuse: shame, sovereignty and epistemic injustice' (2020) 55 Éire-Ireland; A Journal of Irish Studies 68; Claire McGettrick, "Illegitimate" Knowledge: Transitional Justice and Adopted People' (2020) 55 Éire-Ireland; A Journal of Irish Studies 181; Maeve O'Rourke, 'The Manipulation of 'Vulnerability': State Responses to So-Called 'Historical' Abuses in Ireland' (2021) 43(3) Human Rights Quarterly 435.

[33] Fiona Donson and Samantha Morgan-Williams, 'Barriers to Access to Justice for Members of the Traveller Community: Rediscrimination within the Equality System' in Daniel Newman and Faith Gordon (eds), *Access to Justice in Rural Communities: Global Perspectives* (Hart Publishing 2023).

[34] Conor Casey and David Kenny, 'The Risk and Rewards of Ireland's Leviathan: Rule of Law Values and the Irish Executive's Crisis Response to Covid-19' (2023) 70 Irish Jurist 242.

[35] Laura Cahillane, 'Defining the administration of justice in Ireland after the Zalewski decision' (2023) 69 Irish Jurist 164.

[36] Laura Cahillane and David Kenny, 'Lessons from Ireland's 2020 judicial conduct controversy' (2022) 51(1-2) Common Law World Review 24.

[37] Alan D.P. Brady, 'Fundamental rights and administrative decision-makers: *Middelkamp v Minister for Justice and Equality'* (2024) 6 Irish Supreme Court Review 137.

[38] Joe Whelan, 'Maintaining compliance and engaging in impression management' in Joe Whelan, *Hidden Voices: Lived Experiences in the Irish Welfare Space* (Bristol University Press 2022).

the bounds of more rigid rules.[39] This type of work provides insight into the wider systemic issues within bureaucracies that might not always be apparent or made clear when an individual case is before the courts in relation to a particular claim. Insights on the reality of administrative systems can also come from sources outside the 'traditional' academy, for example Vuma's memoir in Rea and Traynor's edited anthology on direct provision.[40] By developing a richer tradition of administrative justice research in Ireland, we can develop a robust evidence base that is instructive and useful in both judicial and administrative decision-making.

'Internal' administrative law

Mashaw was one of the first scholars of 'internal' administrative law.[41] As Harlow and Rawlings note '[t]he bottom-up' perspective on administrative justice began to emerge slowly from the 1970s. This new look had American origins, reflecting in particular the work of Mashaw'.[42] Harlow and Rawlings describe his influence as creating a shift "from 'putting things right' to 'getting things right'".[43] Writing in relation to social security claims, Mashaw argues that "[i]nstructing examiners how to build a file is thus the essence of designing the decision process."[44] Thomas notes that '[c]ase work is not just about individual decisions. It also concerns how the whole casework process is managed and organised.'[45] Halliday argues,

> [t]o understand the complexity of routine government behaviour, we should try as researchers to get as close to it as we can. The closer we get, the easier it is to unpack the range of influences on government decision-making and see the subtleties of discretion at work.[46]

While an 'internal' understanding of administrative law might seem unorthodox in the Irish context, it holds great potential for administrative law scholarship.

We traditionally understand administrative law in terms of 'grounds' of judicial review, but Bell outlines that the '"grounds of review" are not the product of

[39] Majka M. Ryan and Martin J. Power, 'Understanding how decision-makers practice discretion in the context of the Habitual Residence Condition in the Republic of Ireland' (2020) 28(2) Irish Journal of Sociology 143.
[40] Donnah Vuma '905976-14' in Stephen Rea and Jessica Traynor (eds), *Correspondences: An Anthology to Call for an End to Direct Provision* (Correspondences 2019).
[41] Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press 1983).
[42] Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, Cambridge University Press 2022) 547.
[43] ibid 549.
[44] Mashaw (n 41) 125.
[45] Thomas (n 3) 109.
[46] Halliday (n 24) 19.

conscientious design, nor were they created at a single moment in history'.[47] Bell also gives the historical context for how we conceptualise administrative law:

> [T]he publication of two key textbooks, De Smith and Wade, in the late-1950s and early 1960s introduced a new way of conceptualising administrative law. Under this approach, the field was imagined as a cluster of legal standards which apply *generally* across all areas of public administration.[48]

Harlow and Rawlings were instrumental in advancing a pluralistic understanding of administrative law. The first edition of *Law and Administration*, published in 1984, challenged the dominance of a purely doctrinal approach to legal scholarship. Reflecting on their first edition, they note:

> We saw the plural nature of administrative law as largely obscured by a long tradition of legalism, in which 'law' was presented as a non-permeable system of formalistic reasoning and autonomous rules and principles, which were largely the work of courts.[49]

'Internal' administrative law challenges this legalism, and the reality of law-in-action that is obscured through the study of administrative law without consideration of social, structural and institutional contexts.

Management practices and leadership in places where administrative discretion is exercised are important. Cane describes how administrative justice goes beyond a notion of accountability in performance of a normative function, and extends to:

> [W]hat Mashaw calls the 'management side of due process' – the idea that *ex ante* recruitment practices, training programmes, management techniques and internal monitoring are at least as important as *ex post* external scrutiny of individual decisions in raising and maintaining bureaucratic decision-making[50]

Management practices and the way in which information is received into and disseminated throughout an institution both provide contextual variances on how decision-making within public bodies operates. As Zacka has found through an ethnographic study:

[47] Joanna Bell, *The Anatomy of Administrative Law* (Hart Publishing 2020) 61.
[48] ibid 56.
[49] Harlow and Rawlings (n 42), preface.
[50] Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2010) 212.

> By stressing the importance of everyday casuistry and peer-level accountability, one of my aims is to show that street-level bureaucracies are home to a complex moral ecosystem that is largely opaque to hierarchical scrutiny and control. The proper functioning of these organizations— on a moral plane—is largely parasitic on a dense web of informal relationships and practices whose importance is not sufficiently recognized, and which often end up being the intended or unintended casualty of attempts at institutional reform.[51]

The social context within which decision-making happens within public bodies is important. There are many factors that shape and are shaped by this social context.[52] Law imposes a somewhat artificial test on decision-making practices through judicial review whereby a single decision in relation to an individual applicant is considered. The reality of administrative decision-making is much more complex and messier than judicial review envisages and isolates. As Halliday argues:

> From the court's perspective, the decision under scrutiny can easily be regarded as having been made by 'the decision-maker'. The complex bureaucracy, the diverse activities of which produced a final decision-outcome, can be imagined as a single entity. The decision-outcome which is the produce of multiple pre-decision can be artificially reduced to a single discrete 'decision'. The social reality, of course, is quite different. The decision-making process is better conceived as a network of bureaucrats exercising discretion, culminating in a final outcome which is highly contingent on the discretion of multiple actors.[53]

Both Zacka's 'web' and Halliday's 'network' speak to the complex and fluid factors that arise by moving focus from case law and onto bureaucracies. *Zalewski v Workplace Relations Commission*[54] presents a timely opportunity to reflect on how law is animated within bureaucracies.[55] Hickey interprets O'Donnell J's judgment in *Zalewski* as having a Janus-faced role:

> But there is a related development in the O'Donnell J judgment and that is that if Article 37.1 is now going to bark for the administrative state, then it is

[51] Zacka (n 15) 157.
[52] Ryan and Power (n 39).
[53] Halliday (n 24) 41.
[54] *Zalewski* (n 11).
[55] Aisling Ryan, 'The animators of administrative law: challenging the 'monopoly' of law's application' (2025) Public Law (forthcoming).

> going have to bite for the constitutional state as well. If it is now to represent the pillar supporting non-judicial bodies that administer justice of the kind having profound effects on the fundamental interests of individuals, then it must also ensure that that justice is administered in ways that do not undermine the constitutional rights of those individuals.[56]

Donson and others note that *Zalewski* raises many practical questions on the day-to-day practices within the administrative state, and argue that there is a need for a systematic, structured approach to research on administrative decision-making:

> The *Zalewski* case illustrates the reactive, rather than proactive, nature of any change to tribunal powers and structure in the Irish administrative state. A significant limitation is the tendency towards looking at administrative problems with a constitutional spyglass, honing in on the big constitutional issues, but ignoring the interrelated and connected web of administrative justice issues.[57]

Development of work in this area is important not only to improve first instance and tribunal level decision-making, but also to ensure members of the judiciary have visibility of the 'connected web of administrative justice issues' that Donson and others refer to above when determining cases in the superior courts. In a jurisdiction that is far more familiar with the 'administration of justice', it is therefore important to consider what is 'administrative justice' and what is its potential for Irish public law.

Section Two: A way forward

Administrative justice

There are many understandings of administrative justice. Adler describes administrative justice 'as the justice inherent in administrative decision making'.[58] Administrative justice provides a framework through which we can enhance the study of first-instance decision-making and tribunal level adjudication. Hertogh and others offer the following recent description of the field:

[56] Tom Hickey, '*Zalewski* and the Future of Irish Public Law' (2024) 87(2) Modern Law Review 466.
[57] Fiona Donson, Darren O'Donovan and Aisling Ryan, 'Ireland's distinct constitutional vision: the 'administration of justice' in quasi-judicial bodies' in Stephen Thomson, Matthew Groves and Greg Weeks (eds), *Administrative Tribunals in the Common Law World* (Hart Publishing 2024).
[58] Michael Adler, 'Understanding and Analysing Administrative Justice' in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing 2010).

> Administrative justice raises a whole host of complex issues concerning the practices of government, the position of individuals, and the relationship between them. The issues cross many disciplinary boundaries and its study is deeply enriched by this, but it needs to be recognized as a distinctive area of research that can now stand on its own.[59]

Administrative justice has developed hugely in the last thirty years. Adler describes some of the work done in the UK to mark out and cement the field.[60] Despite the commonalities between the organisation of the administrative state in the UK and Ireland, administrative justice as a field of research in Ireland has not benefitted from an active research community in the way it has in the UK. As outlined above, Donson and O'Donovan describe how administrative justice is a field of research largely ignored in favour of over-constitutionalisation of administrative problems in the Irish context.[61] There is a tradition of administrative justice research in Northern Ireland,[62] but south of the border there is a tendency to focus on judicial decision-making.[63]

The above introduces administrative justice as a 'field' of study, but what does the field concern? What does it do? What are its aims? Thomas and Tomlinson offer the following description:

> 'Administrative justice' may not be as familiar as 'criminal justice' or 'civil justice', but it is just as important. It concerns both the making of administrative decisions and the systems for challenging such decisions. The 'system' is complex and fragmented and comprised of various specific systems that divide along 'vertical' policy/functions lines, such as: immigration, social security, tax, criminal injuries compensation, and many more. There are also 'horizontal' cross-cutting different redress

[59] Hertogh and others (n 26) xvi.
[60] Adler (n 60).
[61] Donson and O'Donovan (n 28) [16-09].
[62] Marie Anderson, Andrea McIlroy and Michaela McAleer, 'Mapping the Administrative Justice Landscape in Northern Ireland' Report on research undertaken on the Administrative Justice System in Northern Ireland' (August 2014) <https://essexcaji.org/wp-content/uploads/2015/06/ni-admin-justice-mapping-study-oct-2014.pdf> accessed 13 June 2025.
[63] Although recently there has been an increase in research published on the Executive, particularly post Covid-19. See Casey and Kenny (n 34). The same authors have published on the role of the Attorney General: David Kenny and Conor Casey, 'A One Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (2019) 42(1) Dublin University Law Journal 89; Conor Casey and David Kenny, 'The gatekeepers: Executive lawyers and the executive power in comparative constitutional law' (2022) 20(2) International Journal of Constitutional Law 664.

> mechanisms, including: complaint and ombuds procedures; internal administrative review processes; tribunal appeals; and judicial review.[64]

The Law Commission outlines four broad pillars of administrative justice:

1. Internal mechanisms for redress (e.g. formal complaint procedures);
2. External non-court redress (e.g. public inquiries and tribunals);
3. Public sector ombuds;
4. Redress by way of court action.[65]

As most administrative decisions go unchallenged, considerable public power rests with the first instance decision-makers who exercise discretion on a daily basis. Judicial review cases represent a tiny proportion of the individuals with grievances against public bodies. Halliday and Scott identify research which demonstrates that, among those that do pursue redress, there is significant drop-out at each stage of the review process.[66] Thus, the potential for research impact and improvement in decision-making is significant across the different pillars of administrative justice – but requires research on intersecting and different redress mechanisms.

Developing a research agenda for administrative justice in Ireland

While international administrative justice scholarship presents a useful conceptual framework to use as a starting point, there are features of the Irish administrative state that will require specific attention including the interaction between Article 34.1 and Article 37.1 post-*Zalewski*, and the culture and nature of the Irish state. The separation of powers has an important bearing on how the Irish administrative state has developed and is developing. As students of constitutional law, we learn about the separation of powers and how each arm of the state is separate and distinct in the classic tradition that traces back to Montesquieu, yet the reality is much more porous. Writing extra-judicially, Mr Justice Fennelly notes that the Irish Constitution does not establish a 'rigid system of exclusive powers'.[67] Similarly, Donson and O'Donovan observe:

> It is our belief that judges must recognize the need for a diverse conception of separation of powers, one which acknowledges that the tripartite model

[64] Robert Thomas and Joe Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) Journal of Social Welfare and Family Law 380.
[65] Law Commission, *Consultation Paper on Administrative Redress: Public Bodies and the Citizen* (LC CP 187 - 2010).
[66] Simon Halliday and Colin Scott, 'Administrative Justice' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).
[67] Mr Justice Niall Fennelly, 'The courts and the doctrine of separation of powers in the Irish Constitution' in Eoin Carolan (ed) *Judicial Power in Ireland* (IPA 2018) 49.

> does not, and cannot exist in pure form, and that its borders must be attended to. A constitution is fundamentally about the positive exercise of public power, not its placement within non-interacting silos.[68]

While accepting that there are blurred lines in relation to the separation of powers, the role of the judiciary is weighed down by a doctrine of deference. Writing in the context of administrative tribunals, Cane provides analysis on 'quasi' decision-making and the 'legacy of Montesquieu':

> The concepts of legislative, executive and judicial functions are extremely abstract. Their abstraction partly explains why it has been found very difficult to provide robust accounts of the distinctive nature of various functions and of the differences between them. It also explains why the prefix 'quasi' is sometimes added particularly to the terms 'legislative' and 'judicial': the prefix typically indicates that the speaker senses a distinction between the real thing and the imitation, but cannot pinpoint it with confidence.[69]

Elliot and Thomas note that pinpointing the circumstances in which the judiciary will intervene with discretionary decision-making is a great complexity of administrative law across the common law world:

> One of the great complexities of administrative law concerns the degree to which the courts should review decisions of other decision-makers. This complexity arises because, through the application of administrative law, the role of the courts is to determine the lawfulness of the acts of other branches of the state, yet the legitimate extent of judicial involvement is itself a sensitive matter that raises questions about the courts' role under the separation of powers.[70]

A strong adherence to a deferential judicial branch under the separation of powers can be found in the Irish jurisprudence.[71] Brady points out, '[t]he Executive has just as much potential (if not more potential) than the Oireachtas to intrude upon constitutionally protected rights'.[72] In commenting on *C v Galway County Council*,[73] Casey sets out that 'the highly deferential rationality standard of review is alive and

[68] Donson and O'Donovan (n 28) [16-04].
[69] Cane (n 50) 140.
[70] Mark Elliott and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 71(2) The Cambridge Law Journal 297.
[71] Fennelly (67) 48-50.
[72] Alan D.P. Brady, 'Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of *Meadows*' (2010) 32(1) Dublin University Law Journal 136.
[73] *C v Galway County Council* [2017] IEHC 784.

well, even when the interests and rights of vulnerable persons are prima facie engaged'.[74] The corollary of this deferential approach is that considerable power rests with the executive, which delegates some of this power to decision-makers on the frontlines of public administration

Barrington outlines that when Irish citizens feel aggrieved about administrative decisions, they make representations to members of the legislature, on a scale 'remarkably high per head of population as compared with most other democracies'.[75] He further notes that '[a] good part of the public standing of Irish public representatives comes from their success in acting as 'brokers' between their constituents and public bodies'.[76] Anecdotally, people will use such channels to secure nursing home spaces, planning permission, medical cards, school places, and community investment. This 'who you know' approach leads to a perception of cronyism and unfairness in how systems operate and needs to be challenged in favour of transparent, accessible and fair administrative justice systems. Note of warning here that Barrington was writing over four decades ago and before the Ombuds system in Ireland came into effect in 1984, making the reference somewhat dated.[77] Nevertheless, the culture of clientelism persists, with Donson and O'Donovan more recently noting 'the institutionalised clientelism within which many Irish politicians are habituated or structured'.[78] The potential of the Ombud to investigate systemic maladministration and deliver collective justice is an important part of developing a research agenda for administrative justice research.[79] The recent investigation by the Ombudsman into the administration of HSE schemes to fund necessary medical treatment in the EU/EEA or UK, where people faced a 'fight' with the HSE for reimbursement, demonstrates (i) the scale of the maladministration problem in the state, (ii) the worry and anxiety being caused by administrative issues, and (iii) the potential of Ombud reports to improve systems of administration through constructive dialogue.[80]

[74] Conor Casey, 'Courts, Public Interest Litigation, and Homelessness' (2019) 42 Dublin University Law Journal 191, 196.
[75] TJ Barrington, *The Irish Administrative System* (Institute of Public Administration 1980) 177.
[76] ibid.
[77] Fiona Donson and Darren O'Donovan, 'Critical junctures: regulatory failures, Ireland's administrative state and the Office of the Ombudsman' (2014) Public Law 471, 475.
[78] ibid, 487.
[79] Robert Thomas, 'The Northern Ireland Public Services Ombudsman's Report into Personal Independence Payment and Collective Administrative Justice (Pt 1)' (2023) 30(3) Journal of Social Security Law 143.
[80] Office of the Ombudsman, 'In Sickness and in Debt: An investigation by the Ombudsman into the administration by the Health Service Executive of schemes that fund necessary medical treatment

In developing a research agenda for administrative justice in Ireland, it will be important to include a range of voices and perspectives on different administrative justice systems. Attention and care must be paid to the way in which different forms of knowledge are treated to ensure there is no repeat of the injustice and bureaucratic oppression caused by the way in which survivor testimony was handled in the Final Report of the Commission of Investigation into Mother and Baby Homes.[81] There is a wealth of knowledge on first instance decision-making and appeals within the administrative state already.[82] The challenge is to begin to think across different administrative justice pillars in developing a body of work that can improve first instance decision-making, and improve public perceptions of administrative processes across public administration.

This is not the first time there has been a call for administrative justice research in the state. The Report of the Public Services Organisation Review Group 1966-1969, or the Devlin Report, included a proposal that there should be a 'Commissioner for Administrative Justice', tasked with looking at problems of administrative justice as a whole.[83] In the years since the Devlin Report was published, Government has become increasingly complex and fractured, yet there has been limited administrative justice research carried out. Deeper engagement with administrative justice as a field of study has the potential to assist the Law Reform Commission's ongoing work on Non-Court Adjudicative Bodies. A consultation paper on Non-Court Adjudicative Bodies was expected to be published by the Commission in 2024,[84] but as of June 2025 has yet to be made publicly available. Any reform proposals considered by the Law Reform Commission should take account of the need for a centralised body akin the Administrative Justice Council, but adequately funded and staffed, to act as a research hub and steer the

in the EU/EEA or UK' (April 2023) <https://ombudsman.ie/en/publication/805d0-in-sickness-and-in-debt/> date accessed 13 June 2025).

[81] Catriona Crowe, 'The commission and the survivors' (*The Dublin Review*, 2021) <https://thedublinreview.com/article/the-commission-and-the-survivors/> accessed 11 April 2025.

[82] For example, see FLAC's work on social welfare appeals: FLAC, *Not Fair Enough: Making the case for reform of the social welfare appeals system* (2012) <https://www.flac.ie/assets/files/pdf/not_fair_enough_final.pdf?issuusl=ignore> accessed 14 April 2025.); and TCD School of Law 'Covid Observatory - Reports' https://www.tcd.ie/law/tricon/covidobservatory/reports/index.php accessed 11 April 2025.

[83] Report of Public Services Organisation Review Group, 1966-1969 (Stationary Office 1969) 188 <https://www.lenus.ie/handle/10147/125906> date accessed 13 June 2025.

[84] Mary Hallissey, 'Laying down the law' (*The Law Society Gazette*, 15 May 2024) <https://www.lawsociety.ie/gazette/in-depth/2024/may/laying-down-the-law> accessed 11 March 2025.

development of administrative justice research in Ireland. This would identify and structure the field.

Section Three: Barriers and future developments

Barriers to developing a body of administrative justice work

Four significant barriers to this type of work must be mentioned before any conclusions are drawn – access, competence, funding, and measurement. Exploring the 'internal' requires empirical research. Carrying out this research with public bodies involves negotiations with gatekeepers to secure access to research participants. 'Gatekeeping' can be a significant barrier to successfully conducting empirical legal research. Lund and others describe how '[a] gatekeeper is generally understood to be someone who has the power and control over access to communities and key respondents in a particular location selected for research'.[85] They describe how gatekeepers can influence research by limiting access to participants.[86] Reeves describes 'gatekeepers' as people who 'can help or hinder research depending upon their personal thoughts on the validity of the research and its value, as well as their approach to the welfare of the people under their charge'.[87] Access as a potential barrier includes access to data, raising a whole host of interrelated issues.[88] Administrative justice research is heavily dependent on the availability of empirical data. Public body data gaps is an issue facing many governments at present, and raises the possibility of judicial review proceedings.[89] A lack of systematic data collection in relation to ethnicity and gender was identified in a recent Joint Submission to the Department of Children, Equality, Disability, Integration and Youth.[90]

Second, to expand the methodological toolkit of public law scholars, attention will need to be paid to the training of legal researchers. The Nuffield Inquiry on Empirical

[85] Ragnhild Lund, Smita Mishra Panda and Manju Prava Dhal, 'Narrating spaces of inclusion and exclusion in research collaboration - researcher-gatekeeper dialogue' (2016) 16(3) Qualitative Research 280, 281.
[86] ibid, 292.
[87] Carla L. Reeves, 'A difficult negotiation: fieldwork relations with gatekeepers' (2010) 10(3) Qualitative Research 315.
[88] Such as lack of data gathering, GDPR, technological capabilities, making data available in interoperable formats.
[89] Joe Tomlinson, Jed Meers and Cassandra Somers-Joce, 'Judicial Review of Public Data Gaps' (2023) 28(2) Judicial Review 69.
[90] Pavee Point and others, *Joint Submission to the Department of Children, Equality, Disability, Integration and Youth: Ireland's National Universal Periodic Report for the 39th Session (1 – 12 November, 2021)* (2021) <https://www.paveepoint.ie/wp-content/uploads/2024/01/UPR-Submission-to-the-DCEDIY-11032021F.pdf> accessed 14 April 2025.

Legal Research identified 'the problem of self-replication' due to law schools being dominated by theoretical and doctrinal methods leading to a knowledge gap on non-text based methods.[91] People interested in carrying out empirical work must be trained in empirical methods, understand the different ethical issues arising when carrying out research with human participants, and understand the limitations of different research methods. Senior public law academics and members of the judiciary are less likely to have been trained in different research methods. Changes in the prevailing approaches to research will take time and capacity-building work.

This relates to the third potential barrier – funding. Carrying out fieldwork takes time and raises different complexities to desk-based research. Designing surveys, arranging focus groups or scheduling interviews takes a lot of planning time and requires funding for participant compensation, contracting for surveying services, transcription of interviews or focus groups, and travel expenses. Additionally, in a 'publish or perish' culture, slow scholarship can be less desirable to researchers trying to maintain a steady stream of outputs. Gathering data can be a slow and expensive process requiring funding.

Finally, measurement and how we might simultaneously deal with different perspectives and experiences is a concern for legal scholars – particularly where doctrinal research typically focuses on finding coherence in the law.[92] When we use multiple methods in legal research we come up against the problem of commensurability of outputs and the extent to which the newly generated data sets contribute to answering a research question. Epstein and Martin explain that 'measurement is a critical step in designing research'.[93] It is our role, as researchers, to be curious about different methods of measurement to assess the reliability and validity of our research. [94] By incorporating empirical and socio-legal understandings, administrative justice research necessarily takes an epistemologically constructivist approach that recognises multiple experiences.[95]

[91] Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works* (Nuffield Inquiry on Empirical Legal Research Final Report and Recommendations, November 2006).
[92] Shane Kilcommins, 'Doctrinal Legal Method (Black-Letterism): assumptions, commitments and shortcomings' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 8.
[93] Lee Epstein and Andrew D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press, 2014) 42.
[94] ibid 47.
[95] Rachel Cahill-Callaghan and Linda Mulcahy, 'Where are the numbers? Challenging the barriers to quantitative socio-legal scholarship in the United Kingdom' (2022) 49(1) Journal of Law and Society S105 – S118.

This is both a strength and limitation of administrative justice research. We risk losing coherence or neatness, but we gain complex and dynamic understandings.

The evolving nature of the state, technological advances, and inclusive futures

An important question for further research is how the places of administrative justice have changed and are changing due to the rise of remote hearings and digital delivery of administrative functions. The lack of research at the intersection of administrative law and administrative processes is even more of a concern as we see a growing number of *ad hoc* reforms to certain administrative systems, particularly due to technological advances.[96] The judiciary will increasingly be asked to engage with legal issues pertaining to digital processes or automated administrative decision-making. As Tomlinson outlines, thinking about the issues caused by digitalisation will require institutionally and contextually specific responses:

> It is essential that the ongoing incursion of digital technology into administrative justice is not seen as some distinct field of interest and activity, but as part of the core business of those concerned with public law and administrative justice. There will be no satisfying overall answer or theory that can be developed in response to this incursion. In administrative justice, generalisations are often unhelpful and rarely true. Different instances of digitalisation – whether they are imposed as part of public service provision or arise organically from technological innovation – need to be considered in their particular institutional and political contexts.[97]

Ranchordás emphasises the importance of considering what is lost through digital developments, noting that the automation of decision-making contributes towards the erasure of empathy:

> vulnerable citizens who are the most prone to erring, and also those who, before the automation of government, benefited from the occasional empathy of street level bureaucrats toward first-time mistakes and oversights.[98]

Research from healthcare administration shows that administrative processes that are blind to the varied needs of service users create barriers to services and can

[96] Thank you to the anonymous reviewer for neatly capturing this point.
[97] Joe Tomlinson, *Justice in the Digital State: Assessing the next revolution in administrative justice* (Policy Press 2019) 89.
[98] Sofia Ranchordás 'Empathy in the Digital Administrative State' (2022) 71 Duke Law Journal 1341.

exacerbate pre-existing inequalities.[99] The burgeoning body of work from the field of public administration on 'administrative burden' illustrates how the burdens or costs of engaging with public bodies are not spread equally across society.[100] Thus the need to proceed mindfully and using intersectional frameworks.

Meers and others describe how we live in an age of 'interface first' bureaucracy[101], with Raso arguing that 'interface governance' is 'paradigmatic within many front-line agencies that make decisions about crucial entitlements and penalties'.[102] The places of administrative justice are increasingly hidden from view, with the rise of online hearings, remote working, and closure of public counters. Where law takes place is an evolving phenomenon that administrative justice research can provide a framework to investigate. Now instead of accessing public services via a public counter or a face-to-face encounter with an official, we are increasingly directed to access services including MyWelfare, Revenue, the Housing Assistance Payment and the National Childcare Scheme using the MyGovID login from our phones or personal devices. Yet there are many barriers to accessing online public services including digital exclusion, and the requirement to have a particular form of technology or to pass a validation test.[103]

The introduction of an online application process at the International Protection Office from 31 July 2024 or the pivot to online hearings by the Residential Tenancies Board could make for interesting studies on the impact of digitalisation.[104] So too would the implementation and interpretation of the EU Artificial Intelligence Act by different public bodies[105] or the use of machine learning in public body decision-

[99] Leo Ewbank and others, 'Admin matters: the impact of NHS administration on patient care' (*The King's Fund*, 23 June 2021) < https://www.kingsfund.org.uk/insight-and-analysis/long-reads/admin-matters-nhs-patient-care> accessed 14 April 2025.
[100] Pamela Herd and Donald P. Moynihan, *Administrative Burden: Policymaking by Other Means*. (New York: Russell Sage Foundation 2018); Sebastian Jilke and others, 'Short and sweet: Measuring experiences of administrative burden' (2024) 7 Journal of Behavioural Public Administration 1.
[101] Meers, Halliday and Tomlinson (n 17).
[102] Raso (n17).
[103] Joe Tomlinson, 'Justice in Automated Administration' (2020) 40(4) Oxford Journal of Legal Studies 708–736.
[104] What's new' (International Protection Office, 26 November 2024) <http://www.ipo.gov.ie/en/ipo/pages/whatsnew> accessed 14 April 2025; Adjudication hearings are now 'usually' held online via Microsoft Teams, Residential Tenancies Board Annual Report and Accounts 2023 <https://rtb.ie/wp-content/uploads/2025/05/RTB_Annual_Report_and_Accounts_2023-1.pdf accessed 14 April 2025.
[105] Irish Human Rights and Equality Commission, *Submission to the Public Consultation on National Implementation of EU Harmonised Rules on Artificial Intelligence (AI Act)* (2024) <https://www.ihrec.ie//app/uploads/2024/07/20240716-IHREC-submission-to-the-consulation-on-the-EU-AI-Act_to-OOTD.pdf> accessed 14 April 2025.

making.[106] Social welfare appeals is an area of administrative justice in Ireland that FLAC has long highlighted as in need of reform.[107] There is currently an 'Appeals Modernisation Project' underway, 'the goal of which is to streamline and enhance the end-to-end appeals process for the customer'.[108] An empirical evaluation of the project would be a welcome additional to the literature.

The Administrative Justice Council of His Majesty's Courts and Tribunals Service has two active working groups looking at issues that are also highly relevant to the Irish legal system: 'Addressing disadvantaged people in the administrative justice system'; and 'Digitisation and the tribunal user experience in the modernised tribunal service.' [109] The Ada Lovelace Institute and Alan Turing Institute have recently published results of a nationally demographic survey in the UK on public attitudes to AI – a hugely useful dataset in considering the legal and societal implications of AI.[110] Similar research investments and evidence reviews would be helpful in the Irish context.

Hertogh's work on legal alienation shows how people move away from law and the absence of law in everyday life, demonstrating the need for deeper investigation into how people perceive law or what leads people to abandon law.[111] Further empirical research is needed to gain deeper understanding of the problems both officials and system users encounter in administrative justice systems in Ireland, particularly system users from communities who experience exclusion such as the Traveller Community.[112] Doyle and O'Brien argue that there is much to be gained from a shift in perspective from the court-focused work that dominates the literature at present, to a more holistic, complex understanding of rights in the small places of everyday life.[113]

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[106] Neli Frost, 'The Impoverished Publicness of Algorithmic Decision Making' (2024) 44(4) Oxford Journal of Legal Studies 780-807.
[107] FLAC (n 82).
[108] Parliamentary questions, (22 January 2025) <https://www.oireachtas.ie/en/debates/question/2025-01-22/888/>accessed 14 April 2025.
[109] 'ACJ Working Groups' (*Courts and Tribunal Judiciary*) <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/administrative-justice-council/working-groups/> accessed 14 April 2025.
[110] Ada Lovelace Institute and The Alan Turing Institute, *How do people feel about AI? A nationally representative survey of public attitudes to artificial intelligence in Britain* (2023) <https://www.adalovelaceinstitute.org/wp-content/uploads/2023/06/Ada-Lovelace-Institute-The-Alan-Turing-Institute-How-do-people-feel-about-AI.pdf> access 13 June 2025.
[111] Marc Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (Palgrave 2018).
[112] Donson and Morgan-Williams (n 33).
[113] Doyle and O'Brien (n 11).

To achieve this shift in perspective, there is a related case to be made about further expanding the toolkit of research methods in public law research and much to be gleaned from collaboration and participation – eg doing research *with* communities rather than *about* communities,[114] walking methods that seek to understand positionalities more fully,[115] experimental methods that seek to understand perceptions on 'trade-offs' between different features of administrative processes,[116] or the application of legal design in response to access to justice crises.[117]

Conclusion

The field of administrative justice provides a scaffold and language for the development and expansion of public law scholarship, and provides insights on how to improve first instance and tribunal level decision-making in public bodies. Crucial to the success of the field will be the extent to which different parties are willing to get involved in research projects and are open to new ways of knowing about administrative law. This can be productively understood as a shared dialogue. As Sunkin and Marsons note in marking out future research trajectories for administrative justice:

> Benefits can accrue from dialogue. Not least, dialogue should better enable government and funders to work with independent researchers to identify priority research needs, to better understand what can be investigated and by what methods, and to address obstacles including availability of data.[118]

The development of administrative justice research ought to be seen as a collaborative endeavour, one that involves a diverse range of voices including a representative sample of the public, judges, officials, administrators, researchers,

[114] Sindy Joyce and others, *Irish Travellers' Access to Justice* (European Centre for the Study of Hate 2022).
[115] Maggie O'Neill and Brian Roberts, *Walking Methods: Research on the Move* (Routledge 2020); Doris Murphy, 'Walking, Talking, Imagining: Ethical Engagement with Sex Workers' (2022) 16(2) Ethics and Social Welfare 219-234; Jessica Smith, 'Journeying the everyday of civic space: movement as method in socio-legal studies' (2021) 48(S1) Journal of Law and Society S59.
[116] Jed Meers, Aisling Ryan and Joe Tomlinson, 'Perceptions of procedural fairness and space for personal narrative: an experimental study of form design' (2025) 52(1) Journal of Law and Society 81.
[117] Lois R. Lupica and Genevieve Grant, 'Will human-centred Legal Design improve civil justice systems? And how will we ever know?' in Rossana Ducato and Alain Strowel (eds), *Legal Design Perspectives: Theoretical and Practical Insights from the Field* (Ledizioni 2021).
[118] Maurice Sunkin and Lee Marsons, 'Directions for Future Research on Administrative Justice' in Hertogh and others (n 56) 652.

and legislators. This work is crucial in shifting public law mindsets from ‘putting it right’ to ‘getting it right’ at first instance.[119]

[119] Harlow and Rawlings (n 42).

Frivolous and Vexatious Litigation in the Irish Courts: Challenges, Remedies, and Reform

Adam McCarthy*

Abstract: This article examines the persistent challenge posed by frivolous and vexatious litigation within the Irish judicial system, analysing its impact on judicial efficiency and public confidence in the administration of justice. It critically evaluates current Irish legislative frameworks and judicial measures designed to mitigate procedural abuse, including Litigation Restriction Orders and security for costs orders, highlighting both their strengths and limitations. Drawing comparative insights from jurisdictions such as England, Australia, New Zealand, and Singapore, the article identifies proactive management strategies and legislative reforms that have proven effective internationally. Furthermore, it explores the ethical considerations faced by legal practitioners when addressing vexatious claims, underscoring the need for heightened professional responsibility and proactive judicial oversight. The analysis concludes by advocating for targeted reforms—including graduated civil restraint mechanisms, comprehensive case management innovations, and strategic modernisation of judicial infrastructure—as necessary responses to safeguard both access to justice and judicial efficiency. Ultimately, the article argues that Ireland's judicial system must adopt a coordinated, nuanced approach, leveraging international best practices to ensure procedural integrity, efficiency, and sustained public trust.

Keywords: Frivolous and vexatious litigation; Abuse of process; Litigation restriction orders; Access to justice; Judicial efficiency

Introduction

Litigation is a fundamental aspect of modern judicial systems, serving as a mechanism for resolving disputes and upholding the rule of law. However, the misuse of this vital process through frivolous and vexatious claims threatens to undermine its integrity. These cases, often pursued without merit or for improper purposes, impose undue burdens on the courts, litigants, and the legal profession. The persistence of such litigation in Ireland, as in many jurisdictions, reveals vulnerabilities within the system that demand urgent attention.

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The phenomenon of vexatious litigation raises complex questions about the balance between access to justice and the efficient administration of the courts. The Irish Constitution enshrines the right of individuals to seek redress through the courts, however, this right is not absolute. The judiciary is tasked with safeguarding this principle while preventing its exploitation. Recent cases such as *Ulster Bank DAC v McDonagh*[1] and *Fox v Data Protection Commissioner*[2] have highlighted the pressing need for effective safeguards against baseless claims.

In addition to systemic pressures, vexatious litigation creates ethical considerations for legal practitioners. Solicitors and barristers must navigate a delicate tension between their duty to represent clients and their responsibility to uphold the integrity of the judicial process. This dual obligation becomes particularly challenging when representing clients whose motivations or cases may be questionable.

This article investigates these issues in depth, offering a detailed exploration of the systemic impacts and ethical challenges associated with frivolous litigation in Ireland, as well as its prevalence in the jurisdiction. It evaluates existing legal remedies, including Litigation Restriction Orders (LROs) — formerly referred to as Isaac Wunder Orders (IWOs)[3] — which are designed to prevent persistent litigants

[1] *Ulster Bank DAC v McDonagh & Ors* [No 3] [2024] IEHC 609. The McDonaghs sought to set aside a High Court judgment delivered in 2020, already upheld on appeal, on the basis of serious allegations of fraud against Ulster Bank's legal advisors, including a former Attorney General. They claimed key evidence had been deliberately withheld from the original trial. However, after briefly obtaining legal advice, they withdrew the allegation, accepting on affidavit that they had no evidence to support it. What remained of their application was an argument that certain 'new' or unredacted documents might have changed the outcome of the case—a submission Twomey J dismissed as hopeless and vexatious, noting that the underlying dispute arose from the McDonaghs' €22 million loan default and failed attempt to develop the Kilpedder Site.

[2] *Fox v Data Protection Commissioner* [2024] IECA 92. The Court of Appeal dismissed a further appeal by Mr Fox arising out of a long-running data access dispute with his former employer, the National Gallery of Ireland. The case had already been through multiple hearings in the Circuit Court and High Court. Mr. Fox's core complaints, including allegations of covert surveillance and breaches of data protection law, had been carefully investigated and largely rejected. Despite this, he persisted with appeals which the Court ultimately found were based on fundamental misunderstandings of basic legal principles, including the burden of proof. His arguments were described as 'misconceived' and amounting to an abuse of process, particularly as he failed to identify a point of law on which to ground his appeal. Noonan J noted the serious drain on court resources caused by such relentless and unnecessary litigation, observing that the consequence was enormous cost, delay, and a burden ultimately borne by the taxpayer.

[3] Isaac Wunder Orders (IWOs) are court orders used in Irish law to restrict individuals from initiating further legal proceedings without prior judicial approval. Named after the case *Wunder v Hospitals Trust* (1940) Ltd [1966] WJSC-SC 383, IWOs are typically issued to prevent litigants who have made repeated vexatious or frivolous claims from abusing the judicial process. The orders serve as a safeguard to protect court resources and opposing parties from repetitive, baseless claims, while

from initiating meritless claims without judicial approval. Recent cases indicate a shift in terminology, with the courts increasingly adopting LRO to more accurately reflect the function of these orders.[4] Given that the terms IWO and LRO are presently used interchangeably by various judges, both terms will be used in tandem throughout this article for consistency. The article also considers procedural and legislative reforms that could enhance judicial efficiency without compromising fundamental rights. Drawing on comparative perspectives, it seeks to chart a path toward a balanced approach that respects both the need for access to justice and the imperative of maintaining an efficient process.

Defining Vexatious Litigation: Scope and Prevalence

Vexatious litigation involves the misuse of judicial processes through claims that lack a statutory or legal basis, claims which are barred by doctrines like *res judicata*[5] or the rule in *Henderson v Henderson*,[6] or are otherwise frivolous, misconceived, or

balancing the constitutional right of access to justice; see further Anthony Moore, 'Isaac Wunder Orders' (2001) 1 Judicial Studies Institute Journal 137, which traces the historical development of IWOs from Keaveney v Geraghty through Wunder, examines their constitutional justification under Article 40.3 of the Irish Constitution, analyses their compatibility with the European Convention on Human Rights, and outlines the proportionality principles that courts must apply when imposing such restrictions.

[4] Recent High Court judgments indicate a shift from the term Isaac Wunder Order (IWO) to Litigation Restriction Order (LRO) to provide greater clarity regarding the function of these judicial restrictions; in *A (A Person with Disabilities) v Health Service Executive & Cork University Maternity Hospital* [2024] IEHC 747 [4], Hyland J explicitly referred to an IWO as a Litigation Restriction Order (LRO), emphasising that this terminology better conveys its preventative function; similarly, in *Houston v Reynolds, Ireland & Ors* [2025] IEHC 58 [1], Sanfey J used LRO while acknowledging its traditional designation as an IWO. This evolving terminology aligns with the judiciary's broader efforts to improve procedural transparency and ensure accessibility, particularly for self-represented litigants.

[5] In *Donohoe v Browne* [1986] IR 90, Gannon J held that the plaintiff could not complain of a denial of access to the High Court where his action for personal injuries had been barred as res judicata (because of an earlier binding determination of the Circuit Court that he was solely to blame for the traffic accident that gave rise to the proceedings); see also *Sheehan v Solicitors Disciplinary Tribunal* [2022] IESC 9, where the Supreme Court confirmed that res judicata operates as a substantive defence within proceedings, rather than depriving a tribunal of jurisdiction, and is properly raised during the course of an appeal or hearing.

[6] *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313, at [115]: '[t]he Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'; see further *Munnelly v Hassett & Ors* [2022] IEHC 632 [36]. In this case, Barr J reaffirmed the rule in Henderson v Henderson, holding that re-litigating

futile in nature. The judgment of Birmingham J (as he then was) in *Nowak v Data Protection Commissioner* provides valuable commentary on the interpretation of "frivolous" and "vexatious" within the context of Irish law. Birmingham J stated:

> Frivolous, in this context, does not mean only foolish or silly, but rather a complaint that was futile, or misconceived or hopeless in the sense that it was incapable of achieving the desired outcome. [7]

Further elaborating on the judicial approach to such litigation, Birmingham J in *J O'N v S McD & Ors* observed that the terms *frivolous* and *vexatious* are not merely pejorative labels but are legal terms of art:

> The words "frivolous" and "vexatious" are terms of art, they are legal terms and they are not used in a pejorative sense. They merely mean that the plaintiff has no reasonable chance of succeeding and that, because there is no reasonable chance of success, it is frivolous to bring the case. By the same token it imposes a hardship on the defendant if he has to expend time, effort and money in defending an action which cannot succeed and that is regarded as vexatious.[8]

In *Fox v McDonald*, Irvine J (as she then was) considered the meaning to be attributed to the terms 'frivolous' and 'vexatious' in the context of litigation:

> Proceedings which are regularly struck out as 'frivolous' or 'vexatious' are proceedings clearly destined to cause irrevocable damage to a defendant, such as where a defendant is asked to defend the same claim for a second

matters which could and should have been addressed in earlier proceedings constitutes an abuse of process. He emphasised that while the courts must safeguard access to justice, they also bear a responsibility to protect defendants and third parties from undue burdens caused by repeat litigation. On appeal, the Supreme Court in *Munnelly v Hassett & Ors* [2023] IESC 29 overturned the High Court's decision on its application of the rule to the facts, holding that the plaintiff's second set of proceedings arose from the same factual matrix as her earlier failed claim and were properly barred by the rule in *Henderson v Henderson*. The general reaffirmation of the principle itself by the High Court was left undisturbed; see also *Cunningham v Intel* [2013] IEHC 207, where Hedigan J gave a pithy explanation of the rationale for the rule in *Henderson v Henderson*, at [8]; see further David A R Williams QC and Mark Tushingham, 'The Application of the *Henderson v Henderson* Rule in International Arbitration' (2014) 26 Singapore Academy of Law Journal 1036, where the authors trace the historical development of the rule, explain its application in arbitration contexts, and emphasise the principle that parties must raise all matters arising from the same factual matrix in earlier proceedings where possible, in order to avoid procedural unfairness and promote finality.

[7] *Nowak v Data Protection Commissioner* [2012] IEHC 449, at [20]. The judgment highlights the importance of judicial discretion in filtering out claims that lack a legitimate legal basis, ensuring that the court's resources are not unduly consumed by matters that cannot result in a practical or legal remedy.

[8] *JO'N v S McD & Ors* [2013] IEHC 135, at [18].

> time or where a plaintiff seeks to avail of the scarce resources of the courts to hear a claim which has no prospects of success.[9]

These judicial interpretations accentuate the fundamental principle that while access to justice must be safeguarded, it must also be balanced against the imperative to protect the courts from procedural abuse. The administration of justice demands that claims which are plainly incapable of success should not be permitted to consume limited judicial resources or subject defendants to unnecessary hardship.

The Law Society of Ireland has highlighted how lawsuits it categorises as "Strategic Litigation Against Public Participation" (SLAPPs) represent a particularly insidious form of vexatious litigation, using legal processes to silence critics and deter legitimate public participation. These cases often draw in third parties, such as public bodies or private individuals, through overbroad discovery requests, creating additional financial and administrative burdens.[10] While the ultimate dismissal of these cases does demonstrate the resilience of the system, the prolonged process leading up to such outcomes can still impose significant costs on defendants who are often forced to endure disruption, expense, and the stress of litigation. Moreover, third parties, including public bodies, may become entangled in the process, through extensive discovery requests, thereby diverting their resources and attention from core functions. As the court in *Ulster Bank DAC v McDonagh* acknowledged, the financial toll that such claims cause to defendants and the taxpayer funded court system can be high:

> This begs the question of whether there is anything which can be done to prevent and/or reduce the number of individual litigants, like the McDonaghs, with nothing to lose, taking hopeless and vexatious claims (and subsequent appeals), and thereby imposing huge financial loss on defendants (in the form of irrecoverable legal costs) and also putting a huge drain on taxpayer funded court resources.[11]

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[9] *Fox v McDonald* [2017] IECA 189, at [20].

[10] Law Society of Ireland, Submission on the Draft Recommendation of the Committee of Ministers on Countering the Use of Strategic Litigation Against Public Participation (SLAPPs) (August 2023), [6]. The submission welcomes the Council of Europe's efforts to address SLAPPs and stresses the need to balance protection against abusive litigation with safeguarding access to justice. It highlights the rise of SLAPP-type proceedings in Ireland, especially against journalists and environmental defenders, and endorses procedural safeguards such as early dismissal mechanisms, cost protection, and support for victims of abusive claims.

[11] *Ulster Bank DAC* (n 1), at [53].

Understanding the scope and prevalence of vexatious litigation in Ireland requires a nuanced examination of the legal frameworks, judicial responses, and systemic vulnerabilities. As recognised by Costello J in *Barry v Buckley*[12] , the courts possess an inherent jurisdiction to restrain frivolous or vexatious proceedings. Costello J's remarks remain apposite today, given the continuing challenge such claims pose to the administration of justice. In *Ulster Bank DAC v McDonagh,* the litigants pursued multiple "hopeless/vexatious claims" over a decade imposing significant financial and procedural burdens on the defendants. [13] Twomey J's commentary in the judgment – where he describes the legal arguments of the defendants as "bizarre"[14] – highlights a critical systemic weakness: individual litigants, unlike corporate entities, can avoid the financial consequences of abusive litigation because they are generally not required to provide security for costs at the outset, even where they have a history of meritless claims. When costs are ultimately awarded against them, they may lack sufficient assets to satisfy the judgment or may actively evade enforcement by having no assets in their own name. This makes cost orders effectively meaningless, allowing them to engage in repeated litigation with little personal financial risk.[15]

A similar concern arose in *Fox v Data Protection Commissioner*, in which the Court of Appeal was required to address protracted litigation made "without any regard to what the legislation actually provides for".[16] Despite the limited statutory scope for appeals on points of law, the appellant persistently sought to reargue factual matters long settled by the Data Protection Commissioner and affirmed by both the Circuit Court and High Court. Noonan J, delivering judgment, characterised the litigation as an abuse of process, driven by a 'fundamental misunderstanding of the law' and marked by a deliberate refusal to engage with the limits of the appellate jurisdiction. The judgment highlights the strain such litigation places on public resources and the risk of burdening the taxpayer where costs orders prove unenforceable. It also illustrates how well-intentioned legal pathways — such as access to regulatory appeals — can be abused by litigants who pursue litigation with persistence in the absence of any legitimate legal grounds. *Fox v Data Protection Commissioner* further highlights the broader pattern observed by the

[12] *Barry v Buckley* [1981] IR 306.
[13] *Ulster Bank DAC* (n 1), at [28].
[14] *Ulster Bank DAC* (n 1), at [30].
[15] In *McGreal v Minister for Housing Local Government and Heritage of Ireland* (No 4) [2025] IEHC 163, [6]. Humphreys J declined to award costs against the applicant despite characterising the application as frivolous and vexatious, noting that an Isaac Wunder order would be a more effective means of curbing repeated meritless litigation than reliance on costs alone.
[16] *Fox v Data Protection Commissioner* (n 2), at [75].

courts: that vexatious conduct is not always malicious in intent, but can equally arise from persistent misapprehension or wilful defiance of procedural boundaries, resulting in significant expense to those caught up in it.[17]

In *Ulster Bank DAC v McDonagh*, Twomey J emphasised the importance of requiring plaintiffs to provide financial security, particularly where their claims are persistent, meritless, and impose undue costs on defendants. By doing so, Twomey J highlighted that security for costs acts as both a deterrent and a safeguard, ensuring that litigants are not left to bear the financial burden of defending baseless claims while protecting the efficient administration of justice:

> The most effective deterrent against hopeless and vexatious claims by individual litigants is not a court order for costs after the claim is dismissed that will/may never be paid. Instead, it seems to this Court that the most effective deterrent against hopeless and vexatious claims is the actual payment, upfront in security for costs, even of a relatively minor amount of money, before they can proceed with the litigation...[18]

The court's approach to security for costs is rooted in the principle that defendants should not be left carrying the financial burden of defending claims where there is a genuine risk that the plaintiff will be unable to meet an adverse costs order. In *Beakonford v Stokes*, [19] Twomey J applied the test set out in *Quinn v PricewaterhouseCoopers*,[20] requiring courts to assess whether the defendant has a *prima facie* defence and whether the plaintiff lacks the means to pay costs if unsuccessful.[21] If both conditions are met, security for costs should be granted unless exceptional circumstances dictate otherwise.[22] This judgment is particularly relevant in the context of frivolous and vexatious litigation as it highlights the limitations of conventional costs orders in deterring persistent, meritless claims. Twomey J recognised that defendants often incur significant legal expenses defending such actions with little prospect of recovering costs from litigants who

[17] See *Fox v Data Protection Commissioner* (n 2).
[18] Twomey J, *Ulster Bank DAC* (n 1), at [57].
[19] Beakonford v Stokes & Anor [2025] IEHC 22.
[20] *Quinn v PricewaterhouseCoopers* [2021] IESC 15.
[21] See McGreal (n 15).
[22] This position must be tempered by the default principle outlined by Clarke J (as he then was) in *Farrell v Bank of Ireland* [2012] IESC 42, [2013] 2 ILRM 183, where the Supreme Court held that, absent a significant countervailing factor, the balance of justice as between the parties ordinarily requires that no security for costs should be ordered. Further, as noted in *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.3.217], "it is worth noting that the poverty of a plaintiff is not, in itself, sufficient reason to grant an order requiring the provision of security for costs," citing *Goode Concrete v CRH* [2012] IEHC 116 [28].

have no assets or who strategically evade liability. His emphasis on upfront security for costs as a practical safeguard highlights the judiciary's growing concern over the misuse of litigation as a means of harassment or delay. This approach serves not only to protect defendants but also to preserve the integrity of the legal system by filtering out baseless claims before they consume disproportionate court resources.

While statistical data on the exact prevalence of such litigation is scarce, anecdotal suggests a rising trend, exacerbated in particular by the growing prevalence of self-represented litigants.[23] Similar challenges arise in jurisdictions such as England and Wales [24], where mechanisms like Civil Restraint Orders (CROs) have been introduced to address systemic vulnerabilities.[25] Further empirical research — beyond anecdotal observation[26] — is required to more accurately assess whether there has, in fact, been an increase in the incidence of frivolous and vexatious litigation before the courts generally.

The Rules of the Superior Courts, particularly Order 19, rule 28, empower courts to strike out such claims, while their inherent jurisdiction allows for dismissal based on evidence that the claims are an abuse of process. In *Fay v Tegral Pipes Limited*, the Supreme Court set out the bases upon which an application to strike out or dismiss proceedings may be brought, referring to Order 19, Rule 28:

> The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous

[23] Law Society Gazette, "Lay litigants 'problematic', says Law Society" (11 January 2022) https://www.lawsociety.ie/gazette/top-stories/2021/12-december/Lay-litigants-can-be-problematic-says-Law-Society/ (accessed 7 July 2025). The article cites remarks by Ms Justice Nuala Butler and the Law Society noting the increased demands on court time caused by growing prevalence of litigants-in-person, including repetitive and poorly structured pleadings, multiple applications, and a reluctance to accept adverse rulings—all of which contribute to inefficiency and delay in the courts.

[24] David Giles and Maurice Rifat, *Vexatious Litigants and Civil Restraint Orders: A Practitioner's Handbook* (Wildy, Simmonds and Hill Publishing, 2014).

[25] See Practice Direction 3C – Civil Restraint Orders, issued under the Civil Procedure Rules (CPR), which provides a structured framework for restraining vexatious litigants in England and Wales. The practice direction categorises Civil Restraint Orders (CROs) into three levels: (1) Limited Civil Restraint Orders, applicable within specific proceedings where a party has made multiple meritless applications; (2) Extended Civil Restraint Orders, which apply across related claims in the High Court or County Court where a litigant persistently issues baseless proceedings; and (3) General Civil Restraint Orders, the most severe, prohibiting the litigant from initiating any claim or application in designated courts without prior judicial permission. These measures aim to prevent the repetitive misuse of judicial resources while ensuring that courts remain accessible for legitimate claims.

[26] See Law Society Gazette (n 23).

> or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.[27]

The Supreme Court also pointed to the inherent jurisdiction to stay, strike out or dismiss pleadings where no cause of action is disclosed or if the claim is frivolous or vexatious. McCracken J, on behalf of the court, set out the rationale for the jurisdiction as follows:

> While the words frivolous and vexatious are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed.[28]

Order 19, Rule 28 of the Rules of the Superior Courts was amended by SI No 456/2023, which took effect on 22 September 2023. The revised rule broadens the grounds on which a court may strike out proceedings, allowing for dismissal where a claim:

- Discloses no reasonable cause of action;
- Amounts to an abuse of process;
- Is bound to fail; or
- Has no reasonable chance of succeeding.

While the amendment clarifies the scope of the rule, it does not substantially lower the threshold for striking out a claim.[29] The courts continue to apply a strict test,

[27] *Fay v Tegral Pipes Limited* [2005] IESC 34, at [7].
[28] ibid [10].
[29] See *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.3.194] – [7.3.201], discussing the courts' inherent jurisdiction to strike out proceedings that are frivolous, vexatious, or an abuse of process; the constitutional permissibility of orders for security for costs; and the principle that while access to justice is fundamental, it does not preclude proportionate procedural restrictions to protect the administration of justice and the rights of defendants.

ensuring that only clearly unstateable claims or cases involving an abuse of process are dismissed at a preliminary stage.[30]

In *Davey v Wallace and Etherington*,[31] Phelan J provided important guidance on the application of the amended rule. She observed that the amendment does not alter the established approach but rather incorporates existing judicial principles into the text of the rule. Phelan J reiterated that the power to strike out proceedings should be used sparingly and only in clear cases where a claim is manifestly unsustainable. She stressed that such applications should not be treated as a means of summarily resolving factual or legal disputes, particularly where a claim — though weak or defective — could still be remedied by amendment. Her ruling highlights the courts' reluctance to foreclose litigation at an early stage, particularly where factual disputes remain unresolved or alternative legal arguments might be available.[32]

In *O'Malley v National Standards Authority of Ireland*,[33] Simons J similarly noted that the amendment codifies existing jurisprudence and aligns the rule more closely with the court's inherent jurisdiction to strike out claims.

One of the defining features of vexatious litigation is the repeated pursuit of claims that have already been adjudicated, often in disregard of the age-old principle of *res judicata*. This doctrine, which prohibits the re-litigation of matters that have been finally determined by a court or tribunal, serves as a cornerstone of legal finality and judicial efficiency. In the context of vexatious proceedings, litigants may attempt to reframe old grievances through marginally altered pleadings or reconstituted legal arguments, effectively seeking a second or third bite at the cherry. The Irish courts have consistently reaffirmed that such conduct undermines the integrity of the justice system and imposes undue strain on court resources. For example, in *Morgan v The Labour Court & Kildare and Wicklow ETB*,[34] the Court of Appeal

[30] See further, Eoin Pentony and Edward Murray, "2 Fast, 2 Frivolous: 'Vexatious' claims before the courts," Law Society Gazette, April 2023, 26–31 which examines the grounds upon which courts may dismiss claims under Order 19, Rule 28 of the Rules of the Superior Courts and outlines four primary categories of claims that the courts are likely to strike out: (1) those with no statutory or legal basis, (2) those barred by res judicata or the Henderson v Henderson rule, (3) claims that are statute-barred, and (4) those deemed futile, misconceived, or irremediable. The article also explores the courts' inherent jurisdiction to strike out proceedings and provides a discussion of case law that illustrates the application of these principles.

[31] *Davey v Wallace and Etherington* [2025] IEHC 146.

[32] ibid [73]-[75]. Phelan J refused to dismiss the plaintiff's claim, holding that the validity of the receivers' appointment was still an open question and that the claim—despite its shortcomings—was not necessarily doomed to fail.

[33] *O'Malley v National Standards Authority of Ireland & Anor* [2024] IEHC 500.

[34] *Morgan v The Labour Court & Kildare and Anor* [2025] IECA 4.

upheld the application of *res judicata* to employment-related claims that had already been rejected, highlighting the limited role of statutory appeals and the importance of procedural finality in curbing litigation abuse.

In Ireland, the persistence of vexatious litigation raises urgent and complex questions about access to justice and the effective administration of the judicial system. The courts are constitutionally mandated to remain open to all citizens, ensuring that every individual has the opportunity to seek legal remedies. However, this principle of open access must be carefully balanced against the judiciary's duty to safeguard finite resources, prevent abuse of process, and maintain fairness for legitimate litigants. Frivolous and vexatious claims impose a disproportionate burden on the judicial system, diverting limited time and resources away from meritorious cases and undermining the efficient administration of justice. If left unchecked, these claims will not only contribute to delays and backlogs, but also could work to erode public confidence in the judiciary's efficiency and ability to administer justice effectively. A failure to implement effective deterrents and procedural safeguards to sufficiently address this misuse of court processes undermines the rights of legitimate litigants, depriving them of timely resolutions and increasing litigation costs. Therefore, striking the appropriate balance requires proactive measures, including streamlined dismissal mechanisms, judicial discretion to intervene early, and robust procedural tools to deter abuse while upholding the fundamental right of access to justice.

Systemic Implications: Access to Justice vs. Judicial Efficiency

Balancing access to justice with judicial efficiency is vital to the integrity of any legal system. In Ireland, the right of access to the courts has long been recognised as a constitutional right, as articulated by Kenny J in *Macauley v Minister for Posts and Telegraphs*,[35] where it was affirmed that access to the courts is part of the general guarantee of personal rights under Article 40.3.1° of the Constitution. However, this right is not absolute and must be weighed against the efficient administration of justice. In *Talbot v Hermitage Golf Club*, the Supreme Court, per Charleton J, emphasised that while the right of access to the courts is fundamental, it must be balanced against the duty of the judiciary to use finite court resources prudently. The Court affirmed that it is both proper and necessary to impose reasonable limits on oral submissions and to allocate a measured amount of time to each party for

[35] *Macauley v Minister for Posts and Telegraphs* [1966] IR 345.

the conduct of their case, in the interests of efficiency and fairness within the litigation process.[36]

The constitutional right to litigate, as affirmed in *Grant v Roche Products,*[37] is a fundamental principle that underpins the Irish legal system. In *Grant*, the Supreme Court rejected the notion that civil litigation is merely a mechanism for financial compensation, emphasising that it also serves an essential function in the vindication of rights. The court recognised that, in some cases, access to the courts is necessary not only to recover damages but also to establish accountability and ensure that wrongdoing is publicly acknowledged. This judgment highlights the importance of maintaining an open and accessible judicial system where legitimate claims can be heard. However, this right is not absolute. As noted in *Ó Domhnaill v Merrick,*[38] access to the courts must be balanced against the need to protect judicial resources from misuse. While the courts must remain open to all, they also have a duty to prevent litigation from becoming a tool for delay, obstruction, or harassment. The distinction between cases like *Grant*, where the plaintiff sought a substantive determination of liability, and those involving vexatious litigants, who initiate claims with no prospect of success, highlights this tension. Without appropriate procedural safeguards, frivolous claims can and do obstruct the administration of justice by consuming court time that should be allocated to meritorious cases[39]

The Court of Appeal's judgment in *GM v IM*[40] exemplifies the growing judicial concern with balancing the right of individual litigants to access the courts against the imperative of protecting the judicial system — and opposing parties — from persistent and unmeritorious litigation. The case arose from highly protracted and

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

[37] *Grant v Roche Products* [2008] IESC 35; see further Delany and McGrath, *Civil Procedure* (5th edn, Round Hall 2021) [6]–[57], discussing *Grant v Roche Products (Ireland) Ltd*, where the plaintiff pursued a wrongful death action not merely for financial compensation but to establish causation and accountability. The authors note that the courts accepted that such a motive was legitimate and within the proper purpose of the litigation process, reaffirming the constitutional right to litigate even where the primary relief sought is the vindication of rights rather than damages.

[38] *Ó Domhnaill v Merrick* [1984] IR 151.

[39] See *Gaultier v Four Judges of the Court of Appeal & Ors* [2025] IEHC 334, where the High Court dismissed an application seeking, under the guise of a quo warranto remedy, to challenge a prior Court of Appeal judgment and remove its judges from office. The Court held that the application was a further attempt to relitigate matters already determined and exemplified the type of repeated and unfounded proceedings that strain judicial resources.

[40] *GM v IM* [2024] IECA 169; the Supreme Court has since granted leave to appeal, identifying as a matter of general public importance the question of whether and in what circumstances an Isaac Wunder order may be made in family law proceedings concerning access and maintenance: see *GM v IM* [2024] IESCDET 117.

contentious family law proceedings, during which the applicant initiated or prolonged numerous actions relating to access and maintenance, including repeated appeals, judicial review applications, and collateral challenges to existing orders. The respondent, subjected to over 100 court attendances between 2012 and 2024, argued that the litigation had become a vehicle for harassment and personal distress, including for the minor child. Applying the established criteria from *Riordan v Ireland (No 4)*[41] and *Burke v Judge Fulham*,[42] the Court concluded that the applicant's conduct — marked by procedural abuse, failure to comply with orders, and a pattern of rolling over litigation — justified the imposition of an IWO/LRO restraining further proceedings without prior judicial permission.[43] Woulfe J, sitting in the Court of Appeal, highlighted that such orders, while limiting unfettered court access, serve as a filtering mechanism to prevent systemic abuse, thereby preserving scarce judicial resources and mitigating harm to other litigants. The judgment showcases the tension at the heart of modern court administration: while constitutional access to justice remains sacrosanct, it must be exercised within the bounds of procedural integrity and judicial economy. The case highlights the judiciary's growing readiness to intervene where litigation has evolved into a sustained misuse of the court's processes.

Decisions such as *Ó Domhnaill v Merrick* demonstrate that delays or procedural misuse may justify striking out claims, even where statutory limitation periods have not been breached, and even if the underlying claim might otherwise have merit. In *Ó Domhnaill* the Supreme Court emphasised the importance of timely litigation to prevent injustice and to protect the rights of other parties to a fair hearing within a reasonable time. Similarly, in *Tuohy v Courtney*[44] the Supreme Court affirmed that the enactment of statutory limitation periods represents a constitutionally valid balancing of rights: the plaintiff's entitlement to litigate, the defendant's right to be protected from unjust claims, and the public interest in avoiding stale litigation. The Court emphasised that its role is not to substitute its own view of the balance for that of the Oireachtas, but only to intervene if the statutory scheme is so unreasonable as to constitute an unjust attack on constitutional rights.[45]

[41] *Riordan v Ireland (No 4)* [2001] 3 IR 365.
[42] *Burke v Fulham* [2010] IEHC 448.
[43] On the test applicable to, and the procedures governing, applications for leave to institute legal proceedings where an IWO/LRO is already in existence, see *Riordan v Ireland (No 5)* [2001] 4 IR 463; *Kenny v Trinity College* [2008] IEHC 320; and *Daire v West Finance Co Ltd* [2014] IEHC 271.
[44] *Tuohy v Courtney* [1994] 3 IR 1.
[45] ibid [47].

The systemic inefficiencies caused by vexatious litigation were highlighted in *Barrington v Attorney General*[46] where Twomey J criticised the disruptive impact of meritless applications on the judicial system. In that case, the plaintiffs, acting under the influence of an unqualified litigation adviser, pursued an application seeking to have one High Court judge overturn the decision of another — a procedurally untenable course of action due to the lack of jurisdiction.[47] Twomey J observed that a full half-day of valuable High Court time had been lost on an application that no qualified practitioner would have pursued. Although distinct in nature from the prejudice arising from delay in cases such as *Ó Domhnaill v Merrick*, where the concern centres on the erosion of fair trial rights over time, *Barrington* illustrates a parallel judicial concern: the need to protect the integrity of the court process from procedural abuses that squander limited judicial resources. Similar to the challenges posed by persistent litigants as seen in *Ulster Bank DAC, Barrington* demonstrates how frivolous proceedings, often fuelled by pseudo-legal advice, not only disadvantage opposing parties but also impede access to justice for legitimate litigants waiting for their cases to be heard. The case further supports the argument that stronger procedural mechanisms — such as early dismissal powers and financial deterrents — may be a necessary step to protect judicial efficiency while maintaining fairness in access to the courts.

Striking this balance calls for a mix of judicial discretion, sensible procedural safeguards, and, where needed, legislative support. Alternative approaches such as mediation or other forms of ADR could also help ease the pressure on the courts. At its core, what is required is the preservation of access to justice and the

[46] *Barrington & Anor v The Attorney General & Ors* [2025] IEHC 143.

[47] A similar issue arose in *Board of Management of Wilson's Hospital School v Burke* [2024] IEHC 453, where the High Court dismissed an application by the defendant to set aside a judgment of another High Court judge. Burke sought to invoke the 'inherent jurisdiction' of the court to overturn a final ruling, arguing that it violated his constitutional rights. Sanfey J held that one High Court judge does not have jurisdiction to review or set aside a decision of another, except in extremely limited circumstances. The judgment highlights the principle of judicial finality, cautioning against a system where litigants could endlessly challenge rulings until they secured a favourable outcome. The court characterised the application as an 'abuse of process,' emphasising that the proper avenue for challenging a judicial decision is an appeal, not a collateral attack through a fresh application; see further *McGreal v Minister for Housing Local Government and Heritage of Ireland (No 3)* [2025] IEHC 162, where the High Court dismissed an attempt by a self-represented litigant to set aside an earlier order of the same court. Reiterating that the appropriate mechanism for challenging judicial decisions is an appeal rather than collateral re-litigation, the court held that no exceptional circumstances existed to justify revisiting the prior ruling. The application was characterised as misconceived and part of a broader pattern of unmeritorious litigation, prompting Humphreys J to recommend an Isaac Wunder order rather than rely on costs as a deterrent.

prevention of misuse of the system — a difficult line to walk. And while the courts play a vital role in holding that line, doing so is far from easy.

Impact on the Legal Profession and Ethical Challenges

Frivolous and vexatious litigation not only places a heavy burden on the courts but also puts legal practitioners in ethically difficult positions. Advising clients whose cases may lack merit — or worse, are driven by improper motives — presents real challenges. While access to the courts is a constitutional right, reaffirmed in *Grant*, it is not without limits. Practitioners are subject to clear duties under the Legal Services Regulation Act 2015 to act with professional integrity and to support the proper administration of justice.

Under section 13(5) of the 2015 Act, legal practitioners are required to act with independence and integrity, maintain proper standards of work, and uphold their duties to the courts. That includes a clear obligation to avoid enabling litigation that could amount to an abuse of process. These responsibilities are not merely aspirational — they are enforceable standards that align with the broader professional framework. Part 6 of the Act grants the Legal Services Regulatory Authority oversight powers in respect of professional conduct, ensuring that practitioners meet their ethical obligations while maintaining the integrity of the legal system.

The Code of Practice for Practising Barristers, issued by the Legal Services Regulatory Authority, mandates that barristers act with integrity, avoid misleading the court, and refuse instructions that would require them to breach their legal or ethical obligations. [48] Rule 3.3 of the Code provides for the importance of independence, integrity, and proper standards of work, while Rule 3.41 affirms a barrister's entitlement to refuse to advance a case with no reasonable prospect of success, provided that advice is given to the client clearly and, where possible, in writing. The Bar of Ireland's Code of Conduct, a set of professional standards specific to barristers who are members of the Law Library, provides for these duties.[49] Rule 2.1 requires barristers to act honestly and with integrity at all times. Rule 2.3 goes further, obliging them to uphold the honour and dignity of the profession and avoid any conduct that could bring the administration of justice into disrepute. Rule 2.5 outlines an overarching duty to support the proper and efficient administration of justice, which includes refraining from misleading the court or

[48] Code of Practice for Practising Barristers (Legal Services Regulatory Authority, commenced 26 September 2024).
[49] *Code of Conduct of the Bar of Ireland* (as adopted by AGM, 22 July 2024).

contributing to procedural abuse. Particularly relevant here is Rule 3.25, which clarifies that a barrister is not in breach of their retainer if they refuse to advance a case or argument they believe has no reasonable chance of success — so long as that position is clearly explained to the client, ideally in writing. It is an important safeguard, providing practitioners with a principled basis to refuse to facilitate proceedings that cross the line into vexatiousness.[50]

Similar principles apply to solicitors, who are bound by the *Solicitor's Guide to Professional Conduct*, issued by the Law Society of Ireland.[51] This Guide stresses the core values of honesty, integrity, independence, and professional competence. Solicitors are reminded that they are officers of the court and must not act in a manner that facilitates misuse of the judicial process. The Guide explicitly recognises that solicitors must refuse instructions where to accept them would involve them in unprofessional conduct, and notes that failure to observe professional standards may result in disciplinary proceedings before the Legal Practitioners Disciplinary Tribunal.

This dual obligation — to serve the client while protecting the integrity of the justice system — can give rise to genuine ethical challenges particularly where a client insists on pressing forward with a claim that is plainly without foundation. Practitioners must tread a fine line: advocating strongly for their clients while ensuring they do not contribute to litigation that wastes court time and risks undermining public trust in the legal process. Rule 2.19 of the Bar of Ireland's Code reminds practitioners that even conduct falling short of serious misconduct can still breach professional standards and may give rise to disciplinary action. Where issues are not properly addressed, practitioners may find themselves subject to regulatory scrutiny — whether under the 2015 Act, the Legal Service Regulatory Authority (LSRA)Code of Practice, or the Bar's own disciplinary procedures.

Ultimately, these challenges highlight the fundamental tension at the heart of legal practice: the need to represent a client's interests while remaining true to ethical and procedural obligations.

[50] It should be noted that, in the event of any inconsistency between a code of practice issued by the Legal Services Regulatory Authority and a professional code—such as the Bar of Ireland's Code of Conduct or the Law Society's equivalent—the LSRA's code of practice takes precedence. This is expressly provided for under section 22(5) of the Legal Services Regulation Act 2015, building up the Authority's role as the ultimate statutory regulator of professional conduct within the legal profession.

[51] Law Society of Ireland, *Solicitor's Guide to Professional Conduct* (4th ed, 2022).

Comparative Perspectives and Potential Reforms in Light of Recent Policy Insights

The delayed implementation of the *Civil Justice Efficiencies and Reform Measures*,[52] as outlined in the 2022 implementation plan and the Department of Justice, *Review of the Administration of Civil Justice* (the 'Kelly Review')[53] has hampered efforts to address vexatious and frivolous litigation.[54] Among the proposed reforms outlined in the Kelly Review is the introduction of stricter controls on *lis pendens* registrations, which are frequently deployed in frivolous claims to delay property sales. The plan's recommendation to cap the validity of *lis pendens* at 28 days, extendable only through court application, would shift the evidentiary burden onto the registrant and curtail abuse, though this proposal has not yet been acted upon by the legislature.[55]

Legislative changes are pivotal to curbing frivolous and vexatious litigation. The *Kelly Review* highlighted the need to modernise procedural rules that govern the court's power to strike out unmeritorious claims. Specifically, it recommends restating Order 19, rules 27 and 28 of the Rules of the Superior Courts to better reflect the court's inherent jurisdiction — without relying on outdated terminology such as "frivolous" and "vexatious", which can obscure legal meaning and may alienate lay litigants. Instead, the Review proposes a more precise framework allowing the High Court to strike out claims that amount to an abuse of process, are bound to fail, or have no reasonable chance of success. It also recommends that courts be empowered to consider both pleadings and evidence where appropriate in assessing such applications. By reducing delays and filtering out clearly unstateable claims at an early stage, these reforms would promote more efficient case progression and align Irish procedure with best practices observed in other jurisdictions.[56]

[52] Department of Justice, *Civil Justice Efficiencies and Reform Measures – A Civil Justice System for the 21st Century* (May 2022) 12.
[53] ibid. The report identifies over 90 recommendations for reform across civil justice procedures and discovery obligations. See also Department of Justice, Review of the Administration of Civil Justice: Report (October 2020) (the 'Kelly Review'); among the proposed reforms is the introduction of stricter controls on lis pendens registrations, which are frequently abused in frivolous claims to delay property sales. The plan's recommendation to cap the validity of lis pendens at 28 days, extendable only through court application, would shift the evidentiary burden onto the registrant and curtail abuse. However, the lack of legislative action has allowed this tactic to persist, burdening defendants and the courts alike.
[54] ibid [206], [207], [275], [293], [354], and [355].
[55] ibid [140].
[56] ibid [419].

The experience of in England and Wales further highlights the importance of balancing access and efficiency. Mechanisms such as CROs serve to limit vexatious claims at an early stage, enabling courts to proactively filter out baseless actions. CROs, as outlined in Practice Direction 3C of the Civil Procedure Rules, come in three forms — Limited, Extended, and General — depending on the frequency and severity of the litigant's conduct.[57] A Limited CRO restrains a party from making further applications in a specific set of proceedings without judicial permission. An Extended CRO applies where a party has persistently issued meritless claims across multiple proceedings, restricting their ability to initiate related litigation in the High Court or County Court. There is also provision for publication of a list of General Civil Restraint Orders listing those who are subject to such orders, the list is accessible to the public.[58] A General CRO, the most severe, prohibits a litigant from bringing any claim in any court without prior approval, effectively barring them from initiating new litigation for up to three years. In contrast, IWOs/LROs in Ireland, while serving a similar function, are more reactive in nature, typically issued only after a party has engaged in serial vexatious litigation. Unlike CROs, which allow courts to prevent frivolous applications before they consume judicial time, IWOs operate as a retrospective sanction against litigants who have already abused the system. This difference highlights a potential area for reform in Ireland — incorporating proactive procedural safeguards, such as streamlined dismissal procedures or mandatory pre-litigation checks, to mitigate the systemic burden imposed by frivolous claims.

The phased implementation timelines outlined in the *Civil Justice Efficiencies and Reform Measures* illustrate the scale of the reforms – but also highlight the risk that meaningful change may be delayed or diluted without continued momentum. However, significant legislative delays have prevented these timelines from being met, highlighting the need for greater political prioritisation of judicial efficiency.

Similar practices in Australian jurisdictions — most notably Queensland — illustrate the potential for effective early intervention in managing vexatious litigation. Under the *Vexatious Proceedings Act 2005 (Qld)*, the Supreme Court is empowered to declare an individual a vexatious litigant, thereby prohibiting them from initiating further proceedings without prior leave of the court. The statutory definition of vexatious proceedings includes those instituted to harass, delay, or

[57] Giles and Rifat (n 24).

[58] See UK Government, *List of General Civil Restraint Orders* available at: https://www.gov.uk/government/publications/general-civil-restraint-orders-in-force/list-of-general-civil-restraint-orders (accessed 08 July 2025).

abuse the process, or those pursued without reasonable grounds. The Queensland model exemplifies how clear legislative authority, combined with procedural safeguards such as published registers and threshold leave requirements, can serve to prevent the escalation of frivolous or abusive litigation, reduce unnecessary court burdens, and protect the rights of opposing parties — without impinging on access to justice for genuine claims.[59]

New Zealand's legislative response provides a further comparative example of a graduated, preventative approach to vexatious litigation. As analysed in Mailer's study of the Senior Courts Act 2016, the reforms introduced a flexible framework of civil restraint orders designed to provide graduated control over litigants whose conduct strains judicial resources. The Act permits courts to impose restrictions based not only on repetitive or abusive litigation, but also on claims that are 'totally without merit'. [60] This legislative shift was driven by growing judicial and parliamentary concern over what was described as an 'epidemic' [61] of vexatious claims. Significantly, Mailer critiques the statutory scheme through the lens of access to justice, observing that many litigants stigmatised as vexatious are in fact lay litigants grappling with a legal system not designed for their participation.[62] The reforms, while effective in mitigating systemic abuse, may risk disproportionately excluding certain atypical or self-represented litigants — including those whom Mailer describes as "non-normative litigants" [63] , that is, individuals whose persistent or unconventional procedural behaviour reflects a misalignment with legal norms. As such, New Zealand's experience highlights the delicate balance reformers must strike between efficiency and inclusion, particularly when seeking to constrain litigants without inadvertently curtailing legitimate access to the courts.[64]

The experience in Singapore, another common law jurisdiction, adds further weight to the case for proactive procedural mechanisms to address vexatious litigation. In *Cheong Wei Chang v Lee Hsien Loong,*[65] the High Court of Singapore struck out

[59] Queensland Courts, Vexatious Litigants (Queensland Courts, 2024) http.s://www.courts.qld.gov.au/court-users/practitioners/vexatious-litigants (accessed 15 December 2024).
[60] Constance Mailer, *The Other Side: Vexatious Litigants in New Zealand* (LLB (Hons) Dissertation, University of Wellington, 2016) https://ir.wgtn.ac.nz/server/api/core/bitstreams/3e4f6cdc-f1b3-4fcb-8eed-7345bf2e0386/content (accessed 8 July 2025) at [12].
[61] ibid [4] and [8].
[62] ibid [12].
[63] ibid [5].
[64] ibid [6].
[65] *Cheong Wei Chang v Lee Hsien Loong* [2018] SGHC 217.

repeated, incoherent proceedings that lacked any reasonable basis, noting that the plaintiff had sought to relitigate previously dismissed claims under the guise of new proceedings. The court invoked both the doctrine of *res judicata* and its inherent jurisdiction to restrain further litigation without prior leave, underscoring the importance of protecting the judicial process from abuse. Notably, the court held that such orders need not be limited to statutory mechanisms under section 74 of the Supreme Court of Judicature Act 1969, which permits the Attorney General to seek restrictions on habitual litigants, but may also derive from the court's inherent procedural powers where justice so requires. The judgment reflects a broader judicial philosophy — mirrored in English, Canadian, and Hong Kong jurisprudence — that courts must not be passive in the face of procedural abuse, and may fashion tailored responses, including restraint orders, even absent specific legislative mandates. Singapore's approach exemplifies how a dual-track model — combining statutory and inherent powers — can offer courts the flexibility needed to curtail vexatious conduct while safeguarding the right of access to justice in legitimate cases.

Despite the proposals set out in the *Civil Justice Efficiencies and Reform Measures*, the implementation of these reforms continues to be hindered by resource constraints within Ireland's judicial system. A shortage of judicial appointments, along with outdated courtroom infrastructure, continues to frustrate efforts to modernise case management and improve procedural efficiency.[66] The lack of sufficient digital infrastructure, such as e-litigation tools, further exacerbates these challenges, delaying the efficiency gains these reforms aim to achieve. The antiquated physical paper filing system of hard copy pleadings in the court offices, without general system for e-filing, represents a significant inefficiency.[67] The lack of a streamlined full digital filing system not only delays the processing of legitimate claims but also allows frivolous and repetitive filings to persist unchecked, placing

[66] While some progress has been achieved in addressing judicial capacity within the superior courts in recent years, the District Court and Circuit Court continue to face shortages in judicial appointments - See Judicial Appointments, Dáil Éireann Debates, 23 April 2024, Written Answer to Question No 465 (Bernard J Durkan TD), available at: https://www.oireachtas.ie/en/debates/question/2024-04-23/465/ (accessed 27 April 2025), where the Minister for Justice confirmed ongoing vacancies and noted that the appointment of additional judges to the District and Circuit Courts remains subject to an impact assessment.

[67] See Courts Service of Ireland, Pilot Courts Portal for Circuit Court Family Law in Dublin now live (18 June 2024), available at: https://www.courts.ie/news/pilot-courts-portal-circuit-court-family-law-dublin-now-live. While this initiative marks a welcome step toward digitisation, its narrow and limited scope — currently confined to family law proceedings in the Dublin Circuit only — highlights the broader inefficiencies that persist due to the continued reliance on hard copy filing in most civil proceedings (accessed 8 July 2025).

an unnecessary burden on judicial resources. In a technologically advancing justice system, the introduction of e-filing would enable faster identification and management of vexatious claims, improving efficiency while safeguarding access to justice for genuine litigants.[68]

Although perhaps a well-worn point within the legal profession, the emphasis on promoting ADR mechanisms remain a central pillar of the proposed reforms. By encouraging mediation and arbitration for disputes, Ireland could alleviate court burdens while offering litigants cost-effective and timely alternatives. International examples, such as Canada's mandatory mediation programs for civil disputes, highlight the potential of ADR in reducing reliance on traditional litigation.[69] That said, while the systemic benefits of ADR are well recognised, it is important not to overstate its potential as a remedy for all forms of procedural dysfunction. In particular, ADR is often ill-suited to dealing with the kind of litigant whose engagement with the legal system is itself the problem. Moreover, those who litigate not to resolve disputes but to delay outcomes, harass opponents, or compulsively revisit settled matters, tend to approach mediation or arbitration not as opportunities for resolution but as further arenas in which to prolong conflict. As the Law Reform Commission has cautioned, ADR may in some contexts operate merely as an additional layer of process, driving up costs, and is inappropriate where parties are entrenched, act for improper tactical reasons, or refuse to engage in good faith with compromise.[70] In such cases, diverting proceedings into ADR may do little to reduce strain on the system and may, in fact, compound delays and increase costs for all involved. As Rasnic observes, the success of ADR, especially mediation, depends heavily on party cooperation and equal bargaining power —

[68] Courts Service, *Corporate Strategic Plan 2021–2023* (Courts Service, 2021). The Plan acknowledges that the Irish court system remains heavily reliant on paper-based processes and outdated technology, noting the ambition to transition toward a 'Digital First' approach. While the Courts Service launched a Modernisation Programme in 2020 aiming to establish an 'Court environment', including e-filing capabilities, implementation remains in its early stages. The report highlights that modernising digital infrastructure is essential not only for user accessibility but also for ensuring court efficiency and procedural integrity in a rapidly evolving legal landscape.

[69] Government of Ontario, *Mandatory Mediation in Civil Cases* (Ontario.ca, 2024) https://www.ontario.ca/page/mandatory-mediation-civil-cases (accessed 15 December 2024): the Ontario Mandatory Mediation Program applies to civil litigation in Toronto, Ottawa and Windsor under Rule 24.1 of the Rules of Civil Procedure, and to estates and trust matters under Rule 75.1. It requires parties in certain civil actions to attend mediation early in the litigation process, with strict procedural timelines and oversight by local mediation coordinators. The program demonstrates how institutionalising early-stage mediation can reduce delay and litigation costs, foster settlement, and relieve pressure on the courts, while also retaining safeguards such as mediator assignment protocols, compliance certificates, and limited exemption grounds.

[70] Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98–2010) [1.11].

conditions seldom present when dealing with intransigent or bad-faith actors.[71] The challenge here is not simply to offer alternatives to litigation, but to identify and manage behaviours that exploit the procedural openness of the legal system itself. While ADR will undoubtedly play a vital role in promoting access to justice and reducing court congestion, it cannot — and should not — be seen as a substitute for robust judicial tools designed to curtail abuse, such as the imposition of IWOs/LROs or the early identification and filtering of meritless claims.

The implementation of the *Civil Justice Efficiencies and Reform Measures* must also address resource limitations within the judiciary. The longstanding issue of insufficient judicial availability — encompassing both a shortage in the number of judges and the limited capacity of sitting judges due to existing caseloads — has been a key factor in the accumulation of significant case backlogs. While recent progress, including the appointment of additional judges, is commendable, further structural reform and resource allocation remain necessary. As Chief Justice O'Donnell has noted, Ireland has "the smallest number of judges per capita in Europe," a structural constraint that has profound implications for judicial efficiency and access to justice.[72]

Conclusion: Moving Toward Sustainable Reforms

Frivolous and vexatious litigation continues to pose significant challenges within the Irish judicial system, impacting judicial efficiency and diminishing public confidence in the administration of justice. This article has examined the careful balance courts must maintain between ensuring open access to justice and protecting their finite resources from exploitation. Through a thorough analysis of judicial interpretations, legislative provisions, comparative international approaches, and ethical considerations within the legal profession, it is clear that although current measures provide important safeguards, significant scope for improvement remains.

[71] Carol Daugherty Rasnic, 'Alternative Dispute Resolution Rather Than Litigation? A Look at Current Irish and American Laws' (2004) 4(2) Judicial Studies Institute Journal 182, at [183]–[184]; Mediation Act 2017, section 3(1)(h) (as amended), which excludes proceedings under the Domestic Violence Act 2018 from its scope, reflecting a legislative policy that ADR may be inappropriate in cases involving coercion, power imbalance, or abusive conduct — concerns similarly applicable to vexatious or bad-faith litigants. See further, *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [9] (Dyson LJ). The Court of Appeal affirmed that compelling unwilling parties to mediate may unjustifiably obstruct access to the courts. This principle reinforces concerns that ADR may be unsuitable where one party, such as a vexatious litigant, is acting in bad faith or seeking only to delay resolution.

[72] *Kelly v University College Dublin* [2025] IESC 6,[13].

Existing procedural remedies such as Litigation Restriction Orders and orders for security for costs serve an essential function, yet their effectiveness is limited due to their inherently reactive nature and resource constraints. Insights from other jurisdictions, including England, Australia, New Zealand, and Singapore, illustrate that proactive, early-intervention measures are considerably more effective in preventing misuse of judicial processes. Approaches such as graduated civil restraint orders, robust case management, and proactive judicial supervision provide practical frameworks that Ireland might beneficially adopt.

Furthermore, modernisation of judicial processes through enhanced digitalisation and addressing persistent resource issues—particularly judicial capacity and infrastructure—are crucial steps toward lasting improvement. While ADR is beneficial, it alone cannot adequately address the unique challenges posed by litigants who are intent on procedural misconduct. A more comprehensive response involving proactive judicial management, legislative updates, and reviewing ethical standards within the legal profession is required.

Ultimately, addressing frivolous and vexatious litigation effectively requires a coordinated and nuanced strategy that safeguards constitutional rights without sacrificing judicial efficiency. Ireland stands at an important juncture, with initiatives such as the Civil Justice Efficiencies and Reform Measures, and comparative insights from other jurisdictions, providing clear and actionable pathways toward reform. Prioritising these strategic interventions will ensure that Ireland's judicial system remains robust, equitable, and capable of delivering timely justice, thereby reinforcing public trust and preserving the integrity of the rule of law.

Book Review: Niamh Howlin (ed), *A Century of Courts: The Courts of Justice Act 1924* (Four Courts Press, 2024)

Max Barrett*

One of the joys of reviewing books for a journal such as this is the sheer quality of so many of the books that are now published on Irish law and legal history. This book is a shining addition to this area of scholarship. Professor Niamh Howlin is to be congratulated on assembling a notably distinguished collection of authors, each of whom has produced remarkably informative chapters. Each contains an abundance of knowledge about the establishment of the new court system in 1924 and the ensuing consequences for our contemporary, world-class system of court-administered justice.

The illustrations assembled for the book are also fascinating, particularly for showing the *very* colourful robe designs that were initially proposed for Free State judges by Chief Justice Kennedy but subsequently abandoned. The chief justice apparently thought that the new robes would provide 'an ocular demonstration to the man in the street that our courts are really Irish ones'.[1] (They would certainly have provided 'an ocular demonstration'.) Something of an abiding mystery is why, a century on, robes continue to be worn by bar or bench at all when a dark suit (for whatever gender) would seem to bring the necessary decorum to court proceedings. Perhaps discernible in the retention of such traditions is a form of that abiding '[p]ostcolonial mimicry'[2], to which Dr Mark Coen refers in his interesting chapter on symbolism and the new courts.

Professor Diarmaid Ferriter provides an early chapter which sets the historical background to the establishment of the new court system. The chapter also illustrates the Free State's distressingly quick descent into a near-theocracy which, among other matters, had 'a growing preoccupation with unmarried mothers'[3] – so very different from the enlightened republic contemplated by many of the leading revolutionaries of the earlier 20th century.

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[1] Diarmaid Ferriter, 'Ireland in 1924: the historical context' in Niamh Howlin (ed), *A Century of Courts: The Courts of Justice Act 1924* (Four Courts Press, 2024), 21.
[2] Mark Coen, '"A new order in this country": symbolism and the new courts' in Howlin (n 1) 291.
[3] Ferriter (n 1) 21.

The former editor of this journal, Professor Laura Cahillane, offers an interesting chapter on judicial remuneration.[4] A related paper perhaps awaits to be written on the extent to which constitutional amendment might be made to allow serving judges to engage in societally beneficial external employment, such as teaching in universities, engaging in charity work, or even taking an unpaid year out to pursue university studies, during which they could burnish their learning to the benefit of all. Suitably regulated, such endeavours would seem to pose no threat to judicial independence or integrity.

The former president of the Irish Legal History Society, Daire Hogan, has penned an interesting chapter on the introduction in 1924 of a retirement age for judges[5] – at a time when a judicial appointment had traditionally been lifelong unless an incumbent elected to retire. Today, the mandatory retirement of judges at the age of 70 continues to be of topical concern in an era when many of us are living longer. Thus, one encounters occasional suggestion that the present mandatory retirement age is yielding an unnecessary loss of talent from the judiciary. However, none of us cannot be done without and an opposing (and perhaps more convincing) view is that to keep the judicial branch suitably rejuvenated it is preferable to have a stream of talented new judges constantly entering the ranks of the judiciary.

As ever, Mr Justice Gerard Hogan has provided a notably stimulating contribution to yet another work of scholarship[6], here on the period in 1936 to 1937 when the composition of the Supreme Court was increased from three members to five (an ambition of Chief Justice Kennedy which he died too soon to see realised). Given that we now have a Court of Appeal, a question perhaps arises whether a return to a five-person Supreme Court would be merited.

If I had to give a prize for the most interesting chapter in a most interesting book, it would likely be for Professor Ruane's chapter on establishing judicial independence.[7] Inspiring to me as a judge (and as a citizen of Ireland) is how generations of Irish judges have maintained a well-deserved reputation for independence and integrity. As Bláthna Ruane SC makes clear, this did not just happen by accident, it came about by design and has been 'critical to … the rule of law in Ireland, underpinning the separation of powers and the establishment of a stable democracy'.[8] Her chapter also shows how important the process of

[4] Laura Cahillane, 'Remuneration of judges under the 1924 Act' in Howlin (n 1).
[5] Daire Hogan, The introduction of a retirement age for judges' in Howlin (n 1).
[6] Gerard Hogan, 'The Supreme Court and the winter of 1936-37' in Howlin (n 1).
[7] Bláthna Ruane, 'Establishing judicial independence' in Howlin (n 1).
[8] ibid, 71.

choosing judges is if one is to have a good, well-rounded, and representative judiciary.

The chapters by the chief justice and the president of the High Court on their respective offices are notably insightful because they are written by the present holders of those offices. It was fascinating to me that the present chief justice considers, for example, that 'the role of the chief justice today and the support necessary to perform it, requires comprehensive review and reform'.[9] That is an insight which perhaps only a serving (or recently retired) chief justice could bring. Notwithstanding, however, that both chapters are enlightening, a question possibly arises whether a third-party critique of these important offices might also usefully have been included in the book.

Dr Kevin Costello has contributed a sparkling chapter[10] on the establishment of the Circuit Court and the misplaced concerns which accompanied its establishment as to whether decentralised justice would see a disintegration of justice. There is perhaps a related paper awaiting to be written on why we have not seen a further decentralisation of the courts system in Ireland in the last 100 years, with some relocation of the superior courts (and the associated business they bring) around the State.

In a book that contains 23 chapters, it is not possible to mention every contributor or to consider their chapters individually, save to note that each chapter is written by people of real distinction in their chosen careers, and that each chapter is strikingly well-written and informative. The only book that I have recently reviewed which matches this work in terms of the breadth and depth of the knowledge conveyed is the collection of essays on Chief Baron Palles, edited by Professor Breen and Dr McGrath of Sutherland Law School (and also, as it happens, published by Four Courts Press).[11] I can only conclude my review of Professor Howlin's book in terms similar to those with which I concluded my review of that earlier text, namely that I respectfully commend it highly to anyone with an interest in law and/or history. It is a book that deserves the widest readership.

[9] Donal O'Donnell, 'Who would be a chief justice?' in Howlin (n 1) 201.
[10] Kevin Costello, '"Twenty-six high courts": the Circuit Court, decentralisation and its opponents, 1924-34' in Howlin (n 1).
[11] Oonagh Breen and Noel McGrath (eds) Palles, The Legal Legacy of the Last Lord Chief Baron (Four Courts Press, 2022).