Editorial

Fáilte go dtí an chéad eagrán 2023. Following our special edition on the 21st anniversary of the TD case in late 2022, we return to our regular format of a mix of articles and book reviews for this edition, with a mix of judicial, academic, and early-career authors.

Given the fears recently expressed in the media about a potential forthcoming banking crisis, it is fitting that we begin with an article by Dr Elise Lefeuvre and Dr Jonathan McCarthy, who investigate the steps taken in the recapitalisation of Anglo Irish Bank in order to understand how the resolution worked and why it was controversial. They argue that despite the significant costs, this was a successful endeavour and that recapitalisation should therefore be treated as a relevant option for banking resolution in the future.

In the second article, Dr Brian M. Barry and Dr Rónán Kennedy discuss the results of a survey of Irish judges on their use of technology in their role, their attitudes towards technology, and their views on how it impacts on the judicial function. The piece highlights various issues in relation to online hearings and gaps in technology available in courtrooms. It also asks some pertinent questions relating to the potential future use of AI in Irish Courtrooms.

Jack Healy provides us with a fascinating insight into a device used to help juries better understand their roles in trials in England and Wales in the next article. Having surveyed the empirical evidence and relying on further anecdotal evidence, it is suggested that the 'route to verdict' model is one the Irish courts should consider adopting.

In a further timely piece, Mr Justice Peter Charleton and Ivan Rakhmanin warn of the dangers presented by expert evidence. In order to ensure that the judge retains the decision-making capacity, they argue for a strict application of the rules as to expert testimony and a fact-based approach, reminding us that no greater weight must be given to expert evidence than to ordinary evidence of fact.

The next article centres on a new and potentially powerful tool recently identified by the Supreme Court in the seminal Costello case. Seán Rainford examines this concept of 'constitutional identity', the role it played in the judgment, its place in European Union law, and how it fits with prior constitutional interpretation. He proceeds to argue that introducing this concept into Irish law could 'cut against the principle of popular sovereignty, previously held by the courts to be the fundamental bedrock of Bunreacht na hÉireann.'

Dr Susan Leahy then considers the current rules on consent in Irish rape law and examines the realities of their operation in practice. She relies on her empirical research carried out as part of the Realities of Rape Trials in Ireland: Perspectives from Practice research project. Having examined the operation of the current law in this area, she offers recommendations for both legislative and non-legislative interventions which may contribute to a better understanding of consent in Irish rape trials.

The final article centres on 'one of the greatest judges in the English-speaking world in the 20th century'. Mr Justice Gerard Hogan re-examines the legacy of Alfred Thomas Denning in a piece which should give pause for thought on the role of the judge more generally as he asks what made Denning such a remarkable judge.

In the book review section, Bláithín O'Shea reviews Lyndon Harris and Sebastian Walker: *Sentencing Principles, Procedure and Practice* (3rd edn, Thomson Reuters Sweet & Maxwell 2023) and Max Barrett reviews Oonagh B. Breen, and Noel McGrath (eds), Palles, The Legal Legacy of the Last Lord Chief Baron (Dublin and Chicago: Four Courts Press 2022).

Thank you, as always, to our editorial team at the University of Limerick, our copy-editor – Bláithín O'Shea, our recently appointed Deputy-Editor – Dr Laura Donnellan, who did trojan work on this edition, our Judicial Board, all of the authors who contributed to this edition, and finally to the external reviewers who gave their time so generously.

Go mbainfidh sibh taitneamh as agus beannachtaí na casca oraibh go léir.

Dr Laura Cahillane
Editor in Chief

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AN EMERGENCY OF BANKING AND OF LAW: THE RESOLUTION OF ANGLO IRISH BANK

Abstract: The bank guarantee night and the fall of Anglo Irish Bank are landmarks of modern Irish history. The impact goes beyond Irish politics and economy. The example of Anglo Irish Bank represents a unique case of banking resolution with wide financial and legal implications which still resonate at EU level. In order to demonstrate the effects of the resolution, this article investigates the recapitalisation, the nationalisation, the merger, and the liquidation of Anglo Irish Bank. The analysis of debates, legislation, judgments, and banks' financial statements allows for an understanding of how the resolution worked and why it was controversial. A central argument of this article is that recapitalisation succeeded in containing the scale of the Irish banking crisis, despite the significant costs, and that recapitalisation should therefore be treated as a relevant option for future banking resolution. The nationalisation, merger, and liquidation measures were equally necessary in restructuring the Irish banking sector. The article argues the merits of public resolution, especially as the State is able to impose measures swiftly in the best interests of the economy.

Authors: Dr Elise Lefeuvre is an adjunct lecturer at the School of Law, University College Cork, and Dr Jonathan McCarthy is a lecturer at the School of Law, University College Cork.

Introduction

The resolution of Anglo Irish Bank, which may be all too familiar to Irish readers, was one of the most politically and legally controversial consequences of the 2008 financial crisis. Anglo Irish Bank was emblematic to the Celtic Tiger period that preceded the crisis,[1] insofar as it was a highly profitable bank, it had a rapid growth, and it was almost exclusively dedicated to financing the property sector, which was the booming sector at the time. Anglo Irish Bank also became emblematic of the financial crisis, as the markets fell due to a loss of confidence in banks and the property bubble exploding. As a result, Anglo Irish Bank benefited from the largest resolution plan of the 2008 financial crisis in Europe. Although it occurred over a decade ago, the Anglo Irish Bank resolution remains relevant. Anglo Irish Bank's resolution used all of the tools that are now present in the Single Resolution Mechanism (SRM) in a worst-case scenario context (i.e., a systemic financial crisis diminishing the creditworthiness of banks and governments).[2] Anglo Irish Bank continues to be the only example by which there can be an evaluation of the full range of European banking resolution tools.

This article argues that the Irish Government's resolution strategy for Anglo Irish Bank was pragmatic, expedient, and flexible in responding to an emergency situation. The article analyses the legal implications of the Anglo Irish Bank resolution by considering how the resolution was legally established, how the resolution legislation interacted with – and disrupted – the existing legal environment, and how the legislation withstood legal challenges raised in the courts. Furthermore, the article adds an analytical layer by assessing the financial position of Anglo Irish Bank. This analysis helps to convey the practical motives for, and the consequences of, the legal measures.

[1] For the purposes of this article, the Celtic Tiger denotes a period of economic growth in Ireland from the 1990s to the 2008 financial crisis. The exact timeframe of the Celtic Tiger is debatable: see Seán Ó Riain, *The Rise and Fall of Ireland's Celtic Tiger: Liberalism, Boom and Bust* (Cambridge: Cambridge University Press 2014), and Peadar Kirby, *Celtic Tiger in Collapse: Explaining the Weaknesses of the Irish Model* (Basingstoke: Palgrave Macmillan 2010).

[2] The creation of a permanent and harmonised EU banking resolution regime began in 2014 with the enactment of the Bank Recovery and Resolution Directive (BRRD) 2014/59/EU. This was followed by Regulation (EU) No 806/2014, which created the SRM, the Single Resolution Board (the EU agency in charge of resolution), and the Single Resolution Fund (i.e., the fund in charge of collecting and managing money to finance future resolution plans).

This analysis is chronological since Anglo Irish Bank's complex resolution involved a succession of legislation and court decisions in a short period of time. The first section sets the scene with a financial analysis of Anglo Irish Bank. The section explains what Anglo Irish Bank was, where it stood in relation to the domestic banking sector, and the financial implications of its resolution. The second section focuses on recapitalisation by setting out the procedural aspects of the Credit Institutions (Credit Support) Act 2008 and by explicating how issues relating to the legislation were addressed in case law. The third section concentrates on Anglo Irish Bank's nationalisation, through the procedural aspects of the Anglo Irish Bank Act 2009 and the related legal concerns. In order to tell the full story of the resolution and to show how different methods can be included within a bank resolution, the fourth section explains the merger of Anglo Irish Bank with Irish Nationwide Building Society (INBS), through the Credit Institutions (Stabilisation) Act 2010, and the ultimate liquidation of the bank, through the Irish Bank Resolution Corporation Act 2013. The article concludes by reflecting on the lasting legal significance of Anglo Irish Bank's resolution.

The fall of Anglo Irish Bank: from best case scenario to worst case scenario

The first section consists of a financial analysis of Anglo Irish Bank, based on its annual reports. This section allows for an understanding of where Anglo Irish Bank stood in the Irish banking landscape until the late 2000s. Anglo Irish Bank was the third-largest Irish bank. The bank was characterised by an almost-sole focus on property lending, which rendered it unusual compared to its peers, which operated as universal banks.[3] This section proceeds to show what the financial effects of the resolution measures were. Public resolution was expedient in downsizing Anglo Irish Bank within a few years (from 2009 to 2013) and allowing its safe withdrawal when its liquidation was commenced in 2013. The most striking point is how quickly Anglo Irish Bank moved from the best case scenario, being the *Wunderkind* of the Celtic Tiger, to the worst case scenario of the financial crisis in the EU.

The financial analysis in this section relies on annual reports of the Irish banks, all of which are publicly available. The statistics which are presented in the tables in this section are from the externally audited consolidated financial statements, which are contained within the annual reports of each bank. Anglo Irish Bank's official website was removed, yet the bank's publications (including annual reports) are accessible online.[4]

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[3] A universal bank can be considered as combining commercial banking and investment banking within the same group. The post-crisis Liikanen Report recommended that these activities be separated and that the universal banking model be renounced. However, this has not happened, as EU banks did not subsequently change their business models. See Erkki Liikanen, *High-level expert group on reforming the structure of the EU banking sector* (2012), 89 and 97 <https://ec.europa.eu/info/publications/liikanen-report_en> accessed 1 October 2022.

[4] The tables are compiled using financial data from the consolidated financial statements in the banks' annual reports. The financials presented in the tables are the same as those presented in the annual reports, as audited by external auditors. Allied Irish Banks Annual Report 2007 (31 December 2007), Annual Report 2010 (11 April 2011), and Annual Report 2021 (31 December 2021) <https://aib.ie/investorrelations/financial-information/results-centre/annual-financial-results-archive> accessed 1 October 2022; Bank of Ireland Annual Report 2007 (14 November 2007), Annual Report 2010 (14 April 2011), and Annual Report 2021 (28 February 2022) <https://investorrelations.bankofireland.com/results-centre/> accessed 1 October 2022; Educational Building Society Annual Report 2007 (28 February 2008), and Annual Report 2010 (15 April 2011) <https://www.ebs.ie/annual-reports-and-results> accessed: 1 October 2022); and Permanent TSB Annual Report 2007 (27 March 2008) <http://www.irishlifeandpermanent.ie/~/media/Files/I/Irish-Life-And-Permanent/Attachments/pdf/annual-and-interim-reports/2007/arep07.pdf> accessed 1 October 2022 and Annual Report 2010 (31 December 2010) <http://www.irishlifepermanent.ie/en/~/media/Files/I/Irish-Life-And-Permanent/Attachments/pdf/2010/annualreport2010.pdf> accessed 1 October 2022. As made available by IBRC, the Anglo Irish Bank annual reports are accessible through the following online sources: Anglo Irish Bank Annual Report & Accounts 2006 (5 December 2006) <https://www.yumpu.com/en/document/view/3989057/annual-report-accounts-

Best case scenario: a fast-growing niche player

As of 2008, the Irish banking sector was composed of six main banks, comprised of three 'tier-1' banks – Allied Irish Banks, Bank of Ireland, and Anglo Irish bank – and three 'tier-2' banks – Educational Building Society (EBS), Permanent TSB, and Irish Nationwide Building Society (INBS). In finance, the term 'tier' defines the ranking of a company or financial institution, the highest rank being tier-1. This article focuses specifically on the Irish-headquartered and -incorporated banks at the time of the crisis.

All of the six banks were covered by the public resolution plan. The 2008 financial crisis and the public resolution profoundly reshaped the Irish banking sector and led to a shrinking of the banking landscape. Indeed, Anglo Irish Bank and INBS did not survive the crisis, and the Government decided on their joint liquidation in 2013 after their merger in 2011. In addition, Allied Irish Banks acquired EBS in 2011, which was a private acquisition politically backed by the Government as it acted in favour of the banking sector's restructuring and of the resolution's rationalisation.[5] At the time of writing, the public resolution still has a tangible impact with the Irish State being the shareholder in Allied Irish Banks (63%), and Permanent TSB (75%), while the State has recently exited from Bank of Ireland. In other words, the Irish State has remained the main owner of the Irish banking sector, but this has started to fade away as the State has recently commenced the sale of its shares.[6] Table 1 below provides three snapshots of the Irish banking sector to show this reshaping: before the crisis (2007), in the midst of resolution during the crisis (2010), and at the time of writing. In summary, the Irish banking sector moved from six privately-owned banks to three publicly-owned banks,[7] and the three active banks have been recovering and have started to become profitable again. The Irish financial crisis had a V-shape, that is to say a sharp drop

2006-anglo-irish-bank> accessed 1 October 2022, Anglo Irish Bank Annual Report & Accounts 2008 (19 February 2009) <https://www.yumpu.com/en/document/view/36182731/annual-report-irish-bank-resolution-corporation-limited-in-> accessed 1 October 2022, Annual Report & Accounts 2009 (31 March 2010) <https://www.yumpu.com/en/document/view/3989058/annual-report-accounts-2009-anglo-irish-bank> accessed 1 October 2022), and Anglo Irish Bank Annual Report & Accounts 2010 (30 March 2011) <https://www.yumpu.com/en/document/view/3989100/annual-report-31-december-2010-anglo-irish-bank> accessed: 1 October 2022). IBRC's annual report for 2011 is available at <https://www.yumpu.com/en/document/view/50715829/ibrc-annual-report-for-2011-irish-bank-resolution-corporation-> accessed 1 October 2022). The 2007 details for Anglo Irish Bank are based on the figures provided in the 2008 report. The 2012 IBRC interim report is available at: <https://www.yumpu.com/en/document/view/50188160/interim-report-irish-bank-resolution-corporation-limited-in-> accessed 1 October 2022. Similar to the Anglo Irish Bank website, the website of INBS was also removed. However, extracts of the INBS Annual Report & Accounts 2007 are available in Houses of Oireachtas, *Report of the Joint Committee of Inquiry into the Banking Crisis* (2016) <http://opac.oireachtas.ie/AWData/Library3/Banking/BIINBSCoreBook40.pdf > accessed 1 October 2022.

[5] Allied Irish Bank 'AIB and EBS come together to form one of two Irish pillar banks' AIB Press Release (1 July 2011), and Commission, 'Commission Decision of 07.05.2014 on the State Aid Nos SA.29786 (ex N 633/2009), SA.33296 (2011/N), SA.31891 (ex N553/2010), N 241/2009, N 160/2010 and C 25/2010 (ex N 212/2010) implemented by Ireland for the restructuring of Allied Irish Banks plc and EBS Building Society' C(2014) 2638 (7 May 2014).

[6] The Government of Ireland has provided frequent updates on its shareholdings in Irish banks, see Government of Ireland, 'State's Shareholding in Banks' (14 January 2022) <https://www.gov.ie/ga/foilsiuchan/066a28-banks/> accessed 7 October 2022. Changes of shareholding are also covered by public press releases and newspapers. See Department of Finance, 'Minister Donohoe welcomes the successful disposal of part of State's shareholding in AIB Group plc' (28 June 2022) <https://www.gov.ie/en/press-release/ec9aa-minister-donohoe-welcomes-the-successful-disposal-of-part-of-states-shareholding-in-aib-group-plc/> accessed 05 October 2022, and Joe Brennan 'Bank of Ireland returns €2bn above bailout bill as State exits' *The Irish Times* 23 September 2022 <https://www.irishtimes.com/business/financial-services/2022/09/23/bank-of-ireland-returns-2bn-above-bailout-bill-as-state-exits/> accessed 28 September 2022.

[7] EBS was a building society. It had no shareholders and was owned by its clients. EBS benefited also from extensive public recapitalisation and guarantees but it did not turn into State ownership like the other banks due to its mutualist ownership. For more details on the EBS, see Commission, 'Commission Decision of 07.05.2014 on the State Aid Nos SA.29786 (ex N 633/2009), SA.33296 (2011/N), SA.31891 (ex N553/2010), N 241/2009, N 160/2010 and C 25/2010 (ex N 212/2010) implemented by Ireland for the restructuring of Allied Irish Banks plc and EBS Building Society' C(2014) 2638 (7 May 2014).

in 2009/2010, mainly illustrated by the dramatic losses of Allied Irish Banks (-€12 billion), and Anglo Irish Bank (-€17.7 billion) in 2010, followed by a gradual recovery.

Table 1: Profit and public ownership of recapitalised banks

In EUR bn	2007	2010	2021	2022e
Allied Irish Banks				
Profit/(Loss) before taxation	2.5	(12.0)	0.6	1.1
Government of Ireland's share	0%	99%	75%	63%
Bank of Ireland				
Profit/(Loss) before taxation	1.8	0.7	1.4	0.8
Government of Ireland's share	0%	36%	14%	0%
Anglo Irish Bank				
Profit/(Loss) before taxation	1.2	(17.7)	*Liquidated*	*Liquidated*
Government of Ireland's share	0%	100%	*Liquidated*	*Liquidated*
Educational Building Society				
Profit/(Loss) before taxation	0.7	0.5	*Merged with AIB*	*Merged with AIB*
Government of Ireland's share	N.A.	N.A.	*Merged with AIB*	*Merged with AIB*
Irish Life & Permanent (later Permanent TSB)				
Profit/(Loss) before taxation	0.4	0.2	(0.2)	(0.4)
Government of Ireland's share	0%	75%	75%	75%
INBS				
Profit/(Loss) before taxation	0.4	N.A.	*Liquidated*	*Liquidated*
Government of Ireland's share	0%	90%	*Liquidated*	*Liquidated*

Sources: Banks' annual reports

Anglo Irish Bank (created in 1964 and headquartered in Dublin) was described by the Government-established Commission of Investigation into the Banking Crisis as a 'monoline bank'.[8] Anglo Irish Bank's business was very much focused on property lending and poorly diversified, with c. 70% of revenues originating from lending activity. This lack of diversification rendered Anglo Irish Bank unusual, compared to its national peers, and operating in a niche market. For this reason, the qualification, 'too big to fail', which commonly refers to universal banks, cannot apply to Anglo Irish Bank. As per its 2008 annual report, Anglo Irish Bank displayed a dramatic growth year-on-year during the Celtic Tiger, with a sharp decrease in 2008 as the crisis burst in the last semester (see financials below). Anglo Irish Bank participated in herding practices, similar to its peers, to rapidly increase its lending activity.[9] The 2008 crisis was therefore 'an old fashioned "plain vanilla" property bubble'[10] due to 'over attractive and unreal prices for property'.[11] The Central Bank and the Financial Regulator were criticised after the 2008 crisis for their misjudgement of the health of the banking sector, notably regarding property exposure. [12] This misjudgement led the public authorities to underestimate the crisis at its beginning, insofar as they overestimated the banks' capacity to absorb the shock.[13]

[8] Commission of Investigation into the Banking Sector in Ireland, 'Misjudging risk: Causes of the systemic banking crisis in Ireland' (March 2011) (Nyberg Report), para 2.7.5.

[9] ibid, para. 1.6.3. As defined in the Nyberg Report, the herding practice is 'the willingness of investors and banks to simultaneously invest in, lend to and own the same type of assets, accompanied by insufficient information gathering and processing'. As well as the Nyberg Report, the leading Irish reports on the banking crisis are Governor of the Central Bank, *The Irish Banking Crisis: Regulatory and Financial Stability Policy 2003–2008* (2010) (Honohan Report), Klaus Regling and Max Watson, *A Preliminary Report on the Sources of Ireland's Banking Crisis* (Government Publications 2010), and Joint Oireachtas Committee of Inquiry into the Banking Crisis, *Report of the Joint Committee into the Banking Crisis* (Houses of the Oireachtas 2016) (Oireachtas Banking Inquiry Report).

[10] *Dellway Investments Ltd v National Asset Management Agency (NAMA) and Others* [2011] 4 IR 1.

[11] *Mero-Schmidlin (UK) Plc v Michael McNamara and Company & Ors* [2011] IEHC 490.

[12] Nyberg Report (n 8) para 5.3.1.

[13] ibid.

Most of Anglo Irish Bank's activity was in Ireland (as of 2008, 58% of its borrowers were Irish), and the rest was primarily in the United Kingdom. The fact that this exposure was concentrated on the domestic market facilitated the subsequent resolution measures, notably in terms of certainty as to applicable contract law and law enforcement. This aspect contributed to the expediency of the resolution measures, not only for Anglo Irish Bank, but also for the entire Irish banking system, which was predominantly active on the local market. Table 2 below evinces two features of Anglo Irish Bank that impacted on its reaction to the financial crisis. The first is its high lending activity (reaching 72% in 2007). Anglo Irish Bank's business model was not sufficiently diversified. The lending business was essentially directed towards property, and, consequently, the impact of the bursting of the property bubble was severe on Anglo Irish Bank. The second feature is the portion of Irish business, as the wide majority of borrowers were Irish. This kept the crisis of Anglo Irish Bank relatively localised, which played in favour of a smooth resolution.

Table 2: Anglo Irish Bank's key financials

In EUR bn	**2006**	**2007**	**2008**	**2009**	**2010**
Net income	1.1	1.5	1.8	1.5	0.7
Profit/(Loss) before taxation	0.9	1.2	0.8	(12.7)	(17.7)
Revenues	3	5	9	1.5	0.7
Lending (in % of revenues)	*73%*	*72%*	*52%*	-	-
Treasury (in % of revenues)	*21%*	*21%*	*46%*	-	-
Wealth management (in % of revenues)	*7%*	*7%*	*3%*	-	-
Customer lending	50.2	67.1	73.2	56.3	24.3
Loans to Irish customers	28.2	37.8	42.8	17.2	16.2
Total assets	73.3	96.7	101.3	85.2	72.1
Total equity	2.7	4.1	4.1	4.1	3.5

Sources: Anglo Irish Bank Annual Report & Accounts 2006 (5 December 2006), Annual Report & Accounts 2008 (19 February 2009), Annual Report & Accounts 2009 (31 March 2010), and Annual Report & Accounts 2010 (30 March 2011).

Although weaknesses can be ascertained from a post-crisis reading of the figures, this was not the reading of bankers, investors, and supervisors before the crisis, who understood Anglo Irish Bank to be an Irish success story. Anglo Irish Bank strongly believed in its business model, as underlined by the Nyberg report: 'The bank felt confident that a good knowledge of its customers, asset security and personal recourse, combined with geographic diversification of its loan book, would reduce the risks inherent in its property lending model.'[14] Furthermore, the enthusiasm of investors was reflected in the sharp increase of Anglo Irish Bank's market capitalisation, from €0.3 billion, as in 2000, to €10 billion in 2007.[15] Regarding its shareholding structure, Anglo Irish Bank was held at 40% by private shareholders and free-floated at 60%.[16] The largest private shareholder was the Quinn family (15%),[17] who were involved in several court cases and financial scandals with Anglo Irish Bank after its failure. As this article is focused on the resolution approach, the analysis does not cover the Quinn legal proceedings.

[14] ibid, para 2.4.2.

[15] The precise market capitalisation data for Anglo Irish Bank was removed from the Irish Stock Exchange's website, therefore these figures are based on media reports and journalistic sources. Fintan O'Toole, 'The Anglo Irish Bank sign, 2000-2011' *The Irish Times* (Dublin, 05 January 2013) <https://www.irishtimes.com/news/the-anglo-irish-bank-sign-2000-2011-1.954755?msclkid=d808794cd15111ec8b942ff68c588f65> accessed 1 October 2022.

[16] John Collins, 'Anglo Irish: the major shareholders' *The Irish Times* (Dublin, 17 January 2009) <https://www.irishtimes.com/news/anglo-irish-the-major-shareholders-1.1234758?msclkid=379465dad15411ec8653b155e982af03> accessed 1 October 2022. See also Anglo Irish Banks's annual reports.

[17] The other shareholders were Invesco and Janus Capital, both U.S. investment management companies. Dresdner and UBS are institutional investors, respectively German and Swiss.

Worst case scenario: the most expensive resolution

The weaknesses of Anglo Irish Bank started to be partly revealed in 2008 at the very beginning of the crisis.[18] Hence, the bank's fall was sudden and its resolution was equally drastic and expensive. Table 3 below shows the financial data of Anglo Irish Bank, which became the Irish Bank Resolution Corporation (IBRC) in 2011 after its merger with INBS, from its entry into resolution in September 2009 with the first recapitalisation plan, to the beginning of its liquidation in February 2013.[19] Anglo Irish Bank was a sizeable bank with a €56 billion loan book as of 2009. Its loan portfolio decreased by 72% from 2009 to 2013 (see Table 3 below), primarily due to the transfers to the National Asset Management Agency (NAMA), which took over the impaired loans from the Irish banks.[20] Anglo Irish Bank worked out its portfolio by exiting impaired loans, on its own initiative, when loans were not transferred to NAMA.[21] The merger with INBS had a limited impact on the loan book, representing 10% of the merged loan book. INBS also benefited from the transfers to NAMA prior to the merger, amounting to €8.7 billion.[22] These financial statistics show the expediency of the resolution, and NAMA's role in dramatically reducing the size of Anglo Irish Bank/INBS, which then ensured a safe liquidation.

Table 3: Anglo Irish Bank's loans and deposits

In EUR m	2009	2010	2011	2012 (HY)
Net income	1,525	742	944	538
Profit/(Loss) before taxation	(12,717)	(17,619)	873	(743)
Total loans	56,334	25,987	17,951	15,882
Loans and advances to customers	30,852	24,364	17,689	15,565
Loans held for sale (NAMA)	25,482	1,623	262	317
Loans from INBS (2011 One-Off)	-	-	1,806	-
Total assets	85,212	72,182	55,541	53,165
Customer accounts	2,669	2,460	2,249	1,497
Total equity	4,169	3,535	3,238	2,734

Sources: Anglo Irish Bank Annual Report & Accounts 2009 (31 March 2010), and Annual Report & Accounts 2010 (30 March 2011); Irish Bank Resolutions Corporation Limited Annual Report & Accounts 2011 (28 March 2012), and Interim Report, Six Months Ended 30 June 2012 (23 August 2012).

The losses of Anglo Irish Bank were enormous (€12.7 billion in 2009 and €17.6 billion in 2010). The losses triggered public recapitalisation in the form of promissory notes in 2009 and 2010 (tranches in Table 4 below). The promissory notes managed to temporarily limit the fall of Anglo Irish Bank, which even displayed a positive profit before taxation in 2011 (€873 billion). The main benefit of recapitalisation was for the Government to gain time to assess the situation and to implement appropriate resolution measures, including allowing time for legislative processes. Recapitalisation also limited the disturbance to the markets, as the sudden exit of a tier-1 bank would have been perceived as a further indicator of a highly distressed market and could have resulted in deeper losses of market confidence (leading to further falls in ISEQ share prices).

Table 4: Anglo Irish Banks's promissory notes

In EUR bn	Promissory notes
Tranche 1 (31.12.2009)	8.3
Tranche 2 (28.05.2010)	2.0

[18] Honohan Report (n 9), para 5.33.
[19] The data is based on the 2012 interim (half-year) report which is sufficient in providing a snapshot of IBRC before its liquidation.
[20] See (n 164) and (n 165).
[21] Anglo Irish Bank, *2010 Annual Report* (30 March 2011), 5.
[22] National Asset Management Agency 'Loan Acquisition' <https://www.nama.ie/our-work/loan-acquisition> accessed 1 October 2022.

Tranche 3 (23.08.2010)	8.6
Tranche 4 (31.12.2010)	6.4
Total	25.3

Source: Anglo Irish Bank Annual Report & Accounts 2010 (30 March 2011)

Anglo Irish Bank's recapitalisation represented €42.3 billion of the total recapitalisation cost of €64.2 billion for the six Irish banks.[23] Most of it was in the form of promissory notes (€25.3 billion, see details of tranches in Table 4 above), and there was also a one-off direct injection of capital by the Government in 2010 (€17 billion). From the nationalisation in 2009, the new board of directors worked on the 'planned and controlled downsizing'[24] of Anglo Irish Bank, which was accelerated after its merger with INBS in 2011 with a view to liquidating the merged entity (which was being described as a wind-down organisation).[25] The full public ownership of Anglo Irish Bank allowed the plan to be quickly carried out, insofar as no negotiation with other shareholders was needed. The benefit of nationalisation was therefore to enable immediate stringent restructuring measures. As shown in Table 5 below, when Anglo Irish Bank/IBRC entered into liquidation in February 2013, the Irish Government was the sole shareholder, the main counterparty with an exposure of €36 billion, and the main funder with 52% of assets being promissory notes.

Table 5: Anglo Irish Bank's capitalisation

In EUR bn	**2010**	**2011**	**2012 (HY)**
Capital support	17.0	0	0
Promissory notes (carrying value)	25.3	29.9	27.8
Promissory notes share in Total assets	46.8%	53.8%	52.3%
Exposure to the Irish Government	39.0	35.0	36.0
Total capital support provided by the shareholder	29.3	29.3	29.3
Total Tier 1 capital	4.0	3.8	3.1
Total Capital	4.6	4.1	3.4
Risk weighted assets	36.7	25.1	22.8
Tier 1 capital ratio	12.4%	15.1%	13.6%
Total capital ratio	10.9%	16.3%	14.8%

Sources: Anglo Irish Bank Annual Report & Accounts 2009 (31 March 2010), and Annual Report & Accounts 2010 (30 March 2011); Irish Bank Resolutions Corporation Limited Annual Report & Accounts 2011 (28 March 2012), and Interim Report, Six Months Ended 30 June 2012 (23 August 2012).

The readiness and flexibility of the Irish Government in managing the resolution of Anglo Irish Bank turned what was a worst case scenario in September 2009 into an exemplary resolution, as from 2010. Recapitalisation, nationalisation, work-out of assets (through NAMA and through standalone measures), and merger facilitated a controlled exit of Anglo Irish Bank, without exacerbating panic on the recovering Irish market.

The financial analysis of Anglo Irish Bank's resolution shows very positive findings, as, in effect, the public resolution worked. However, the next sections will demonstrate that the resolution, in its legal aspects, was controversial. A final assessment of Anglo Irish Bank's resolution should therefore be balanced between its financial expediency and the legal issues which arose.

[23] This resolution represented an enormous expenditure to the State. The journalist Simon Carswell declared that the resolution of Anglo Irish Bank '[…] dragged an entire country to the brink of bankruptcy', Simon Carswell, *Anglo Republic Inside the Bank that Broke Ireland* (Penguin Books 2011), Prologue. The total cost of resolution, which primarily involves the cost of recapitalisation, is given in Oireachtas Banking Inquiry Report (n 9) Volume 1, 287.
[24] IBRC, *2012 Interim Report* (23 August 2012), 4.
[25] ibid, 6.

Recapitalisation

This section examines, firstly, the procedural aspects of Anglo Irish Bank's recapitalisation and, secondly, the case law arising from the recapitalisation decision. Recapitalisation necessitated legislation in an emergency context, which involved an exception to EU state aid law, and new pieces of legislation, since recapitalisation was not covered before 2008 in most EU Member States' legislation (including Ireland). The EU exceptional regime and the new legislation (Credit Institutions (Financial Support) Act 2008) triggered several court cases in Ireland, but not in other EU countries. This makes Ireland a uniquely instructive example. The case law reveals the legal grounds on which recapitalisation was challenged, and how the courts upheld the legality of recapitalisation. On top of explaining what happened at the time in Ireland, analysing the case law remains relevant to understanding how recapitalisation decisions could potentially be challenged in future.

Procedural aspects

The immediate background to Anglo Irish Bank's recapitalisation lay in the panic on Irish financial markets on 29 September 2008, due to dramatic decreases in banks' share prices and in the ISEQ generally. On the night of 29 September and the morning of 30 September, the Government decided to financially support Irish tier-1 (Allied Irish Banks, Anglo Irish Bank, Bank of Ireland) and tier-2 banks (Irish Nationwide Building Society, EBS, and Irish Life & Permanent). Because the Government, regulators, and bankers did not anticipate the crisis, an emergency solution needed to be found by submitting a Bill before the Oireachtas and by voting on the proposed legislation.

The decision to guarantee the banks was legally enacted by the Oireachtas on 2 October through the Credit Institutions (Financial Support) Act 2008.[26] The Oireachtas was urged by the Government to vote rapidly.[27] This exigency raised stormy debates in the Dáil.[28] The Joint Oireachtas Committee of Inquiry into the Banking Crisis subsequently found that it was a mistake to decide on a guarantee without restructuring measures also being in place.[29] The restructuring measures came later and were eventually enacted in the Credit Institutions (Stabilisation) Act 2010.

From October 2008, the Government decided to impose a range of restructuring conditions on the covered banks in order to ensure a return to normal activity and business continuity.[30] Within the framework of the Credit Institutions (Financial Support) Scheme 2008,[31] covered banks were bound to limit their business and their exposure, such as 'expansion of capital and lending activity'.[32] To do so, the Minister for Finance was entitled to oversee commercial

[26] See further Oireachtas Banking Inquiry Report, (n 9) Volume 1, 272.
[27] Some TDs complained that the vote was abnormally rapid as the Bill 'passed all legislative stages in less than 24 hours.' See Gavin Barrett, *The Evolving Role of National Parliaments in the European Union Ireland as a Case Study* (Manchester University Press 2018) 150.
[28] Some TDs claimed that recapitalisation was a 'straitjacket' imposed on the Irish nation (per Deputy Pat Rabbitte in Dáil Deb 01 December 2010, vol 723 no. 4, and that '[t]he one major defect in the Credit Institutions (Financial Support) Bill is its democratic deficit. The Oireachtas has been asked to write a blank cheque for the Government and Ireland's financial institutions' (per Deputy Jim O'Keeffe in Dáil Deb 01 October 2008, vol, 662, no. 2).
[29] Oireachtas Banking Inquiry Report, (n 9) Volume 1, 282.
[30] In order to ensure a return, the Government required the banks to give an 8% fixed dividend on the preference shares. The Government also intervened in the banks' management by taking the right to appoint 25% of directors, by imposing commercial decisions regarding lending to SMEs and individuals, and by imposing reductions in compensation. See Oireachtas Banking Inquiry Report, (n 9) Volume 1, 293.
[31] As introduced through SI 2008/411, the Credit Institutions (Financial Support) Scheme 2008 provided details on the application of the Credit Institutions (Financial Support) Act 2008.
[32] SI 2008/411, Reg 11.

decisions of covered banks,[33] and the management of balance sheets.[34] The issue of information provision also needed to be addressed, as the covered banks were bound to disclose information on their financial positions to the Central Bank of Ireland.[35] The Central Bank was given the power to issue commercial conduct rules for covered banks.[36] Furthermore, there were EU-originated business and accounting conditions imposed on the covered banks.[37]

Covered banks' depositors also required a guarantee. From December 2008 to March 2013, the Government protected depositors under the Eligible Liability Guarantee Scheme.[38] The guarantee was created under s. 6(4) of the Credit Institutions (Financial Support) Act 2008 and it was 'unconditional and irrevocable'. [39] In 2009, the Central Bank implemented the Deposit Guarantee Scheme, which aimed at protecting all covered banks' depositors holding less than €100,000 in deposits.[40] Under this Scheme, the Central Bank was liable to repay the deposits. This was supposed to be an advance payment as a covered bank would be liable to reimburse the Central Bank.[41] Capital injections in the covered banks were regular and happened as soon as financial weaknesses were found. There were four capital injections between 2008 and 2010. [42] All capital injections were subject to approval by the European Commission (Commission).[43] The Commission required the Government to limit the guarantee schemes to only what was necessary in the interests of recapitalising the covered banks.[44] The Commission approved the guarantee as described in the Credit Institutions (Financial Support) Act 2008 and it imposed an obligation that the guarantee comply with the three requirements of Article 4(2) of the European Communities Treaty (EC Treaty):appropriateness, necessity and proportionality.[45]

Recapitalisation converted private debt into sovereign debt.[46] This accordingly increased the levels of public debt. Consequently, the Government bore the responsibility for budgetary restrictions in order to deleverage the cumulative debt. The Government planned substantial

[33] SI 2008/411, Regs 38 and 39.
[34] SI 2008/411, Reg 37.1.
[35] SI 2008/411, Reg 24.
[36] SI 2008/411, Reg 36.
[37] The covered banks were required to have balance sheet growth, to comply with rules on balance sheet management, to meet liquidity and solvency requirements, to have control over acquisition of shares, to comply with targets on asset and liabilities, to comply with solvency, liquidity and capital ratios, to maintain a limitation on dividend payments, controls on remuneration, and control on representation and executive management. See generally Mark Kennedy, Máire Whelan, and Feargus Ó Raghallaigh, *The National Asset Management Agency Act 2009* (Gill & McMillan 2011).
[38] Deposit guarantee schemes were created at the EU level in 1994 under the Directive 94/19/EC, and it was transposed to Irish law under European Communities (Deposit Guarantee Schemes) Regulations, SI 1999/468. On 20 September 2008, the Irish Government committed to deposit protection and ensured that 'all deposits in Irish financial institutions are safe': Simon Carswell, 'The big gamble: The inside story of the bank guarantee' *The Irish Times* (Dublin, 25 September 2010) <https://www.irishtimes.com/news/the-big-gamble-the-inside-story-of-the-bank-guarantee-1.655629> accessed 1 October 2022. On 30 September 2008, the Irish Government announced the deposit protection for the deposits which were not covered by the Directive 94/19/EC Scheme: see European Central Bank, 'National Rescue Measures in Response to the Current Financial Crisis' (2009), ECB Legal Working Paper Series No 8, Appendix 1, 90.
[39] Credit Institutions (Eligible Liabilities Guarantee) Scheme 2009, para 6.
[40] European Communities (Deposit Guarantee Schemes) (Amendment) Regulations 2009, SI 2009/228, Reg 10.
[41] Financial Services (Deposit Guarantee Scheme) Act 2009, s. 8. This condition was also linked with the belief that the covered banks were solvent and had capacity to recover: see Oireachtas Banking Inquiry Report, (n 9) Volume 1, 260-263.
[42] See Oireachtas Banking Inquiry Report, (n 9) Volume 1, 290–293.
[43] Commission, 'Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis' (2008) OJ C 270/2.
[44] ibid para 25.
[45] Commission Decision, Guarantee Scheme for Banks in Ireland, N 48/2008, OJ C 312/2.
[46] Irene Lynch Fannon, 'The End of the Celtic Tiger: An Irish Case Study on the Failure of Corporate Governance' (2015) 66(1) Northern Ireland Legal Quarterly 1.

cuts in public spending to maintain a balanced budget and to preserve credibility in the eyes of the EU.[47] All of these measures proved to be very unpopular with the public.[48]

Permitting recapitalisation programmes required important modifications to EU law. The starting point was the removal of the State Aid prohibition in EU law. In EU law,[49] the default position is for the prohibition of State Aid.[50] This regime can be disapplied in exceptional circumstances, such as a 'serious disturbance of the economy'.[51] The 2008 financial crisis was deemed to have fallen within this category.[52] In October 2008, the Commission gave formal legal approval for this exception.[53] All Member States could benefit from this exception, subject to prior Commission approval. [54] In 2010, the EU's recapitalisation programmes were the European Financial Stability Facility,[55] and the European Financial Stabilisation Mechanism.[56] In 2011, the eurozone Member States merged these two programmes and created, by treaty, the European Stability Mechanism (ESM). [57] The European Stability Mechanism was approved in Ireland by referendum in 2012 and transposed under the European Stability Mechanism Act 2012. [58]

Aside from the contentious legal questions discussed in the next sub-section, there was some political controversy around the role of the Minister for Finance. In the Credit Institutions (Financial Support) Act 2008, the Minister for Finance was placed in charge of implementing financial support.[59] This granting of powers was heavily criticised during the Oireachtas debates.[60] Following the enactment of the Credit Institutions (Financial Support) Act 2008,

[47] For example, the Financial Emergency Measures in the Public Interest Act 2009 decreased civil servants' salaries. The Financial Emergency Measures in the Public Interest Act 2010 reduced pensions and the pensions continued to be cut under the Financial Emergency Measures in the Public Interest Act 2013.

[48] For example, Deputy Maureen O'Sullivan declared: 'I am reminded of the lines Mercutio spoke […]: "A plague o' both your houses! They have made worms' meat of me." That is the feeling of many people in this country': Dáil Deb 01 December 2010, vol 723, no. 4. The conversion of private debt to sovereign debt was one of the most controversial events of the 2008 financial crisis, and it was largely commented by official institutions and academics. See, for examples, Samba Mbaye, Marialuz Moreno Badia, and Kyungla Chae, 'Bailing out the people? When private debt becomes public' (2018) IMF Working Paper 18/141, Anton Brender, Florence Pisani and Emile Gagna, *The Sovereign Debt Crisis, Placing a Curb on Growth* (Centre for European Policy Studies 2012), and Adrian Blundell-Wignall, 'Solving the Financial and Sovereign Debt Crisis in Europe' (2012) 2011 OECD Journal Financial Market Trends 2.

[49] EU State Aid Law is based on Articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU), formerly Articles 87 to 89 of the European Community (EC) Treaty. See Andrea Biondi and Elisabetta Righini, *An Evolutionary Theory of State Aid Control* (Oxford University Press 2015).

[50] Article 107 (1) TFEU. The Commission gives the following definition: 'State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities.' See Commission, 'State aid overview' (2019) <https://ec.europa.eu/competition/state_aid/overview/index_en.html> accessed 1 October 2022.

[51] EC Treaty Article 87(3)(b), now Article 107(3)(b) TFEU.

[52] Commission (n 43).

[53] ibid 8.

[54] ibid general principles in paras 6 to 16.

[55] The European Financial Stability Facility was created in June 2010 by the Eurozone Member States to provide Ireland, Portugal, and Greece with temporary and emergency financial assistance. See European Stability Mechanism, 'Before the ESM – EFSF – the temporary fiscal backstop' <https://www.esm.europa.eu/efsf-overview> accessed 1 October 2022.

[56] The European Financial Stabilisation Mechanism was created under the Council Regulation (EU) No 407/2010 of 11 May 2010 to provide Ireland, Portugal, and Greece with temporary and emergency financial assistance. See Commission, 'European Financial Stabilisation Mechanism (EFSM) – Pre-2015 support' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-financial-stabilisation-mechanism-efsm_en> accessed 1 October 2022.

[57] The European Stability Mechanism was created to provide any Eurozone Member State with financial assistance in order to help it to maintain its financial stability: see European Stability Mechanism Treaty, Article 3.

[58] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [1].

[59] Credit Institutions (Financial Support) Act 2008, s. 2(1).

[60] Deputy Kenny declared: 'The House has placed an enormous amount of trust in the Minister of Finance, on behalf of the people' Dáil Deb 02 October 2008, vol 662, no. 3. Ireland was not an exception, as Ministers for Finance of other EU Member States were also granted powers to roll out the resolution programmes. For example, in Germany, the Financial Market Stabilisation Act 2009 allowed 'the German state to gain unlimited control over banks of systemic importance'. See Klaus J. Hopt, Christoph Kumpan and Felix Steffek, 'Preventing Bank Insolvencies in the Financial Crisis: The German Financial Market Stabilisation Acts' (2009) 10(4) European Business Organization Law Review 515. The British Parliament

the Minister for Finance issued the Credit Institutions (Financial Support) Scheme 2008, by which the Minister designed the framework for guarantee. [61]

The Credit Institutions (Financial Support) Act 2008 designated the Minister for Finance as responsible for recapitalisation.[62] The Minister was granted extended powers in doing 'anything that appears necessary or expedient'[63] to ensure the Act's implementation. The Minister was able to design and grant financial support.[64] The guarantee was principally on the equity side, by the purchase of shares and securities,[65] as well as creation and issuance of securities.[66] The Minister had significant discretionary power for allocating financial support, and financial support could be withdrawn at any time.[67]

While the Credit Institutions (Financial Support) Act 2008 settled the recapitalisation framework, the Minister specified the exact form of recapitalisation in the Credit Institutions (Financial Support) Scheme 2008. The Minister designed the whole recapitalisation process and its conditions himself through the design of the reimbursement scheme,[68] its amendment,[69] and its revocation. [70]

There were political concerns regarding the role of the Minister for Finance in the Oireachtas debates on the Credit Institutions (Financial Support) Bill, specifically as to whether the Minister for Finance was acting in an unreasonable way and granting undue amounts of support. As it transpired, there were no subsequent problems surrounding the extent of the Ministerial powers and there is no trace of a negative assessment on the Minister for Finance's decisions or conduct in the post-crisis official reports. Indeed, the Nyberg, Honohan, and Regling and Watson reports opted to concentrate on how the statutory framework applied, rather than on the Minister's discretion as to its design. [71] However, the extent of Ministerial discretion was certainly unusual by the standards of Irish legislation and within a context of democratic institutions. The powers provided for through the legislation indicate the level of trust which was placed in the Minister individually (and the departmental civil service). Three politicians (two Fianna Fáil and one Fine Gael) successively occupied the position of Minister for Finance throughout the crisis. The conduct of recapitalisation and resolution progressed without difficulties during their terms of office, and without any major complaint as to Ministerial proficiency and probity during the resolution process.

Case law

Recapitalisation was challenged in four legal proceedings (*Pringle*, *Doherty*, *Hall*, and *Collins*) whereby the plaintiffs (all Oireachtas members) sought to have the legislation rendered void

granted important powers to the Treasury to bailout Northern Rock: see Roman Tomasic, 'The Rescue of Northern Rock: Nationalization in the Shadow of Insolvency' (2008) 1(4) Corporate Rescue and Insolvency 109-111.

[61] SI 2008/411. This scheme by the Minister for Finance was a requirement under the Credit Institutions (Financial Support) Act 2008 s. 6(5)

[62] Credit Institutions (Financial Support) Act 2008, s. 2(1).

[63] ibid, s. 5(1).

[64] ibid, ss. 6(1) and (4).

[65] ibid, s. 6(9).

[66] ibid, s. 6(11).

[67] ibid, ss. 6(10) and s. 6(14)

[68] SI 2008/411, Regs 16 to 23.

[69] ibid, Reg 7.

[70] ibid, Reg 13.

[71] (n 9).

and to stop the recapitalisation programmes.[72] These four legal actions signified the transfer of political disputes from the Oireachtas, where the TDs disagreed with the final recapitalisation decisions, to the courts, where the TDs objected to recapitalisation on grounds of EU and Irish law. Above all, the courts were satisfied that recapitalisation was legal and favourable to the financial stability of Ireland. To that extent, the Government was found to have acted in the common interest and that its actions were therefore constitutional.[73] Ireland was the only EU Member State where recapitalisation was challenged on several occasions in courts, as there was only one other occurrence in Germany with the *Gauweiler* case.[74]

Two court cases (*Pringle* and *Doherty*) were founded on arguments of EU law. Recapitalisation was a new measure in 2008 and had no prior legal existence. Its legal creation was therefore a disruption, or, at the very least, an exception, in EU State Aid law,[75] where the normal regime is the prohibition of State Aid.[76] As per the existing State Aid rules, state aid is possible in exceptional circumstances, such as a 'serious disturbance of the economy'.[77] The European Commission decided that the 2008 financial crisis fell within this category and thereby legalised recapitalisation.[78] In *Pringle v Government of Ireland & Others*,[79] the plaintiff, Thomas Pringle TD, challenged the validity of the ESM Treaty.[80] This challenge was based on EU law (the Treaty on the Functioning of the European Union (TFEU) and Decision 2011/199/EU),[81] and on Irish constitutional law.[82] Pringle asked for a legal assessment as to whether the ESM Treaty complied with the rule of law, as understood in the EU and in Ireland,[83] and claimed that the ESM Treaty fell outside of the economic and monetary competencies of the EU.[84]

[72] The relevant cases are: *Pringle v The Government of Ireland & Ors* [2012] IEHC 296; *Pringle v The Government of Ireland & Ors* [2012] IESC 47; and C370/12 *Pringle v Government of Ireland* [2013] OJ C26/15, *Doherty v The Referendum Commission* [2012] IEHC 211 *David Hall v Minister for Finance & Ors* [2013] IEHC 39 and *Collins v Minister for Finance & ors* [2013] IEHC 530.

[73] This was the conclusion of the High Court in *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [119], and the Supreme Court in *Pringle v The Government of Ireland, Ireland and the Attorney General* [2012] IESC 47 [8.13]. Indeed, the judiciary assessed that the Government was free to enter the ESM Treaty as part of its policies.

[74] C62/14 *Peter Gauweiler and Others v Deutscher Bundestag* [2015]. Peter Gauweiler, a German MP, challenged an ECB decision regarding sovereign debt purchase on secondary markets. Gauweiler was opposed to this decision because it would financially support EU countries other than Germany, and especially Greece. The European Court of Justice confirmed the validity of the ECB's decision.

[75] EU State Aid Law is based on Articles 87 to 89 of the EC Treaty. For further analysis, see particularly Andrea Biondi and Elisabetta Righini, *An Evolutionary Theory of State Aid Control* (Oxford University Press 2015).

[76] EC Treaty Article 87(1). The Commission gives the following definition: 'State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities.' See Commission, 'State aid control' (2019) <https://ec.europa.eu/competition/state_aid/overview/index_en.html> accessed 1 October 2022.

[77] Article 107 (3)(b) TFEU.

[78] Commission (n 43).

[79] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296; *Pringle v The Government of Ireland & Ors* [2012] IESC 47; and C370/12 *Pringle v Government of Ireland* [2013] OJ C26/15.

[80] The European Stability Mechanism was created to provide any Eurozone Member State with financial assistance in order to help it to maintain its financial stability. See European Stability Mechanism Treaty, Article 3.

[81] Decision 2011/199/EU amended Article 136 of the TFEU to allow the creation of stability mechanism by the Member States, ie, recapitalisation and public support programmes. The amendment is: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality' (Article 1).

[82] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296, Section I.

[83] Joe Noonan and Mary Linehan, 'Thomas Pringle v The Government of Ireland, Ireland and the Attorney General' (2014) 17 *Irish Journal of European Law* 129-138. Noonan and Linehan use the work of Tom Bingham to define the rule of law: see Tom Bingham, *The Rule of Law* (Penguin Books 2011).

[84] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [18].

As it concerned EU matters, the *Pringle* case was referred to the Court of Justice of the European Union (CJEU).[85] The CJEU confirmed the lawfulness of the ESM Treaty, as part of the EU economic and monetary policy established in the Treaty on the European Union (TEU) and the TFEU.[86] The Court recognised the decision of the European Commission to take a united approach to crisis resolution, and the Court did not find any legal ground to prevent the EU from financially assisting a Member State in distress.[87] Additionally, the Court emphasised the principle of solidarity between the Member States, even in a time of crisis.[88]

In *Doherty v Referendum Commission*,[89] the plaintiff, Pearse Doherty TD, challenged the Treaty on Stability, Coordination and Governance in the European and Monetary Union (Fiscal Treaty).[90] Doherty asked the High Court, firstly, whether the Irish Government would have been in a position to veto the Article 136 TFEU amendment on public deficit limit;[91] and, secondly, whether the Article 136 TFEU amendment complied with Article 48(6) TEU on the revision and amendment of the TFEU.[92] The High Court concluded that the EU law-related questions should be directed to the CJEU.[93] Doherty eventually did not request that the Court send the case to the CJEU. The questions of EU law therefore remained unanswered.

Three court cases (*Pringle*, *Hall*, and *Collins*) challenged recapitalisation based on Irish law. In *Pringle*,[94] the plaintiff argued that the ESM Treaty was incompatible with the Irish Constitution,[95] because it involved a transfer of sovereignty,[96] or in his own words an 'abdication of sovereignty by allowing majority decision-making by the ESM institutions'.[97] The Court concluded that the Government was free to enter into the ESM Treaty as part of foreign and economic policies,[98] and that the Court had 'absolutely no role in commenting

[85] ibid, Section VI. Pringle requested a reference to the CJEU regarding three questions: '(a) The plaintiff challenges the compatibility of the ESM Treaty both with the Constitution and with Union law. (b) The determination of certain of the constitutional aspects of the case is dependent on the interpretation of the Union Treaties and "General Principles of Union law", as developed in the case law of the CJEU. (c) Questions of law ought to be referred to the CJEU for preliminary ruling pursuant to Article 267 TFEU.' *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [24].
[86] C370/12 *Pringl*e v *Government of Ireland* [2012] [93] – [100].
[87] Roderick O'Gorman, 'Thomas Pringle v Government of Ireland, Ireland and the Attorney General' (2013) 50 Irish Jurist 221.
[88] C370/12 *Pringl*e v *Government of Ireland* [2012] [115].
[89] *Doherty v The Referendum Commission* [2012] IEHC 211.
[90] This Treaty aimed at enshrining the obligation for all the Member States to maintain a balanced budget. The rule was to limit the public debt deficit between 0.5 and 1% of the GDP: see Tony Costello, 'The Fiscal Stability Treaty Referendum 2012' (2014) 29 Irish Political Studies 459.
[91] *Doherty v The Referendum Commission* [2012] IEHC 211 [49].
[92] ibid [50] – [54].
[93] ibid [66].
[94] [2012] IEHC 296 and [2012] IESC 47.
[95] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [1]. The High Court based the constitutional analysis on Article 5, Articles 29(4)(1) and (2), and Article 29(5)(1) of the Constitution: see *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [97] – [99].
[96] ibid [111]. Precisely, the claim was based on Articles 5, 6, 28, and 29 of the Constitution. These Articles refer to the independence and the sovereignty of the State, to the separation of powers, to the definition of executive power: see *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [97] to [99].
[97] Jan-Herman Reestman, 'Legitimacy through adjudication: the ESM Treaty and the fiscal compact before the national Courts' in
Thomas Beukers, Bruno de Witte and Claire Kilpatrick, *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 258.
[98] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296, [119]. To reach this conclusion, the Court applied the *Crotty* test. See *Pringle v The Government of Ireland & Ors* [2012] IEHC 296, [30]. Crotty was an Irish citizen, and he was an opponent to the Ireland's membership to then European Economic Community. He challenged the constitutionality of the Single European Act 1986 in *Crotty v An Taoiseach* [1987] IESC 4. He claimed that the Oireachtas and the Government could not constitutionally surrender a part of sovereignty. Gerard Hogan, 'The Supreme Court and the Single European Act' (1987) 22(1) Irish Jurist 55-70, and Maria Cahill, 'Crotty after Pringle: The Revival of the Doctrine of Implied Amendment' (2014) 17(1) Irish Journal of European Law 1.

as to whether participation is a good or bad strategy for Ireland'.[99] Moreover, the Court concluded that the ESM Treaty would not involve 'any transfer or diminution of sovereignty by Ireland to the European Stability Mechanism (ESM) or other Members of the ESM'.[100] The Court therefore confirmed that both the ESM Treaty and the ESM Act 2012 were compatible with the Constitution.[101]

Pringle appealed the High Court's decision to the Supreme Court.[102] The Chief Justice and three judges out of four were satisfied that the ESM Treaty was constitutional. The three judges who acknowledged the constitutionality found that there was no impingement on economic and monetary sovereignty, that there was no unlawful transfer of sovereignty, that entering the ESM Treaty was a policy decision, that the ESM Treaty was limited in time, and that the ESM Treaty benefited Ireland.[103] The dissenting judgment deemed the ESM Treaty to be unconstitutional, as it involved a transfer of sovereignty incompatible with the Constitution,[104] and that a referendum would be needed for ratification.[105] The Supreme Court dismissed the appeal and confirmed the constitutional validity of the ESM Treaty.

In *David Hall v Minister for Finance & Others*,[106] the plaintiff, David Hall TD, challenged the constitutionality of section 6 of the Credit Institutions (Financial Support) Act 2008, which permitted the Minister for Finance to guarantee the banks.[107] The High Court did not answer the legality question, but instead focused its judgment on the *locus standi* of Hall, that is, his capacity to bring a constitutional challenge to Court.[108] The High Court concluded that Hall was not entitled to raise a constitutional challenge, on the basis that his claim did not concern 'any actual breach or threatened breach of his rights'.[109]

In *Collins v Minister for Finance & Others*,[110] same as in *Hall*, the plaintiff, Joan Collins TD, challenged the constitutionality of the Credit Institutions (Financial Support) Act 2008. Collins claimed that 'the Minister had acted wrongfully or in an unconstitutional fashion'[111] and 'without further recourse to Oireachtas the Minister for Finance appropriated enormous sums of public funds in favour of the banks'.[112] Her challenge was broken down into two questions: (i) whether the €30bn financial support[113] exceeded the time limit under the Credit Institutions (Financial Support) Act 2008 s. 6(3);[114] and (ii) whether the Credit Institutions (Financial Support) Act 2008 s. 6(1)[115] implied an approval by the Oireachtas to release financial support.[116]

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99 *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [124].
100 *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 s. VIII(a)(2).
101 ibid s. VIII.
102 *Pringle v The Government of Ireland, Ireland and the Attorney General* [2012] IESC 47
103 ibid [17.vii], [26], [4.22], [8.13], [10.1], [38-40] and [43-44].
104 ibid 47.
105 ibid.
106 [2013] IEHC 39 and [2013] IESC 10.
107 This power was granted under s. 6(4): 'Financial support may be provided under this section in a form and manner determined by the Minister and on such commercial or other terms and conditions as the Minister thinks fit.'
108 *David Hall v Minister for Finance & Ors* [2013] IEHC 39.
109 Since *Cahill v Sutton* [1980] IR 269, the plaintiff must evidence that his 'rights have either been infringed or are threatened' to be granted the possibility to bring a constitutional challenge to Court. See *David Hall v Minister for Finance & Ors* [2013] IEHC 39.
110 [2013] IEHC 530 and [2016] IESC 73.
111 *Collins v Minister for Finance & ors* [2013] IEHC 530 [31].
112 ibid [34].
113 ibid [1].
114 Credit Institutions (Financial Support) Act 2008 s. 6(3) provided 29/09/2010 as a deadline for any financial support.
115 Credit Institutions (Financial Support) Act 2008 s. 6(1) provided that the Minister for Finance could decide the form and the amount of the financial support.
116 *Collins v Minister for Finance & ors* [2013] IEHC 530 [59].

On the first question, the High Court concluded that the Minister for Finance acted *intra vires,*[117] and issued the €30bn financial support before the deadline.[118] On the second question, the Credit Institutions (Financial Support) Act 2008 s. 6(12) provided that the financial support fell within the category of non-voted expenditure,[119] which does not need parliamentary approval.[120] The High Court concluded that, although the Minister of Finance was in a position to use significant amounts of money, his power was limited in a satisfactory manner, [121] as he was allowed to grant financial support under strict conditions.[122] With the strict limitations to certain conditions, the High Court concluded that, in this instance, the Minister could grant support without further parliamentary approval.[123]

Collins appealed the High Court's decision to the Supreme Court,[124] and asked the Court whether the Oireachtas was constitutionally allowed to grant the Minister for Finance powers to make important financial commitments for the guarantee.[125] The core of Collins' argument was based on the absence of a limit to the guarantee.[126] The Supreme Court held that the Credit Institutions (Financial Support) Act 2008 was an exceptional solution to exceptional circumstances.[127] The Supreme Court was satisfied that the powers of the Minister were limited, in providing a guarantee only for ailing banks and in limiting the time.[128] The Supreme Court was therefore satisfied that 'the powers of the Minister to provide financial support are significantly constrained by the legislation.'[129] Based on the exceptional circumstances of the crisis and on the limited powers granted to the Minister, the Supreme Court confirmed the lawfulness of the guarantee under the Credit Institutions (Financial Support) Act 2008.

In all of the above cases, the courts dismissed the claims, although the courts were occasionally ambivalent in expressly endorsing the recapitalisation decision, as in *Pringle* and

[117] ibid [2013] IEHC 530 [59].
[118] Credit Institutions (Financial Support) Act 2008 s. 6(3) settled that no financial support could be issued after 29/09/2010. See also *Collins v Minister for Finance & ors* [2013] IEHC 530, [60] – [62]. The payments to Anglo Irish Bank and EBS were released on 31December 2015. See *Collins v Minister for Finance & ors* [2013] IEHC 530 [64]. This was allowed by an amendment of Credit Institutions (Financial Support) Act 2008, s. 6(3), which permits financial support after 29 September 2010. See *Collins v Minister for Finance & ors* [2013] IEHC 530 [134].
[119] *Collins v Minister for Finance & ors* [2013] IEHC 530 [89]. There are two kinds of expenditure: voted and non-voted. As explained in the Supreme Court: 'Non -Voted expenditure is "money which a specified Act has authorised to be paid from the Central Fund (or Exchequer), indefinitely, so that this expenditure does not have to come under the annual review of the Dáil". Voted expenditure is the expenditure involved in the annual exercise of determining the votes for each Department of State and other heads of expenditure, which each have their "votes".' See *Collins v Minister for Finance & ors* [2016] IESC 73 [59].
[120] *Collins v Minister for Finance & ors* [2013] IEHC 530 [97]. To answer this question, the High Court used the *Cityview* test. This test was defined in *Cityview Press* [1980] I.R. 381, 399 and aims at assessing the delegation of powers. See *Collins v Minister for Finance & ors* [2013] IEHC 530 [98].
[121] ibid [109], and the judgment stated that 'we consider that the 2008 Act satisfies the principles and policies test and that it did not confer on the Minister an unfettered and unreviewable discretionary power with regard to the provision of financial assistance': *Collins v Minister for Finance & ors* [2013] IEHC 530 [115].
[122] ie, '(i) a serious threat to the stability of the banking sector; (ii) the giving of such support is necessary to maintain the stability of the State's financial system and (iii) this is also necessary to restore equilibrium in the wider economy.' *Collins v Minister for Finance & ors* [2013] IEHC 530 [111].
[123] *Collins v Minister for Finance & ors* [2013] IEHC 530 [130].
[124] *Collins v Minister for Finance & ors* [2016] IESC 73. All of the Supreme Court judges participated, and this underlined the importance of this case: see *Collins v Minister for Finance & ors* [2016] IESC 73 [1].
[125] ibid [6]. The question was later rephrased by the Supreme Court as to whether the Credit Institutions (Financial Support) Act 2008, s. 6, involved 'an impermissible delegation or transfer by the Oireachtas to the Government of the power of expenditure and consequently an impermissible abdication by the Oireachtas': *Collins v Minister for Finance & ors* [2016] IESC 73 [63].
[126] ibid [65].
[127] ibid [70] – [71].
[128] ibid [77] – [78].
[129] ibid [81].

Hall. The cases evidence the propensity of some politicians to use the courts to oppose recapitalisation, but, since this happened only in Ireland, it is difficult to draw conclusions as to similar trends and tendencies at EU level. Nevertheless, the cases indicate the grounds on which there can be attempts to obstruct recapitalisation, ie, constitutional and sovereignty concerns. Sovereignty, as addressed in *Pringle* and *Doherty*, is perhaps particularly interesting because it relates to the legitimacy of the EU to coordinate and centralise bank resolution. Such challenges on recapitalisation would be more difficult now as it is a measure provided for in the Single Resolution Mechanism, which also reinforces the authority of the EU. This does not preclude cases being brought to the courts, but courts do have more grounds to support the legal validity of recapitalisation.

Nationalisation

This section investigates, firstly, the procedural aspects of Anglo Irish Bank's nationalisation, and, secondly, the legal implications of the nationalisation. While nationalisation did not cause court challenges, the Oireachtas debates and the content of the nationalisation legislation are informative as to the potential legal challenges which could arise. Nationalisation primarily affects shareholders. As the Irish State was already the major shareholder of Anglo Irish Bank after the recapitalisation, the shareholders in these circumstances did not impede the nationalisation.

Procedural aspects

In early January 2009, the Government decided to nationalise Anglo Irish Bank, for which it was already the de facto major shareholder (75%) as a result of the 2008 recapitalisation programmes.[130] Nationalisation was legally enabled under the Anglo Irish Bank Act 2009, and it was based on three processes: transfer of shares to the Minister for Finance; valuation of shares; and compensation of shares. This Act raised several controversies during the parliamentary debates, which indicated the level of policy-based apprehension about the decision. However, these concerns did not materialise in case law once the Act was in force, most probably because the State was already the major shareholder, the shares were close to a nil value, and the bank had already entered an advanced phase of a resolution programme.[131] Nevertheless, these controversies remain of interest in highlighting aspects of nationalisation that can potentially generate case law.

The policy process for nationalisation happened in two steps. The first step happened in 2007 when the NTMA, the Financial Regulator, and the Central Bank identified nationalisation as an option for banking resolution.[132] This anticipation led to the advance preparation of nationalisation legislation. Nationalisation was not to be a project in particular for Anglo Irish Bank,[133] but rather a precautionary measure as the Irish financial situation was worsening.[134] Nationalisation legislation was consequently available prior to the 'Guarantee Night' in September 2008.[135] At that time, nationalisation was categorised as a non-favoured option because of uncertainty as to its efficiency,[136] and its reputational risk

[130] Speech by Minister for Finance at second stage of Anglo Irish Bank Corporation Bill (2009), Department of Finance, Government of Ireland.
[131] At the last trading date, the value of an Anglo Irish Bank share was €0.22. See MarketScreener, 'Anglo Irish Bank' <https://www.marketscreener.com/quote/stock/ANGLO-IRISH-BANK-1412358/> accessed 1 October 2022.
[132] Oireachtas Banking Inquiry Report (n 9) Volume 1, 202 and 207. It is interesting to note that liquidation was not part of these recommendations.
[133] ibid 232.
[134] ibid 216.
[135] ibid 242.
[136] '[The Options paper] ruled nationalisation out as an option if it would take a long time to enact the legislation or the announcement of intent to nationalise would be insufficient to round up' (n 9) Volume 1, 217.

for Ireland.[137] The second step happened in late 2008, when the Government eventually preferred a nationalisation by transfer of shares to further recapitalisation. Further recapitalisation would effectively have been the equivalent of a nationalisation by purchase of shares.

The choice of legislation for nationalisation did not raise questions during the legislative process, but it was subsequently questioned by the Joint Oireachtas Committee into the Banking Crisis. The Committee questioned why the Anglo Irish Bank Act 2009 was needed to nationalise Anglo Irish Bank, insofar as the Credit Institutions (Financial Support) Act 2008 already provided the State with the possibility to be the major, or sole, shareholder.[138] Indeed, the only substantive difference between these two Acts is the method for nationalisation: transfer of shares under the Anglo Irish Bank Act 2009, and purchase of shares under the Credit Institutions (Financial Support) Act 2008. Taoiseach Brian Cowen told the Committee that nationalisation legislation was ready and, in such a time of confusion, an arbitration between the two legislative Acts was not conducted. Therefore, the Credit Institutions (Financial Support) Act 2008 was not used to nationalise Anglo Irish Bank,[139] but instead the Oireachtas passed a special Act.

During the parliamentary debates on the Anglo Irish Bank Act 2009, there were concerns expressed by TDs, which eventually did not materialise. As with the Credit Institutions (Financial Support) Act 2008, the legislative process for voting on the Anglo Irish Bank Act 2009 happened in a very short amount of time, less than three weeks.[140] The Government based its submission of the Bill on two justifications. For the first justification, the Government explained that Anglo Irish Bank was of systemic importance, considering the number of customers and employees.[141] Some TDs challenged this justification.[142] In light of the financial analysis in the first section of this article, Anglo Irish Bank could not be categorised as a systemic bank, insofar as it was not a universal bank, such as Allied Irish Banks and Bank of Ireland. Nevertheless, Anglo Irish Bank had a sizeable portfolio, and from this perspective, an orderly resolution was necessary to avoid market disturbance. For the second justification, the bank recapitalisation signified that the Government had to progress with its high exposure to Anglo Irish Bank.[143] The Government was also confident that nationalisation was possible because Anglo Irish Bank might become solvent again, and this view was shared by some TDs.[144] Nationalisation was thus presented as a further step in recapitalisation and reorganisation. Several TDs indicated that there might be an inability to deal with Anglo Irish Bank, due to a severe lack of information on the financial state of the

[137] '[…] the long term reputational damage to Ireland as a financial centre if an institution was nationalised' (n 9) Volume 1 217.
[138] ibid 271-272.
[139] ibid.
[140] ibid Chapter 8. See also The Houses of the Oireachtas Official Website 'Anglo Irish Bank Corporation Act 2009 – History of this Act' (21 Jaunary 2009) <https://www.oireachtas.ie/en/bills/bill/2009/1/> accessed: 1 October 2022).
[141] In the presentation of the Anglo Irish Bank Bill to the Dáil, the Minister for Finance indicated that Anglo Irish Bank had 7,000 customers with loans, where 5,000 were Irish. The retail depositors were 300,000 and 72,000 of them were Irish. Among the 12,000 depositors, 3,500 were Irish. Anglo Irish Bank had approximately €70 billion in loans and advances to customers. The Minister for Finance started his presentation of the Bill by showing that the national importance of nationalisation was undeniable: Dáil Deb 20 November 2009, vol 672, no 1. Besides, the bank employed a significant number of persons and the Government guaranteed that all employees would keep their job after nationalisation. Speech by Minister for Finance at second stage of Anglo Irish Bank Corporation Bill (2009), Department of Finance, Government of Ireland.
[142] Deputy Kieran O'Donnell in Dáil Deb 16 December 2009, vol 689, no 4.
[143] Speech by Minister for Finance at second stage of Anglo Irish Bank Corporation Bill (2009), Department of Finance, Government of Ireland. See also the financial analysis in the first part of the article.
[144] Deputy Joan Burton in Dáil Deb 20 November 2009, vol 672, no 1.

bank and uncertainty as to whether nationalisation could bring the bank back to business.[145] The Oireachtas eventually passed the Anglo Irish Bank Act 2009 because it was the only plan of the Government to rescue Anglo Irish Bank.

Another controversial aspect of Anglo Irish Bank Act 2009 was the granting of powers to the Minister for Finance, which were substantive and therefore problematic for some TDs. Similar to the Credit Institutions (Financial Support) Act 2008 and the Credit Institutions (Stabilisation) Act 2010, the Anglo Irish Bank Act 2009 granted important powers to the Minister for Finance,[146] who was in charge of the management of nationalised Anglo Irish Bank.[147] Additionally, the Act made the Minister the sole shareholder of Anglo Irish Bank,[148] benefiting from the usual rights accorded to shareholders.[149] These objections remained limited to the parliamentary debates and no major issue relating to the Minister's role in the governance of Anglo Irish Bank was reported during the period of nationalisation.

Legal implications

There were no examples of case law that challenged the nationalisation, and the main measures of the Anglo Irish Bank Act 2009 (transfer,[150] valuation,[151] and compensation)[152] were generally accepted by the shareholders. Anglo Irish Bank's shareholders did not publicly object to the transfer,[153] which was very probably due to the negligible value of the shares and to the major public shareholding. Nevertheless, TDs warned that several shareholders were actually Anglo Irish Bank's employees and some of them had invested most of their savings in Anglo Irish Bank.[154] This was also observed by the High Court in *Anglo Irish Bank Corporation Ltd v Companies Acts* [155] when identifying the mismanagement of Anglo Irish Bank ahead of nationalisation: 'The collapse of Anglo Irish Bank […] has caused much hardship to many small shareholders who invested in it in good faith.'[156] Again, these concerns remained at a political level and did not ultimately materialise in legal proceedings. As a point of comparison with the Irish approach, seven nationalisations happened in the EU during

[145] 'The major shortcoming is we are debating under a shadow of ignorance because we do not know the facts, as a result, we must exercise great caution, as legislators, in the manner in which we deal with this issue', Deputy Charles Flanagan in Dáil Deb 20 November 2009, vol 672, no 1.

[146] Among others, issuing shares (Anglo Irish Bank Act 2009, s. 34), performance of management tasks (Anglo Irish Bank Act 2009, s. 17), design of business plan (see Department of Finance, 'Relationship framework specified by the Minister for Finance pursuant to Section 3 of the Anglo Irish Corporation Act 2009 in respect of the Relationship between the Minister for Finance and IBRC Ltd' (Department of Finance 2012)), staff management (Anglo Irish Bank Act 2009, ss. 19 and 20).

[147] '[…] the powers of the Minister for Finance are almost completely limitless. In law, he is a tsar of the covered institutions. He is even more of a tsar in terms of his control and power over Anglo Irish Bank' Deputy Joan Burton in Dáil Deb 16 December 2009, vol 698, no 4. Anglo Irish Bank Act 2009, s. 7.

[148] Anglo Irish Bank Act 2009, s. 6(1)(b).

[149] Anglo Irish Bank Act 2009, s. 7(1).

[150] ibid,s. 6(1)(b).

[151] ibid, s. 28.

[152] ibid, s. 28.

[153] The only notable exception is the Quinn Group.

[154] Dáil Éireann Deb 16 December 2009, vol 698, no 4.

[155] [2011] IEHC 164.

[156] *Anglo Irish Bank Corporation Ltd v Companies Acts* [2011] IEHC 164 Introduction,. This is the opening sentence of a case brought to the High Court by the Director of Corporate Enforcement and the Garda Bureau of Fraud Investigation. The High Court was requested to legally review actions taken by Anglo Irish Bank, namely the 2008 financial assistance to purchase its shares, loans granted to directors, and misleading information in its public statements. From the applicants' point of view, these actions might be contrary to Companies Acts 1963 – 1990. The High Court concluded that there was insufficient evidence to prove the breach of Companies Acts by Anglo Irish Bank. The investigations carried out by the Director of Corporate Enforcement and the Garda Bureau of Fraud Investigation failed to find substantial evidence.

the 2008 financial crisis.[157] Nationalisation was challenged only once by a shareholder claiming an expropriation, in the *Heilbronn* case, which led to a plaintiff's dismissal.[158]

Even though the procedures were slow, Anglo Irish Bank's shareholders did not publicly object to the valuation and compensation procedures. The conclusions of the assessor were not published until 2020.[159] The Anglo Irish Bank Act did not impose an immediate valuation, and referred to the discretion of the Minister for Finance by specifying that the valuation could be 'as soon as [the Minister] considers it appropriate in the circumstances'.[160] In 2020, the assessor concluded that Anglo Irish Bank's shares had a nil value, and, consequently, that there was to be no compensation.[161] As recognised in above when describing the features of the Credit Institutions (Financial Support) Act 2008, the Minister's discretion in specifying when the valuation could be conducted goes to demonstrate the significant degree of authority which was placed in the Minister. Although it was a significant delegation of powers, there were no controversies which materialised as regards the arrangements for valuation.

Despite an absence of case law, the parliamentary debates on the Anglo Irish Bank Act 2009 allowed for an identification of potentially controversial parts of the nationalisation legislation. An aspect of controversy concerns the powers granted to the Minister for Finance, which were assessed by some TDs as being *ultra vires*.[162] A major potential for contention lay with shareholders, who could have challenged the nationalisation processes by arguing particularly on the basis of property rights. As a *chose in action*, a share confers a right to sue, in addition to a variety of bundled rights.[163] Such legal actions can hamper nationalisation as some processes may be delayed or frozen until the cases are ruled on. This did not happen for the Anglo Irish Bank nationalisation. The State was already the main shareholder after the recapitalisation, which immediately reduced any probability of a legal action. Moreover, since the valuation concluded that Anglo Irish Bank's shares were at close to a nil value, there was very little incentive for a shareholder to even contemplate instituting legal proceedings.

Later in 2009, the Oireachtas passed the National Asset Management Agency Act 2009, which created the first Irish work-out agency.[164] NAMA took over the impaired loans from

[157] Together with Anglo Irish Bank in Ireland, there were Hypo Real Estate in Germany, Banco Financiero y de Ahorros in Spain, Northern Rock in the United Kingdom, SNS Reaal and ABN Amro in the Netherlands, and Dexia in Belgium.
[158] In 2014, a SNS Reaal shareholder sued the Dutch Government at the Heilbronn Court, as he claimed that the transfer of his shares was an expropriation. He claimed compensation under § 826 of the German Civil Code, where damages can be granted in case of unintentional injury. The first line of defence of the Netherlands was State immunity as protected by Article 25 of the Fundamental Law, and the fact that the German Courts had no jurisdiction for this case under Article 15 and 16 of the EU Civil Procedure. The Court was satisfied by the line of defence of the Netherlands and the claimant was dismissed. LG Heilbronn (28/02/2014) 4 O 69/13 Ko. The case was heard at the Court of Heilbronn, as the shareholder was a German citizen.
[159] Department of Finance, 'Determination of Value of Shares Transferred to the Minister for Finance and Rights Extinguished under the Anglo Irish Bank Corporation Act 2009, Report prepared by David Tynan, Assessor under the Anglo Irish Bank Corporation Act 2009' (2020) <https://www.gov.ie/en/publication/cdb19a-anglo-irish-bank-assessor-report/> accessed 1 October 2022) [6.7] and [6.8].
[160] Anglo Irish Bank Act 2009, s. 22(1).
[161] Department of Finance, (n 160) [6.7] and [6.8].
[162] '[…] the powers of the Minister for Finance are almost completely limitless. In law, he is a tsar of the covered institutions. He is even more of a tsar in terms of his control and power over Anglo Irish Bank' per Deputy Joan Burton in Dáil Deb 16 December 2009, vol 698, no 4.
[163] See analysis of the legal nature of shares in Thomas Courtney, *The Law of Companies* (4th edn, Dublin: Bloomsbury Professional 2016) [8.005] – [8.012].
[164] Detailed analyses of the NAMA Act can be found in the academic literature, in particular Kennedy et al (n 37) and Noel Mc Grath and Morgan Shelley, *National Asset Management Agency Act 2009* (Round Hall 2009). See also Elise Lefeuvre and Jonathan McCarthy 'Lessons for a model of work-out agency in the EU: the Irish example of NAMA' (2022) 37(5) Journal of International Banking Law and Regulation 177-186. The article also investigates two main court cases involving NAMA:

five Irish banks, and Anglo Irish Bank was the main beneficiary.[165] This measure contributed to downsizing the loans portfolio of both Anglo Irish Bank and INBS, which subsequently facilitated their merger and liquidation.

Merger and liquidation

So as to provide a comprehensive account of the resolution of Anglo Irish Bank, from start to finish, this section examines, firstly, the merger of Anglo Irish Bank and INBS, and, secondly, the ultimate liquidation of both banks as IBRC. Although an overview of these actions is specific to the story of Anglo Irish Bank's resolution, the merger and the liquidation are instructive for banking resolution cases generally. This section highlights that there are different methods and tools which can be involved in resolution, including mergers. It is necessary to understand how liquidation in a national or domestic setting could be used when a resolution does not succeed. As demonstrated in each of the sub-sections, the merger and the liquidation were ensured by legal procedures which helped to reduce the amount of litigation arising from the actions.

Merger with INBS

The merger between Anglo Irish Bank and INBS proceeded in 2011, leading to the creation of IBRC. The merger was a preparatory measure for the joint liquidation of the two ailing banks. As the State was the sole shareholder of Anglo Irish Bank, there was no indication of legal or political controversy associated with the merger.[166] This article argues that the relative absence of controversy can be attributed to the preparations made by the Government for the merger. Firstly, NAMA operated a dramatic downsize of portfolios, and, in effect, the merger involved a limited number of assets and clients. Secondly, as the Government was the sole owner of Anglo Irish Bank after its nationalisation, the Government was in an opportune position to make a decision on a merger.

The merger was legally initiated by the Credit Institutions (Stabilisation) Act 2010. The purpose of this Act was to address the disruption caused to the Irish banking sector and the threat to the stability of certain credit institutions, as well as implementing reorganisation and restructuring measures for those institutions. [167] The legislation applied to four of the six banks covered by recapitalisation.[168] Although the Act was intrusive for banking business and involved important public intervention, there was no trace of major legal or political controversy. As regards criticisms of the Credit Institutions (Stabilisation) Act 2010 in the press,[169] in the banking sector,[170] and in the political field, [171] these arguments were primarily

Dellway Investments & Ors v NAMA & Ors [2011] IESC 4, [2011] IESC 13, and [2011] IESC 14 and *National Asset Management Agency v Commissioner for Environmental Information* [2013] IEHC 86, [2013] IEHC 166, and [2015] IESC 51.

[165] NAMA received in total a €74 billion portfolio, as per the breakdown: Allied Irish Banks (€20.4 billion), Anglo Irish Bank (€34.1 billion), Bank of Ireland (€9.9 billion), EBS (€0.9 billion), and INBS (€8.7 billion). National Asset Management Agency 'Loan Acquisition' <https://www.nama.ie/our-work/loan-acquisition> accessed 1 October 2022).

[166] The causal relationship between Anglo Irish Bank's nationalisation and a smooth merger with INBS is not extensively analysed in official reports or in academic literature. However, the lack of controversy concerning the INBS merger can be contrasted with the example of the merger of Fortis Belgium and BNP Paribas in Belgium during the 2008 crisis. Fortis Belgium's shareholders legally challenged the merger decided by the Government. See RTBF Reporters, 'Actionnaires Fortis au tribunal de commerce de Bruxelles' RTBF (Brussels, 29 September 2019).

[167] Credit Institutions (Stabilisation) Act 2010, s. 2.

[168] Allied Irish Banks, Anglo Irish Bank, Bank of Ireland, and INBS.

[169] Carswell (n 23).

[170] Maarteen van Eden, the former CFO of Anglo Irish Bank, claimed that the Government potentially owed and ruled the financial sector: Carswell (n 23).

[171] The Labour Party considered that the Act settled a 'one man legislature'. See Suzanne Lynch, 'Putting the squeeze on the banks' *The Irish Times* (Dublin, 17 January 2010) <https://www.irishtimes.com/business/putting-the-squeeze-on-the-banks-1.687758?msclkid=f471071ad15811ecbfd0177606346b56> accessed 1 October 2022.

based on the text of the Act. The arguments were based on what was legally and theoretically possible, but not in the way in which the Act operated in practice.

Under the Act, four restructuring tools could be used by the Minister for Finance: direction order, special manager order, subordinated liabilities order, and transfer order. A direction order proposes to direct a bank to take, or refrain from taking, an action. A special manager order appoints special managers for the reorganisation of a bank. A subordinated liabilities order is a recapitalisation measure through the issuance of subordinated liabilities. The transfer order is the transfer of assets and liabilities from a bank to another. Each order can be implemented by a similar procedure in requiring the Minister to apply to court for an order issuance. In relation to determining the legal validity of any order, the court is empowered by the legislation to decide 'on the hearing of the judicial review as it thinks fit, including an order remitting the matter back to the Minister with such directions as the Court thinks appropriate or necessary'.[172] There were no reported instances of judicial dismissal, or modification, of a Ministerial application.

On 1 July 2011, upon an *ex parte* application of the Minister for Finance, the High Court ordered the merger of Anglo Irish Bank and INBS under a transfer order pursuant to the Credit Institutions (Stabilisation) Act 2010.[173] The merger was operated by the transfer of INBS' portfolio to Anglo Irish Bank.[174] With this Act, the Government and the Oireachtas made it clear that public intervention in the banking sector was possible for resolution purposes. Five orders were issued under the Credit Institutions (Stabilisation) Act 2010, and only one was challenged by shareholders.[175] The positive impact of the Credit Institutions (Stabilisation) Act 2010 on the merger was enhanced by the limited number of shareholders and clients left in Anglo Irish Bank and INBS.

The first factor for a smooth merger was the decrease of the portfolios of Anglo Irish Bank and INBS. In March 2010, the 'bad' portfolios of Anglo Irish Bank and INBS were transferred to NAMA, which significantly reduced their sizes. The 'good' portfolios were transferred to Allied Irish Banks in the case of Anglo Irish Bank, and to Irish Life and Permanent for INBS.[176] Transfers also extended beyond loans as the Government moved 238 employees to Irish Permanent and 210 employees to Allied Irish Banks. This downsizing was also an important element in the feasibility of the merger.

As the product of the merger, IBRC possessed the status of a State-owned bank.[177] IBRC was 'a resolution company, which does not lend, does not accept deposits and is devoted solely to collecting whatever it can from those borrowers still on its books'.[178] IBRC's core activity was to work out the loan book,[179] and, prior to its liquidation, it began the process of

[172] Credit Institutions (Stabilisation) Act 2010, s. 63(2).
[173] This was specifically based on the procedure for a transfer order in s. 34 of the Credit Institutions (Stabilisation) Act 2010.
[174] The High Court 2011 No. 29 MCA para. A. The transfer also concerned the material goods of INBS (such as IT devices). See also High Court 2011 No. 29 MCA para. B.
[175] For a shares purchase by the Minister for Finance: *Irish Life Permanent Group Holding PLC v Credit Institution Stabilisation Act 2010* [2012] IEHC 89, [2012] IESC 32, and the CJEU decision in *Dowling v Minister for Finance* C-41/15 [2016] ECR I-836.
[176] High Court 2011 No. 29 MCA.
[177] This status was discussed in *Citywide Leisure Ltd v Irish Bank Resolution Corporation Ltd* [2012] IEHC 220, where the plaintiffs claimed that IBRC was comparable to NAMA, and that the plaintiffs should therefore benefit from the same advantages as NAMA's borrowers.
[178] Colm McCarthy, 'Ireland's European Crisis: Staying Solvent in the Eurozone' (2012) WP12/02, University College Dublin 7 <https://www.ucd.ie/economics/t4media/WP12_02.pdf > accessed 7 October 2022.
[179] Christophe Galand and Minke Gort, 'The Resolution of Anglo Irish Bank and Irish Nationwide Building Society' (2011) EC Competition Policy Newsletter No. 3.

managing the portfolio inherited from Anglo Irish Bank and INBS.[180] IBRC was active from 1 July 2011 to 7 February 2013, when its winding-up was decided by the Oireachtas under the IBRC Act 2013.

Liquidation

The joint liquidation of Anglo Irish Bank and INBS, as IBRC, was legally enabled by the IBRC Act 2013. The liquidation is ongoing, and it is expected to end in 2024.[181] The Oireachtas created specific legislation for the IBRC liquidation, as existing liquidation proceedings in Irish statute were considered to be inappropriate for the winding up of a bank.[182]

Under the IBRC Act 2013, the Minister for Finance and the Special Liquidators administered the proceedings, instead of a liquidator and the High Court, as would have been provided for in the Companies Act 1963. The Minister for Finance initiated the liquidation by appointing the Special Liquidators – Messrs Kieran Wallace and Eamonn Richardson of KPMG Ireland – in the Special Liquidation Order.[183] The liquidation process of the loan book started with a valuation.[184] Afterwards, the loan book was divided into six parts, and the Special Liquidators worked on their transfer and sale. The loans were essentially sold to international funds, and this measure was unpopular among some TDs.[185] The Government tried to mitigate this concern by stating that the same regulatory regime would be maintained after the sale.[186] Furthermore, the Special Liquidators had to ensure that the contractual terms in respect of individual loan contracts remained the same after the sale. It should also be noted that the sale of loans was principally used to reimburse IBRC's creditors.[187] It allowed

[180] Along with portfolio management, INBS also inherited the disputes of Anglo Irish Bank. As an example, in *Assénagon Asset Management S.A. v Irish Resolution Corporation Limited (Formerly Anglo Irish Bank Corporation Limited)* [2012] EWHC 2090 (Ch) and [2013] 1 All E.R. 495, an Anglo Irish Bank bondholder challenged the validity of the bond contracts of some transactions. This case is significant in that the Court tested for the first time the legality of exit consent. Exit consent is a technique used by corporate bondholders when the issuer (here, IBRC) offered a replacement for bonds in different terms. The bondholders vote for the amendment of the existing bonds and this vote may damage the rights attached to the existing bonds. That is why it is called 'exit consent'. Logically, the bondholder who refuses to vote may undergo a devaluation of its bond, inasmuch as there is no *locus poenitentiae*. With this procedure, the bondholders are bound to accept the change. Litigation also continued with Anglo Irish Bank's major shareholder, ie, in *Quinn & Ors v Irish Bank Resolution Corporation & Ors* [2015] IEHC 313. The High Court declared the transactions unlawful and unenforceable.

[181] Joe Brennan, 'IBRC liquidation extended to avert 30% assets hit amid Covid' *The Irish Times* (1 July 2021).

[182] The Oireachtas created a special regime *vis-à-vis* the Companies Act 1963 and some EU regulations. Section 10 of the IBRC Act listed numerous sections of the Companies Act 1963 that were disapplied. The aim of the disapplication clauses was primarily to replace the Court with the Special Liquidators, and therefore the Act largely decreased the powers and role of the Court as settled under the Companies Act 1963. Also, the disapplication clauses modified some liquidation procedures to hasten and facilitate the removal of IBRC. In general, insolvency proceedings in company law are not considered as being adapted to banks' constraints regarding time, continuity of functions and risk of contagion. See Peter Brierley, 'The UK Special Regime for failing banks in an international context' (2009) Financial Stability Paper No. 4, Bank of England, London. As an exceptional regime to EU State Aid, the winding-up of a bank was considered either as a first measure or as a last resort measure when recapitalisation turned out to be unsuccessful. See [2008] OJ C270 and [2009] OJ C195.

[183] Irish Bank Resolution Corporation Act, 2013 (Special Liquidation) Order, SI 2013/36, Reg 3.

[184] '[…] independent advice in developing a robust and credible sales strategy for the sale of the residential mortgage portfolio which would ensure that maximum value was achieved for the benefit of all creditors of IBRC', Discussion Joint Committee on Finance, Public Expenditure and Reform Debate 26 February 2014. The Special Liquidators appointed PricewaterhouseCoopers for this task. See E Richardson, 'Opening Statement Joint Committee Meeting' (2014).

[185] '[…] thousands of IBRC mortgage holders now feel they will be at the mercy of an unregulated, unsympathetic, potentially foreign-owned fund which is out to maximise the profit it can make from the mortgages those people took out in good faith from an Irish financial institution, regulated by the Irish Central Bank. They will find themselves completely exposed, isolated and vulnerable to whatever that particular fund decides to do with their mortgages', per Deputy Michael McGrath in Discussion Joint Committee on Finance, Public Expenditure and Reform Debate 26 February 2014.

[186] Department of Finance, *Consumer Protection on the Sale of Loan Books* (2014). This decision required legislation to later be introduced in the interests of protecting borrowers whose loans were subject to sale from principal lenders: the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 and the Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Act 2018.

[187] Discussion Joint Committee on Finance, Public Expenditure and Reform Debate 26 February 2014.

for repayment of the State support, and, as of 2020, the total reimbursement was €1.57 billion.[188] Legal controversies around the liquidation proceedings were limited,[189] insofar as the main creditors were the Irish Government,[190] the Central Bank of Ireland, and the ECB.[191] However, some court cases arose during the sale process.[192] The case *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* dealt with the use of interlocutory injunction in a special context.[193] The plaintiff based a claim on two other resolution-related cases, *Dellway Investments & Ors v NAMA & Ors*[194] and *Treasury Holdings and Ors v The National Asset Management Agency and Ors.*[195]

The plaintiff, a former borrower of Anglo Irish Bank, was asked by the Special Liquidators to make representations regarding the sale process of his loans.[196] His submissions were all rejected,[197] and the plaintiff applied to the High Court for 'an interlocutory injunction order that the [Special Liquidators] not divest, sell or transfer […] any of the loans […]'.[198] He based his litigation on s. 6 of the IBRC Act 2013,[199] which settled the rules for proceedings and claims against IBRC.[200] The plaintiff claimed that the IBRC liquidation fell 'within the realm of public law'[201] and he was therefore entitled to have 'a right to a fair hearing'[202] and 'a corollary right to have sufficient reasons',[203] ie a right to be informed.[204] The plaintiff's counsel based their arguments on two cases involving NAMA:[205] *Dellway Investments & Ors v NAMA & Ors,*[206] for the right to be heard and the right of be informed,[207] and *Treasury Holdings and Ors v The National Asset Management Agency and Ors,*[208] for the 'duty to act in a fair and reasonable manner'.[209]

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188 Department of Finance, 'Seventh Progress Update Report on the Special Liquidation of IBRC' (2020) 15 <https://www.gov.ie/en/publication/014a6-seventh-progress-update-report-on-the-special-liquidation-of-ibrc/> accessed 7 October 2022.

189 By 'controversy', it is meant as to whether a major litigation brought to court. IBRC faced several claims during its liquidation, but many were settled out of court. See Department of Finance, 'IBRC Sixth Progress Update Report' (2019) 8 <https://www.gov.ie/en/publication/365bc5-t/>accessed 7 October 2022.

190 It was the biggest creditor with a €1.2 billion portfolio: see Joe Brennan, 'State eyes €100m of backdated interest from IBRC liquidation' *The Irish Times* (Dublin, 11 May 2019) <https://www.irishtimes.com/business/financial-services/state-eyes-100m-of-backdated-interest-from-ibrc-liquidation-1.3888190?msclkid=58d48e70d15a11ec816e970ff8ccd20a> accessed 7 October 202.

191 Discussion of Joint Committee on Finance, Public Expenditure and Reform Debate 26 February 2014. The first objective was to waive the exposure of the Government, the Central Bank, and the ECB. The main tasks of the Special Liquidators were to remove the promissory notes programme, which was one of the 2008 emergency recapitalisation programmes.

192 The other notable case is *Irish Bank Resolution Corporation (In Special Liquidation) v Morrissey* [2013] IEHC 208, [2013] IEHC 506, [2014] IEHC 527, and [2014] IEHC 469, and its related case *Morrissey & Anor v National Asset Management Agency & Ors* [2014] IEHC 343. The *Morrissey* case concerned litigation on the nature of the relationship between Morrissey and IBRC.

193 [2014] IEHC 192.

194 [2011] IESC 13.

195 [2012] IEHC 297.

196 Namely to 'make representations on the manner in which their loans would be sold' and to 'make any submission […] in relation to the sale process and […] in how their loans would be offered for sale […]': *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 19 [5].

197 *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [9].

198 ibid [1].

199 ibid 192 [12].

200 s. 6 of the Irish Bank Resolution Corporation Act 2013 is extensive on the method for conducting proceedings and claims against IBRC, as well as on the effects on liquidation.

201 *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [19].

202 ibid.

203 ibid.

204 Mr. Brendan McCabe's counsel claimed that the Special Liquidators should give a more detailed background for their decision: *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [23].

205 See analysis of these two cases in Lefeuvre and McCarthy (n 164).

206 [2011] IESC 13.

207 *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [22] and [45].

208 [2012] IEHC 297.

209 *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [27] and [45].

The High Court acknowledged that the concerns based on *Dellway Investments & Ors v NAMA & Ors*[210] and on *Treasury Holdings and Ors v The National Asset Management Agency and Ors*[211] were fair.[212] Nevertheless, the High Court dismissed the plaintiff, based on a timing issue,[213] that the claim was brought too late,[214] and because a fair solution for the loans was available.[215] Moreover, based on s. 3 of the IBRC Act 2013 stating that a rapid liquidation is in the public interest, [216] the High Court acknowledged the importance of the liquidation and of its speed.[217]

In the *Dagenham Yank* case, the High Court favoured public interest over private interest, particularly because only minor damages could have been foreseen for the borrower. In this instance, the reasoning of the High Court differed from the decisions of the Supreme Court in *Dellway Investments & Ors v NAMA & Ors*[218] and of the High Court in *Treasury Holdings and Ors v The National Asset Management Agency and Ors*.[219] In these cases, the Courts recognised the obligation of NAMA to comply with the right to be heard and the duty to act fairly as the actions of NAMA fell under the public law's realm. The *Dagenham Yank* case is still relevant today because it provided an endorsement of the approach taken towards liquidation as a banking resolution tool.

Conclusion

The analysis of Anglo Irish Bank's resolution, both in terms of its legal and financial implications, allows for conclusions to be drawn on the efficacy of banking resolution approaches. The analysis of Anglo Irish Bank's resolution is therefore relevant for understanding the current SRM because of the range of resolution tools provided for within the SRM framework.

As demonstrated in this article, the Anglo Irish Bank crisis necessitated urgent and extraordinary legal actions. The most controversial tool was recapitalisation, for which EU banking resolution has had a changing approach. Within the Bank Recovery and Resolution Directive (BRRD) in 2014, recapitalisation (as a public resolution tool) was ranked as a last resort measure,[220] essentially because of its unpopularity during the 2008 financial crisis. Recapitalisation was rehabilitated in 2017 with the decision of the Commission to recognise the possibility to use precautionary recapitalisation.[221] This is a positive development as it incorporates recapitalisation within the EU resolution toolbox. As recognised in this article, it is necessary to have such a recapitalisation tool for addressing solvency crisis. Even if recapitalisation is an expedient action, it does not prevent political and legal debates around its legitimacy, mainly regarding its cost for the State. In the case of Ireland, notwithstanding

[210] [2011] IESC 13.
[211] [2012] IEHC 297.
[212] *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [58].
[213] ibid [61].
[214] 'In consideration of the balance of convenience, as was emphasised by counsel for the defendants, the plaintiffs have delayed in bringing the within claim': *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [60].
[215] A buying out of the loans. See *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [60].
[216] Irish Bank Resolution Corporation Act 2013 s. 3(b): 'to provide for the winding up of IBRC in an orderly and efficient manner in the public interest'.
[217] The High Court referred also to s. 8(1) (the Court shall consider the public interest). See *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [60].
[218] [2011] IESC 13.
[219] [2012] IEHC 297.
[220] Directive 2014/59/EU, Article 56.
[221] Directorate General for Internal Policies, 'Precautionary recapitalisations under the Bank Recovery and Resolution Directive: conditionality and case practice' (European Parliament 2017).

the court challenges, recapitalisation survived because the courts confirmed its legality. These court cases show that recapitalisation must be legally sound in order to be able to withstand legal challenges.

Nationalisation, merger, and liquidation have also been successful as they did not trigger significant business disruption or legal issues. Two causes can be found to explain these absences. Firstly, these solutions use the existing market conditions – for example, by transfers to other established players.[222] Secondly, these solutions were publicly driven, so the State bore the risk and was in a position to pass stringent restructuring decisions.

The Irish resolution example allows for an identification of the parameters of a good banking resolution. A good resolution regime must have a panel of tools that can address different kinds of financial distress, and that can be used alone, combined, and/or successively. All resolution tools must have a sound legal basis in order to be predictable and easily implemented. In light of this assessment, it can be concluded that the Irish Government managed the resolution of Anglo Irish Bank very well, along with rescuing the entire Irish banking sector. The Irish Government succeeded in using different resolution tools together or consecutively, while also maintaining a coherent resolution strategy and trying to limit the cost as much as possible.

Een vinger in de dijk steken[223] is a Dutch expression that originates from the heroic action of Hans Brinker, a fabled character who saved his village's polder by plugging a hole in the dike.[224] Banking resolution acts in the same way, insofar as it fixes flaws to safeguard the banking sector and the wider economic system which is financed by banks. In that respect, all of the resolution tools pursue the same ultimate objective to ensure the continuity of banking services for companies and individuals during downturns and crises.

[222] Assets of Anglo Irish Bank (tier-1 Irish bank) and INBS (tier-2 Irish banks) were transferred to Allied Irish Banks and Bank of Ireland (tier-1 Irish banks).
[223] Put the finger in the dike.
[224] Gérald de Hemptinne, *Pays-Bas, les pieds sur terre* (Nevicata 2014) [19].

VIEWS OF THE IRISH JUDICIARY ON TECHNOLOGY IN COURTS: RESULTS OF A SURVEY

Abstract: Technology continues to transform how judges perform their functions, both in Ireland and elsewhere. This article reports the results of a survey of Irish judges on their use of technology in their role, their attitudes towards technology, and their views on how it impacts on the judicial function. The survey, part of a global survey, found that Irish judges habitually used digital technologies, and were broadly satisfied with the technology available in chambers, but less so with what was provided in courtrooms. Although generally happy to embrace change, the majority of respondents were concerned with, and did not prefer, online hearings as a substitute for in-person hearings, with many highlighting fundamental issues regarding fair and open justice in this regard.

Authors: Dr Brian M. Barry, Lecturer in Law, Technological University Dublin, Dr Rónán Kennedy, Associate Professor, School of Law, University of Galway

Introduction

Emerging technologies continue to transform how judicial systems operate and how judges perform their functions. Improvements in software, internet access and the evolution and application of artificial intelligence tools and blockchain technology present opportunities for judicial systems to deliver more efficient, and potentially more effective, justice. In particular, the rapid shift to online court proceedings using video-conferencing platforms during the COVID-19 pandemic brought about significant changes to how courts operate which merit retrospective evaluation. Judges in jurisdictions around the world are grappling with this technological change and its impact on their role. What is their experience of this change? What are their impressions of the technology they use today, and how do they expect the judicial function to evolve in the future?

A global survey, co-led by one of the authors of this paper, is currently being conducted by researcher members of an International Research Collaborative (IRC) on Judges and Technology.[1] The IRC comprises about 60 scholars and judges worldwide under the auspices of the Law and Society Association. To date, approximately 1,000 judges have participated in national survey studies using the same survey instrument in Ireland, Scotland, Canada, Brazil, Kenya, Australia, New Zealand, Spain and Portugal. Data collection is ongoing, and comparative analysis of the total dataset is expected to take place towards the end of 2023. This article describes and analyses the results of the national survey study of Irish judges on their use of and views on technology in Irish courts.

The remainder of this article comprises three parts. Part 1 provides background and context for the survey study by outlining the development and current state of technology in Irish courts. Particularly significant in this regard are recent initiatives and strategic plans developed by the Courts Service, most notably the Courts Service's ICT Strategy 2021 – 2024, but also broader digital strategies at a national policy level. Part 2 describes the aims, objectives and method of the survey. Part 3 presents and analyses the results of the survey

[1] For further information, Law & Society Association, 'International Research Collaboratives: Judges and Technology <https://www.lawandsociety.org/lsairc19/> accessed 23 January 2023.

study. The article concludes by setting out further research questions that the survey results suggest.

To briefly synopsise the findings, judges were broadly positive about the technology that they used, and were relatively unconcerned by (or even in some cases satisfied with) technological change, although they were more circumspect about remote court proceedings using video-conferencing technologies.

Part 1: The development and current state of technology in Irish courts

The Irish courts did not have any significant investment in information and communication technology (ICT) until this century. The Working Group on the Courts Commission (whose work led to the creation of the Courts Service as an independent agency to manage the courts) underlined the value of developing appropriate systems during its work in the late 1990s, saying that 'the application of modern technology to the Courts would be of considerable benefit.'[2] Since then, considerable developments have taken place, as documented in the annual reports of the Courts Service.[3] However, there was under-investment during the financial crisis that began in 2008 and the general reduction in public expenditure which followed, leading to concerns about the poor state of ICT infrastructure by the mid-2010s.[4] This has been substantially addressed in recent years, including the announcement of a €100 million programme for this decade.[5] The Courts Service has adopted 'Digital First' as one of its six strategic goals for 2021-23, as a foundation for achieving its 'Strategic Vision 2030', which is 'a modern, digital first, user focused courts system.'[6] Under this heading, a number of milestones have already been achieved: modernising application architecture, a pilot online appointment booking system, expanding video courtroom technology, testing cashless payments, and collaborations with other agencies on digital data sharing and exchange projects.[7] Also, as might be expected and in common with other state agencies and large organisations, ICT is an important aspect of other strategic goals of the Service: family law reform (initially maintenance payments),[8] provision of support services for the judiciary (particularly an online 'Knowledge Hub' portal for judges),[9] and improvements to work practices (modernisation of computer desktops).[10]

Similarly unsurprising (and well-known) is the impetus that the COVID-19 pandemic gave to some specific aspects of ICT adoption, particularly the use of video-conferencing and remote hearings: the number of remote calls increased dramatically, from 8,254 in 2019 to 28,289 in 2020 and 38,176 in 2021; an increase of 343% and then 135% year-on-year and 463% over the three years. Feedback from court users on these were quite positive.[11] Other technologies which are focused on assisting with court processes and proceedings while responding to the exigencies of the pandemic have been introduced, such as a remote hearing

[2] Working Group on the Courts Commission, 'Second Report: Case management and court management' (1996) 10 <https://www.courts.ie/policy-reports-strategic-plans##Pub19> accessed 27 February 2023.
[3] See Courts Service, *Annual Report 2019*, 38–40 <https://www.courts.ie/annual-report> accessed 27 February 2023. Further annual reports are available at <https://www.courts.ie/annual-report>.
[4] Mark Hilliard, 'Courts Service boss fears collapse of IT system' *The Irish Times* (Dublin, 28 November 2015).
[5] Colm Keena, '€100 million digital-first plan for courts could allow online guilty pleas' *The Irish Times* (Dublin, 18 January 2020).
[6] Courts Service, *Annual Report 2021*, 18 <https://www.courts.ie/annual-report> accessed 27 February 2023.
[7] ibid 24–35.
[8] ibid 29.
[9] ibid 31.
[10] ibid 35.
[11] ibid 23.

platform; technology-enabled 'pop-up' courtrooms; design of new digitally enabled jury empanelment solutions in nearby but remote settings (providing for social distancing measures); digitally enabled overflow facilities catering for legal teams, members of the media and the public; new digital systems to support information sharing by legal practitioners (to reduce manual paper-based distribution requirements); and the rollout of supporting technologies, such as Wi-Fi.[12]

The Service has ambitious plans for the future. As part of its 'Modernisation Programme' to 2030,[13] it aims to design and deliver effective processes and systems to court users to enable a digital court experience.'[14] Its vision is of 'enabling coherent end-to-end user-centric digital journeys, designed and built in a co-creative, multidisciplinary and agile manner, where ICT works in partnership with the business and the judiciary.'[15] The use of terminology from agile software development and design thinking methods indicates that approaches to deployment are being modernised in tandem with the technologies adopted. Its ICT Strategy 2021 – 24 is structured around six themes:

1. Court Technology;
2. Unified Case Management Platform;
3. Desktop and Infrastructure Modernisation;
4. Security and Resilience;
5. Capacity, Capability and Governance; and
6. Data as an Enabler.

These encompass some 42 significant actions which aim to improve and expand the availability and usefulness of ICT for Courts Service staff, court users, and the judiciary. In broad terms, these could be seen as *consolidation* of work already begun (such as networking of court buildings), *integration* of internal and external systems (bringing together the diverse civil, criminal, and family law databases and processes, and better connecting to other agencies such as An Garda Síochána) and *experimentation* (with indications that the Service may explore new technologies such as e-signatures, artificial intelligence and blockchain).[16] For the time being, the focus is likely to be on the first two of these, as it is clear that there remains substantial work to be done in order to bring a disparate and sometimes creaking infrastructure up-to-date.[17]

Although it is not as immediately relevant to the courtroom experience of judges, practitioners or litigants, it should be noted that the Courts Service has also published a 'Data Strategy 2021-24', which is a novel development. This should be a foundation for the efforts outlined above, aiming to enhance the management of courts' data through 23 actions grouped under headings of better governance, use of data, improved processes and

[12] Courts Service, *ICT Strategy 2021 – 2024* (30 September 2021), 7–8 < https://www.courts.ie/acc/alfresco/10e5f628-0ffd-4817-935f-e5818626827e/2809_CT_ICT_Strategy_v10.pdf/pdf#view=fitH> accessed 3 March 2023.
[13] ibid 7–8.
[14] ibid 13.
[15] ibid 13.
[16] Rónán Kennedy and others, 'Lawtech in Ireland: A Snapshot' (Computers and Law, 22 December 2022) <https://www.scl.org/articles/12769-lawtech-in-ireland-a-snapshot> accessed 11 January 2023.
[17] The Report of the Judicial Planning Working Group commissioned by the Department of Justice further details these challenges and notes that the 'development of modern and integrated IT solutions should remain a priority for the Courts Service.' Department of Justice, *Report of the Judicial Planning Working Group* (Department of Justice 2022) 111 <https://www.courts.ie/content/publication-judicial-planning-working-group-report> accessed 27 February 2023.

technology.[18] It includes a commitment to the development of a Courts Service Open Data Portal which may lead to interesting re-use of court data in the future.

Part 2: About the survey study

The aims of the global survey of judges, and the survey of Irish judges as part of that wider project, were:

- to understand what technologies judges currently use in their role;
- to collect and analyse judges' views, perceptions, attitudes and satisfaction levels with the technologies that they use; and
- to collect and analyse judges' views about broader issues of the role of technology and its impact on the judicial function, both at present and in the future.

The survey instrument was designed by the first author and co-principal investigator, Professor Tania Sourdin, with input from members of the IRC. Drafts of the survey instrument underwent various phases of consultation with leading scholars in judicial studies.[19] In particular, the researchers consulted with Professor Cheryl Thomas, author of the UK Judicial Attitude Survey, the most recent of which was conducted in 2020.[20] The UK Judicial Attitude Survey asks a limited number of questions about judges' attitudes towards the technologies that they use. The survey instrument for the present study used the exact wording as those questions in the UK Judicial Attitude Survey to generate comparative data. The survey was conducted online through the Question Pro platform, using a series of closed format questions with binary yes/no or multiple-choice responses, attitudinal-style questions using Likert scales and 'open comment' style questions. The survey instrument was broken into seven primary sections. The first section gathered information about participant judges' judicial posts, including their court level, jurisdiction, caseload composition and level of experience on the bench. The second section concerned judicial resources and digital working. The third section concerned the judiciary and technology, focusing on broader issues of the impact of technology on the judicial role. The fourth section sought information about working conditions. The primary purpose of this section was to generate comparative data to complement the output of Professor Thomas' Judicial Attitude Survey study of UK judges.[21] The fifth section addressed training and personal development for judges about technology. The sixth section, titled 'change in the judiciary', asked judges about their perceptions and attitudes towards change in the judicial function. The seventh section, entitled 'being a member of the judiciary', returned to themes explored in Professor Thomas' Judicial Attitude Survey around judges' perceptions of various groups – parties, the public,

[18] Courts Service, 'Data Strategy 2021 – 2024', 8 < https://www.courts.ie/acc/alfresco/4b2aaffb-e567-4eba-8e33-443f1245696b/Courts%20Service%20Data%20Strategy%202021%20-%202024.pdf/pdf#view=fitH> accessed 27 February 2023.

[19] The authors would like to acknowledge the significant contributions, in particular, of Kathy Slowey, Amelia Rebellato and Charlotte Kuszelyk for their research assistance at various stages of the project and to Professor Sharyn Roach Anleu and Professor Cheryl Thomas for their feedback and insights into the survey instrument at the drafting stage.

[20] See further, Cheryl Thomas, *2020 UK Judicial Attitude Survey - Report of Findings Covering Salaried Judges in English and Welsh Courts and UK Tribunals* (UCL Judicial Institute 04 February 2021) <https://www.judiciary.uk/guidance-and-resources/judicial-attitudes-survey/> accessed 23 January 2023, Cheryl Thomas, *2020 UK Judicial Attitude Survey - Report of Findings Covering Salaried Judges in Scotland* (UCL Judicial Institute 25 February 2021) <https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judiciary/scotland-judicial-attitude-survey-2020-publication-25-feb.pdf?sfvrsn=7e0823ca_2> accessed 23 January 2023, and Cheryl Thomas, *2020 UK Judicial Attitude Survey - Report of Findings Covering Salaried Judges in Northern Ireland* (UCL Judicial Institute 25 February 2021) < https://www.judiciaryni.uk/sites/judiciary/files/media-files/2020%20Judicial%20Attitude%20Survey%20-%20Northern%20Ireland%20-%2025%20Feb%2021.pdf > accessed 23 January 2023.

[21] ibid. The focus of this article is on judges and technology. As such, questions from this section are not addressed in this article.

government, legal representatives, court staff, media and colleagues.[22] The eighth and final section asked some questions about participants' demographic profile, such as their age, gender and educational background, which participants were explicitly advised were optional. Judges consented to participate in the survey before answering questions after reading an information sheet. They were advised that anonymity was guaranteed and that any identifying information in the data would be removed in advance of data analysis (although this did not prove to be necessary for any instance). The Human Research Ethics Committee at the University of Newcastle, New South Wales, granted research ethics approval for the global project, and the Research Ethics Committee at TU Dublin granted research ethics approval for the Irish judges' survey. The Irish judges' survey study was approved for circulation to the Irish judiciary by the Legal Research and Library Services Committee of the Courts Service in accordance with their protocol for judicial participation in academic research projects.[23] The survey was disseminated by email by Courts Service personnel to all members of the Irish judiciary on 22 June 2022 and closed on 30 August 2022.

Part 3: Results of the survey and analysis

About the participants

55 judges participated in the survey out of a population of 173 serving judges (32% overall).[24] 21 were judges of the District Court (38%), 13 were Circuit Court judges (24%), 16 were High Court judges (29%), and five were Court of Appeal judges (9%). No Supreme Court judges participated in the survey. Nevertheless, the spread of judges across the other four courts was broadly representative of the total population of judges.

Judges provided information about their level of experience on the bench. One participant first started working as a judge in an Irish court before 1995, none started between 1995-1999, one started between 2000-2004, six (11%) started between 2005-2009, 14 (26%) started between 2010-2014, 15 (28%) started between 2015-2018 and 17 (31%) started between 2019 to mid-2022 when the data was collected.[25] As such, some 85% of participants started in their role during or after 2010. Nearly half (46%) of the 54 who responded had served on their current court for between one to five years. Participating judges described their caseloads as follows: 15 (28%) described theirs as either exclusively or mainly criminal law, 15 (27%) described their case law as exclusively civil law,[26] five (9%) as mainly civil law, and 17 (31%) as a mix of criminal and civil law. Three (5%) described their case law as 'other.'

Judicial resources and digital working

The survey asked judges about technology resources and digital work practices. The vast majority of judges indicated that they used a computer to prepare judgments (51, 93%), remote video conferencing platforms (42, 76%), audio playback (43, 78%) and online legal

[22] Again, questions from this section are not addressed in this article.

[23] For further information, see Courts Service, 'Legal Research and Library Services' <https://www.courts.ie/legal-research-and-library-services> accessed 23 January 2023.

[24] Although 63 judges opened the survey instrument, eight judges abandoned the survey before answering any substantive questions on their use of, and attitudes towards technology. As such, these eight participants who only answered initial questions categorising their role (court level, experience on the bench etc.) were removed from the analysis, leaving a final dataset the 55 judges – ie, those who engaged with the substantive questions on their use of and attitudes towards technology. The 55 participant judges did not answer all questions. Therefore, the data presented here notes the number of participants who responded to each question. The figure of 173 judges is, to the best of the authors' knowledge, correct on 30 August 2022, the date that the survey closed. One new judge was appointed to the Irish bench during the data collection period.

[25] One judge did not provide a response to this question.

[26] The authors decided, for clarity, to use round percentage numbers without decimal points. As such, some necessary differences in percentage calculations may appear, as in this instance.

databases to access case law, legislation, commentary etc. (44, 80%). Judges were broadly positive about the standard of IT equipment that they personally use when working at court (i.e. laptop, desktop computer, software). 12 (22%) rated this equipment excellent, 17 (31%) good, and 14 (25%) adequate – a combined positive response of 43 out of 55 judges (78%). To compare this finding with UK judges, this satisfaction level broadly corresponded with equivalent findings from the 2020 UK Judicial Attitude Survey which asked the same question: in England and Wales the combined positive response was 74%, in Northern Ireland, 84%, and in Scotland, 88%.[27] This finding of Irish judges' views on the IT equipment that they personally use broadly mirrored views on the standard of equivalent IT equipment available to judges for working remotely: eight (15%) rated this excellent, 25 (45%) good, 15 (27%) adequate – a combined total of 48 out of 55 judges (87%). Relatively speaking, there was marginally less satisfaction with the standard of IT equipment used in trials and hearings (e.g., playback and video link equipment, tele-conferencing). In this instance, two (4%) rated this equipment excellent, 17 (31%) good, 22 (40%) adequate, with a sizable minority of 12 (22%) rating this equipment poor. Two (4%) said they did not have it. Judge participants rated IT support very highly – a combined total of 51 (93%) said such support available in their court building was adequate, good or excellent, while a combined total of 48 (88%) rated such support when working remotely as adequate, good or excellent.

Judges' personal internet access in courtrooms and general availability of Wi-Fi in court buildings came in for varying degrees of criticism. While 38 of 54 (70%) said that personal internet access in courtrooms was either adequate, good or excellent, some 15 judges (28%) said that internet access was poor, and one District Court judge said there was no internet access available. Judges on the District Court and Circuit Court generally rated internet access poorer than judges on the High Court and Court of Appeal did. 13 of 52 (25%) judges reported that Wi-Fi was not available in courtrooms, while 18 of 49 (18%) reported that Wi-Fi was not available in all other parts of the building. Judges were also asked about the quality of internet – whether fixed or via Wi-Fi – personally available to them in court. A combined total of 33 of 48 (69%) said it was adequate, good or excellent, while eight (17%) said it was poor, and a further seven (14%) said it did not exist or that they did not know. The overall picture, then, is one of patchy internet access and Wi-Fi availability, particularly in the lower tiers of the court system. The Courts Service has acknowledged this as a priority issue in its ICT Strategy 2021 – 2024.[28]

Case management systems, or rather the absence of them, was also an issue. Just three of 55 judges (5%) said that they used some version of a 'case management system.'[29] A unified case management system is, however, mooted in the Courts Service ICT Strategy 2021 – 2024.[30] At a later point in the survey, several judges commented on the absence of such and the benefits that it would bring. On the other hand, judges were broadly positive about the access and quality of legal databases available to them. Of 53 responses to a question seeking the extent of agreement with the statement 'the legal databases I have are appropriate to my needs,' 12 (23%) said they strongly agreed, 25 (47%) said they agreed, 15 (28%) said they were neutral, none said they disagreed, and one (2%) said they strongly disagreed.

[27] It is worth emphasising that the UK Judicial Attitudes Survey ran from 27 May 2020 through 22 June 2020, in the immediate aftermath of the outbreak of the COVID-19 pandemic.
[28] Courts Service (n 12) 20.
[29] The survey instrument defined a case management system as '[a] digital system used by courts to manage the progression of a case or matter after it has been commenced'. Presumably, the three judges that reported that they used one were referring to a specific system that they used in their discrete area of law. No unified case management system exists across the Irish courts system.
[30] Courts Service (n 12) 23-9.

Video-conferencing technology and online proceedings

Judges were asked if they had participated in any online remote trials or hearings using video-conferencing technology. Of 54 responses, 49 (91%) said yes, five (9%) said no. Judges were asked to rate the performance of such technology for the purpose of fully or partially remote trials or hearings. The response was relatively positive. Of 54 responses, six (11%) rated performance very well, 16 (30%) well, 25 (46%) average. Only seven (13%) said the technology performed poorly, and no judges said it performed very poorly. A further question on how well online proceedings supports fair outcomes garnered a similar response: of 54 responses, six (11%) said very well, 17 (31%) well, 25 (46%) average, five (9%) poor, one (2%) very poor. That more than half of judge participants indicated that video-conferencing technology was 'average,' 'poor' or 'very poor' in this respect suggests a generally cautious, if not sceptical, view on whether this technology improves the quality of justice.

Overall, judges preferred in-person hearings to online hearings. Of 55 responses, 33 (60%) said that they preferred in-person hearings, 22 (40%) said they preferred a mixture of online and in-person hearings, while no judges preferred online hearings using video-conferencing technology. Comments from judges about their experiences of online remote proceedings using video-conferencing technology were illuminating. Some offered generally negative views, including that they were 'inferior to … in-person hearings,' 'sub-optimal,' 'very unsatisfactory,' and that they 'have limitations and should be exceptional.' Other judges expressed specific concerns about online proceedings. One judge rather emphatically rejected online proceedings as a 'failure to administer justice in public in any real way,' and that there was an 'over emphasis on efficiency in comparison with other essentials in [the] administration of justice.' Another cautioned that 'the outcome may be fair but the perception of a hearing online is that it is something less than a formal court hearing.' Others suggested that online proceedings were particularly unsuitable for contested issues of fact and that it can be 'very difficult to judge a person's disposition, attitude and mannerisms.'

Several judges commented that the technology's success or failure depended on its reliability and the digital literacy of those participating in online proceedings. Success or otherwise 'depend[s] on the quality of the Wi-Fi available and the technological expertise of the participants,' and the availability of 'a top class remote platform,' according to one judge. Another suggested that 'where there have been difficulties these have tended to relate to connectivity on the part of remote participants.' One referred to 'a lot of breakdowns' during online hearings, while another hinted at a digital divide among different groups in society: 'older litigants and other others have difficulty with the software and are further stressed by the experience.' One judge raised the potential for witness coaching: '[i]t is …difficult to establish if a person in family law proceedings is alone or whether there is another present and some undue influence or otherwise.' These observations highlight the broad range of issues and challenges that parties and their representatives face, impacting the fairness and efficiency of court proceedings. More positively-disposed judges highlighted how online proceedings were useful or effective for short or procedural hearings that are straightforward and uncontested, for case management, for hearing evidence from an expert witness and, generally, in the area of commercial law.

A later question in the survey asked how concerned judges were about the reduction in face-to-face hearings. The responses tallied with findings from the earlier question discussed above where more judges expressed a preference for in-person hearings than for other modes. Of 47 responses, nine (19%) said they were 'extremely concerned,' 17 (36%) said they were 'somewhat concerned,' eight (17%) said they were 'not sure,' eight (17%) said they

were 'only slightly concerned,' and five (11%) said they were 'not concerned at all.' Compared to UK judges' attitudes from the most recent Judicial Attitude Survey in 2020, Irish judges were somewhat less concerned than their UK counterparts were. In Scotland, 26% said they were extremely concerned and 35% said they were somewhat concerned.[31] In Northern Ireland, 43% were extremely concerned and 37% were somewhat concerned,[32] In England and Wales, 44% were extremely concerned and 31% were somewhat concerned.[33] The different timings of data collection for the Irish survey (June to August 2022) and the UK survey (May to June 2020) may be a factor here, with Irish judges reporting with the benefit of more experience of online proceedings throughout the course of the COVID-19 pandemic, compared to UK judges who were surveyed in the immediate aftermath of the pandemic's outbreak.

The data and commentary highlight the diversity and complexity of views among Irish judges on this issue. What is clear is that there is no appetite for wholesale replacement of in-person hearings with online proceedings. Indeed, it is noteworthy that more participating judges preferred wholly in-person proceedings over a hybrid model mixing online and in-person elements. Overall, participating judges appeared cautious about adopting this technology. Judges' current perceptions may be coloured by recent and live issues, including judges' experiences of hurriedly moving to online proceedings at the start of the COVID-19 pandemic and the technical capabilities of the video-conferencing platform currently used by the Courts Service, Pexip.[34] The Chief Executive Officer of the Courts Service argues '[r]emote courts are the worst they are ever going to be today. They will only improve.'[35] Further empirical research may reveal more positive attitudes towards this technology in future if the technology improves and judges become more comfortable using it. Still, the comments excerpted above highlight fundamental concerns about the appropriateness of this approach to many types of hearings which may see judges argue for its use to be restricted to matters of procedure and commercial law, no matter how good it may become.

The judiciary and technology

The survey asked Irish judges for their views on broader themes relating to technology for judiciaries, beyond their personal day-to-day experience of their digital working environment. Questions addressed participants' perceptions about whether technology may replace judges in the future, what impact technology has on access to justice, whether technology can enable judges to work more effectively, and judicial training on technology.

Judges were asked whether they 'considered that it was possible some judges might be replaced by technology' in the next ten, 20 or 30 years in three successive questions. This broadly-framed question aimed to capture judges' perceptions of changes in the judicial landscape and the prospect of artificial intelligence and related tools infiltrating the judicial role. Of course, AI-based tools are currently being deployed in multiple jurisdictions predominantly to assist in making decisions, although in very limited instances, to supplant

[31] Cheryl Thomas, *2020 UK Judicial Attitude Survey - Report of Findings Covering Salaried Judges in Scotland* (n 20) 34.
[32] Cheryl Thomas, *2020 UK Judicial Attitude Survey - Report of Findings Covering Salaried Judges in Northern Ireland* (n 20) 27.
[33] Cheryl Thomas, *2020 UK Judicial Attitude Survey Report of findings covering salaried judges in England & Wales Courts and UK Tribunals* (n 20) 66.
[34] Angela Denning, Chief Executive Officer of the Courts Service remarked on Pexip: '[i]t may not be the fanciest but it is free to the user, simple to use for those who are not at ease with technology and it works from any phone or device.' Angela Denning, 'The Courts Service's Modernisation Programme' (Chief Justice Working Group on Access to Justice Conference 01 and 02 October 2021) 71 <https://www.courts.ie/news/launch-chief-justices-access-justice-working-group-conference-report> accessed 23 January 2023.
[35] ibid.

judicial decision-making by human judges.[36] Participant judges mainly pushed back at the suggestion posed by the question. The suggestion that some judges might be replaced in ten years was met with considerable scepticism. Of 52 responses, 46 (88%) said 'no', six (12%) said 'maybe', and none said 'yes'. Extending the prospect to 20 years, there was more acceptance of the possibility: of 51 responses, 32 (63%) said 'no', 16 (31%) said 'maybe', and three (6%) said 'yes'. Extending further to thirty years, still more judges were more accepting. Of 47 responses, 27 (57%) said 'no', 16 (34%) said 'maybe', and four (9%) said 'yes'. These results indicate that judges perceived an increasing likelihood of some judges being replaced by technology over time. However, the widely-held view that their own (or other judges') roles were not under particular threat in the short-to-medium future was perhaps the most significant trend here. Of course, this suite of questions required judges to future gaze through the lens of their own experience on the Irish bench. Circumspection, perhaps even scepticism, emerged – a divergence from the clamour of academic commentary around the rise of 'robot' judges,[37] not to mention the actual adoption of AI tools for judicial decision-making in other jurisdictions (particularly in China).[38]

A related question on judges' perception of whether, and if so, how, AI currently plays a role in Irish court proceedings also provided interesting insights. Judges were asked a nuanced question worth setting out in full:

> 'To the best of your knowledge, do some decisions that you make involve a review of a decision made by a form of Artificial Intelligence (AI)? For example, where an insurance company has relied on a form of AI to assist it to decide on a claim or in a criminal matter where AI might indicate whether reoffending is more or less likely'.

This question sought to glean judges' knowledge and understanding of whether AI tools directly or indirectly already play a role in court proceedings. This question (like all others in the survey instrument) was drafted to garner insights from judges in various jurisdictions operating in different contexts. To give one common example, in many jurisdictions algorithmic tools are increasingly used by prosecution services to recommend decisions on pre-trial bail applications or sentence lengths in various jurisdictions. As such, this question was broadly framed to capture judges' understanding of the use of AI tools by parties, their representatives, by prosecutorial services or other organisations or state agencies to present information (or propose decisions) to judges. Of 51 responses, two (4%) said 'yes', 38 (75%) said 'no', and 11 (22%) said 'do not know.' Perhaps the most interesting finding here was the sizable minority of judges who acknowledged their own uncertainty around how AI trickles upwards to potentially affect judicial processes. One interpretation is that some judges are

[36] See further, Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing 2021); Rónán Kennedy, 'Will We See 'Robot Judges' in Irish Courtrooms in the Future?' (*RTÉ Brainstorm*, 22 November 2022) <https://www.rte.ie/brainstorm/2022/1118/1337050-law-artificial-intelligence-machine-learning-robot-judges-/> accessed 23 January 2023; Brian M Barry, *How Judges Judge: Empirical Insights Into Judicial Decision-Making* (Informa Law from Routledge 2021) ch 8.

[37] For example, Tania Sourdin, 'Judge v. Robot: Artificial Intelligence and Judicial Decision-Making' (2018) 41 University of New South Wales Law Journal 1114; John Morison and Adam Harkens, 'Re-Engineering Justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision-Making' (2019) 39 Legal Studies 618; Jasper Ulenaers, 'The Impact of Artificial Intelligence on the Right to a Fair Trial: Towards a Robot Judge' (2020) 11 Asian Journal of Law and Economics; Ray Worthy Campbell, 'Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning' (2020) 18 Colorado Technology Law Journal 323.

[38] See Ran Wang, 'Legal Technology in Contemporary USA and China' (2020) 39 Computer Law and Security Review 105459 and George G. Zheng, 'China's Grand Design of People's Smart Courts' (2020) Asian Journal of Law and Society 1.

broadly aware that AI tools may be at play but that interactions with them, whether direct or indirect, may be unwitting or unbeknownst to judges themselves.

The survey asked judges whether digital technology positively or negatively impacted access to justice in the Irish judicial system. Of course, access to justice is, in its own right, a multi-faceted construct that has evolved over time. Originally, in the narrowest sense, access to justice referred to a citizen's right to litigate in court. However, over time, it has grown in scope to include legal representation for those who cannot afford it, the ability to access information about laws and the legal system, and equality of outcomes among different groups in society.[39] Of 53 responses, 43 (81%) said it had a positive impact, two (4%) said it had a negative impact, and eight (15%) said it had no impact. A follow-up question asked judges to identify important factors in their answers. Among the 43 judges who said that digital technology had had a positive impact, the most important factors were the digital literacy of lawyers (39 of 43 respondents, 91%), the ease of court process when used remotely (34 of 43 respondents, 79%), and the availability of internet and audio-visual technology (30 of 43 respondents, 70%). This data suggests that judges perceived lawyers' ability to navigate digital platforms and services competently and users' satisfactory experience of remote court processes as being critical to technology improving access to justice.

When asked to comment on the role technology plays vis-à-vis access to justice, judges identified the provision of legal information online and how online hearings can reduce delays and costs in court proceedings as contributing to improved access to justice. One judge questioned whether the shift towards a more digitised judicial system and, in particular, remote hearings and the shift to information being provided online, may negatively impact access to justice:

> 'The move of cases to an online forum has meant that members of the public cannot attend and this alone is an access issue. More information is now available online, about solicitors, about courts and about court hearings. But this ignores that portion of the population with literacy difficulties and less access to the internet'.

This raises two important issues: first, whether a publicly-available live stream of at least some court proceedings ought to be made available to reflect public access to courtrooms in court buildings to satisfy the constitutional requirement of public administration of justice,[40] and second, to interrogate how legal information is made available and not to assume digital literacy among the public. The 2021 European Commission Digital Economy and Society Index indicated that just 53% of the population have basic digital skills, slightly below the EU average of 56%.[41] A further question about judges' perceptions of whether parties (lawyers and/or litigants) experience difficulties using remote services provided by courts adds weight to these concerns. Of 51 responses, 27 (53%) said parties experience difficulties, while 24 (47%) said they did not. Among those who said that parties experienced difficulties, participant judges said that these primarily related to 'difficulty accessing technologies to

[39] For a brief summary of these developments, see Alberta Civil Liberties Research Centre, 'What Is Access to Justice? Five Different Ways of Considering Access to Justice' <https://www.aclrc.com/what-is-access-to-justice> accessed 25 August 2021. For an Irish perspective, see Office of the Chief Justice, 'Chief Justice's Working Group on Access to Justice Conference Report' (2022) <https://www.courts.ie/news/launch-chief-justices-access-justice-working-group-conference-report>.

[40] Article 34.1: 'Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.'

[41] European Commission, 'Digital Economy and Society Index (DESI) 2021' (European Commission 2021) <https://digital-strategy.ec.europa.eu/en/policies/desi-ireland> accessed 3 March 2023.

access court remotely' and the 'quality of audio-visual technology' (as distinct from its actual availability).

Judges were asked whether they considered that technology will enable them to do their work more effectively into the future. Of 55 responses, 37 (67%) said yes, 17 (31%) said maybe, and one (2%) said no. Judges were asked to explain their reasons for their answer, providing interesting insights into perceptions on how technology will continue to shape their role. Many judges offered examples of technologies that could assist in future. As mentioned above, six judges highlighted the need for or benefits of a unified, cloud-based case management system across the judicial system. The Courts Service ICT Strategy 2021 – 2024 has identified moving towards such as platform as an 'area of focus.'[42]

Interestingly, four judges highlighted AI tools to enhance, supplement or assist in their role. One judge identified the need for a 'smart' system for people who cannot afford lawyers to encourage settlement of actions, rather than going to hearing: 'AI will have a role to play in the future perhaps in providing the parties with a predictive result of the litigation thus encouraging earlier resolution and saving costs and court time,' they suggested. Two judges suggested the deployment of tools to assist judges in writing judgments, while another suggested automated decision-making tools could conduct routine tasks and manage administrative functions, commenting:

> 'There are judicial tasks which are easy but time-consuming. For such decisions, it makes sense to move to a digital solution. As in the medical field, some decisions are more reliable when made by algorithm. However, … the perception that justice is being done is very important. And any digital decision-making relies completely on the human who programmed the computer and the information fed into it in order to make that decision. For any but administrative or routine decisions which follow a strict formula, it may be impossible to successfully replace a human decision-maker'.

Other judges were concerned that technology may have paradoxical, adverse effects: rather than enhancing their effectiveness in performing certain tasks, it may compromise their output. One commented that technology 'has increased expectations re turnover and, in consequence, the work burden. People forget that the rendering of judgment is in part a reflective exercise. There seems to be less and less time for proper reflection, as ever more instantaneous or speedy responses are expected.' In a similar vein, another reflected: 'I think the use of technology itself generates additional work which can detract from the core task of the judiciary which is to decide cases as fairly and as quickly as possible.' These more hesitant observations suggest that, for some, technology for judges is a double-edged sword, perhaps negatively affecting the quality of their output. Others remarked on the importance of consultation in the design and deployment of technology: 'there must be consultation between the system creators and users for technology to work effectively,' and hinted that judges' ability to competently use technology is critical: 'the master is only as good as his tools springs to mind.' This latter comment speaks to the importance of training programmes for judges on their digital working environment and new technology tools as they become available, a theme that the survey addressed directly elsewhere. In evaluating judges' perceptions of training, it is important to reflect on the current and evolving context

[42] Courts Service, (n 12) 23-9.

of the recent and ongoing development and implementation of various training modules by the Judicial Council's Judicial Studies Committee.[43]

Judges were asked to express satisfaction with three aspects of judicial training on technology: the extent of judicial training available, the quality of judicial training available and the time available to undertake judicial training. 52 judges responded. As for the *extent* of judicial training related to technology available, four (8%) were 'completely satisfied,' 25 (48%) 'were satisfied,' 21 (40%) said it 'could be better' and two (4%) were 'not satisfied at all.' As for the *time available* to take such training, one (2%) was 'completely satisfied,' 15 (29%) were 'satisfied,' 20 (38%) said it could be better and 16 (31%) were 'not satisfied at all.' As for the *quality* of the training itself, seven (13%) were 'completely satisfied,' 29 (56%) were 'satisfied,' 14 (27%) said it 'could be better' and two (4%) were 'not satisfied at all.'

The dominant concern, then, appeared to be judges' perceived scarcity of time to undertake training in this domain: two-thirds were dissatisfied in this regard – an issue identified in previous research on training for Irish judges.[44] This perception also corresponds to judicial attitudes expressed in the UK Judicial Attitude Survey from 2020. 51% of Scottish judges,[45] 66% of Northern Irish judges[46] and 52% of English and Welsh judges and judges on UK tribunals[47] said that the time available to undertake training 'could be better' or that they were 'not satisfied at all'. Returning to the Irish survey, somewhat more judges were satisfied with the extent of training than were not, and their view on the quality of the training that they *did* receive was relatively positive: two-thirds were satisfied. Open comments on judicial training on technology often concentrated on a lack of time to avail of training: seven judges commented variously on time constraints compromising, disincentivising or prohibiting participation in training.[48] Judges were asked to identify which areas they would welcome new judicial training opportunities in. Of the 50 judges who responded to this question, the highest number of responses, 40 (80%), identified 'hands-on training using IT in court.' Notably, the second highest number of responses, 35 (70%), identified 'understanding how newer technologies linked to artificial intelligence (AI) can impact on judicial work.' This perhaps indicates Irish judges appreciated the current and ongoing potential for artificial intelligence to impact on their role. This finding perhaps reflects sentiments from an earlier question where a sizable minority of judges expressed they were uncertain about if, and if so, how artificial intelligence tools were used in Irish court proceedings.

Judges were asked generally about changes to the judiciary in recent years. Just over half of responding judges *disagreed* with the proposition that 'too much change has been imposed on the judiciary in recent years.' Of 50 responses, four (8%) strongly disagreed with this proposition, 22 (44%) disagreed, 13 (26%) said they were not sure, eight (16%) said they agreed and three (6%) said they strongly agreed. There was a high level of agreement with

[43] For further information, see <https://judicialcouncil.ie/judicial-studies-committee/> accessed 23 January 2023.

[44] Time, resources and workload have previously been identified by experts and judges as obstacles to judges participating in training. See Laura Cahillane and others, *Towards Best Practice: A Report on the New Judicial Council in Ireland* (Irish Council for Civil Liberties 2022) <https://www.iccl.ie/wp-content/uploads/2022/02/Towards-Best-Practice-Judicial-Council.pdf> accessed 23 January 2023, 46–50.

[45] Cheryl Thomas, *2020 UK Judicial Attitude Survey - Report of Findings Covering Salaried Judges in Scotland* (n 20) 31.

[46] Cheryl Thomas, *2020 UK Judicial Attitude Survey - Report of Findings Covering Salaried Judges in Northern Ireland* (n 20) 24.

[47] Cheryl Thomas, *2020 UK Judicial Attitude Survey - Report of Findings Covering Salaried Judges in English and Welsh Courts and UK Tribunals* (n 20) 60.

[48] These comments mirror observations made by the Judicial Planning Working Group that '[t]he importance of prioritising Court sittings means that training requirements and obligations for judges can often take second place.' Department of Justice, *Report of the Judicial Planning Working Group* (Department of Justice 2022) 120 <https://www.courts.ie/content/publication-judicial-planning-working-group-report> accessed 27 February 2023. See Cahillane (n 44) 49–50.

the proposition that 'more change is still needed in the judiciary.' Of 50 responses, none strongly disagreed, seven (14%) disagreed, ten (20%) said they were not sure, 23 (46%) agreed, and ten (20%) strongly agreed. There was an even higher level of agreement (perhaps unsurprisingly) with the proposition that 'the judiciary needs to have control over policy changes that affect judges.' Of 48 responses, none strongly disagreed, two (4%) disagreed, four (8%) said they were not sure, 17 (36%) said they agreed, and 25 (52%) strongly agreed. There were mixed responses to a question asking about the extent judges felt that their work as a judge had changed since they were first appointed. Nine of 50 respondents (18%) expressed the view that there has been a large amount of change, 22 (44%) said that there had been some change which has affected them, 12 (24%) said it had only changed a very small amount and this does not affect them and seven (14%) said it had not changed at all. Of course, each participant's individual reflections on this question correlate to some degree with the length of time they have served on the bench. Six of the seven judges who said their work had not changed at all were first appointed to the bench between 2019 and 2022, for instance. Judges strongly agreed that some of the changes as a result of the COVID-19 emergency would remain. Of 50 responses, 38 (76%) agreed or strongly agreed, seven (14%) said they were uncertain, and five (10%) disagreed or strongly disagreed.

On a positive note, a vast majority of judges agreed with the statement, 'despite any reservations I may have about changes in the judiciary, I still enjoy my work as a judge.' Of 50 responses, three (6%) strongly disagreed, none disagreed, two (4%) said they were not sure, 16 (32%) agreed, and 29 (58%) strongly agreed.

Judges were invited to provide open comments on changes in the judiciary. One judge opined '[t]he tendency in the Irish Courts system has been to be reactive with technological innovation rather than pro-active,' while another expressed the view 'judges should all be open to change for [the] public interest.' When asked how concerned judges were about technological change in the justice system, judges seemed, on the whole, more unconcerned than concerned. Of 45 responses, 16 (35%) said they were 'not concerned at all,' 12 (27%) said they were 'only slightly concerned,' eight (18%) said they were 'not sure,' eight (18%) said they were somewhat concerned while one (2%) said they were 'extremely' concerned. Overall, the sentiment expressed on the theme of change in the judiciary suggests that judges have a relatively progressive, even optimistic view of change.

Conclusions

In summary, we see that the use of digital technology by judges is very common. There is general satisfaction with the technology available in chambers, but less so with what is provided in courtrooms. Online hearings function well from a technical perspective but are not entirely popular, and some judges have strongly negative opinions on their continued use. There are limited concerns about judges being replaced by AI in the future. Judges generally enjoy their work and are happy to embrace change, although they would prefer that this was managed with their close consultation.

Before commenting on these results, the limitations of the study must be acknowledged. We should always be cautious about over-extrapolating from statistical data. This survey only achieved approximately one-third participation from judges, which provides broad coverage but not comprehensive, particularly as Supreme Court judges were notably absent. The reporting of judges' comments here is necessarily selective in order to give a balanced account. In addition, this is a snapshot at a particular point in time; results might be different now and certainly will be in the future. Nonetheless, the survey does highlight some key

issues that deserve further debate. The dissatisfaction expressed regarding remote hearings stems from concerns both about the limits of the technology and the need to respect fundamental principles. The first set of issues might be addressed in time by service providers, but the second is more challenging and is a matter for judges, lawyers and policy-makers rather than technologists. A particularly pressing research question is to identify (by means of surveying users and stakeholders or otherwise) in what types of proceedings – in terms of areas of law and in terms of stages in the court process – online platforms can appropriately and effectively be deployed without compromising natural justice and fair procedures. Despite the widespread use of these as a response to the public health concerns raised by the COVID-19 pandemic, initial indications are that the answer to this question, at least in the opinion of the Irish judiciary, may be quite limited in scope.

The possible usefulness of AI tools requires similar exploration. Although not as salient in the survey, judges nonetheless expressed nuanced views, welcoming some possible applications while pointing to problems that may put other uses out of bounds. As the power and sophistication of AI progress rapidly and there is likely to be external pressure to adopt it more widely in courts (particularly as practitioners do so), the judiciary should engage in a thorough assessment of the capabilities of AI tools to perform judicial tasks and develop a coherent position on where and how they can and cannot be used, before these decisions are made elsewhere.

Another important issue is the continued support provided to the judiciary through the Courts Service and the need to monitor the execution of its ICT strategy. Finally, the satisfaction expressed with the quality of training indicates that the work of the Service and the Judicial Council's Judicial Studies Committee in this regard is very important and should also be subject to review. On the other hand, the dissatisfaction with the time available to attend training highlights that government urgently needs to take steps to address the insufficient resourcing of the judiciary, as Ireland is consistently the EU member state with the lowest number of judges per capita.[49]

Finally, the findings here present further opportunities to better understand how Irish judges and the Irish judicial system use and deploy technologies, and their impact on the delivery of justice. In due course, the results here will be compared to the results of equivalent national studies in several other jurisdictions, providing further context by generating insights into how the Irish judicial system compares internationally. Moreover, given the significant changes proposed by current ICT and related strategies for the Irish judicial system, a follow-up survey some years hence will help to evaluate the success (or otherwise) of those initiatives, as well as longitudinally measure changes in Irish judges' attitudes as technology evolves.

[49] European Commission for the Efficiency of Justice, *European Judicial Systems Edition 2018: Efficiency and Quality of Justice* (Council of Europe 2018) 106. The report claims (at 107) that '[t]he small number of professional judges per inhabitant in *UK-England and Wales* (3 per 100 000 inhabitants), as in *UK-Scotland* and *Ireland*, is consistently explained by the very high proportion of cases tried by non-professional *magistrates*'; the confusion regarding the existence of lay magistrates in this jurisdiction further highlights how out of step Ireland is with the rest of the EU. In the 2021 Rule of Law Report from the European Commission, Ireland is criticised as having the lowest number of judges per inhabitant in the EU, and it is noted that this 'could also affect the efficiency of the Irish justice system.' European Commission, *2021 Rule of Law report: Country Chapter on the rule of law situation in Ireland* (Brussels, 20 July 2021) SWD(2021) 715 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0715> accessed 24 January 2023.

ROUTE(S) TO VERDICT – THE CLEAR PATH FORWARD IN CRIMINAL JURY TRIALS

Abstract: Juries are selected at random by design but how they are instructed is a more carefully designed process. How the jury is charged by the judge plays a crucial role in dictating how the jury will deliberate. In this way, it is a cornerstone of equipping a jury to reach a legally justified verdict. Jurors as laypersons in many instances will lack an understanding of many legal terms, tests and standards. This article addresses a novel measure introduced in the United Kingdom called a route to verdict and advocates for its introduction in this jurisdiction when the empirical research is considered.

Author: Jack Healy (LLB) Trinity College Dublin, (LLM) Utrecht University, Kings Inn (BL) candidate.[1]

Introduction

As O'Malley writes, 'few legal institutions have had so many passionate defenders and so many detractors as the jury'.[2] To illustrate his point, he makes reference to Lord Devlin, Blackstone and Mark Twain. Devlin describes the jury as 'the lamp that shows that freedom lives'.[3] To Blackstone, a 'palladium' and 'the sacred bulwark of our nation'.[4] Twain providing the anthesis condemns it as '[putting] a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury'.[5] One columnist from The Times goes as far to say that the 'Jury trial has outlived its usefulness. To pretend that it delivers justice is absurd. This archaic theme park democracy is expensive, a waste of time and adds nothing to fair trial'.[6] Having observed the jury process first hand working as a judicial assistant, the author's own view has seen a shift from Devlin more towards the view of Twain.

Whatever your own opinion on the jury model, there is a consensus that it is optimal so as to instil public confidence in the criminal process.[7] Colloquially, and for similar reasons, there is disdain amongst many for what can be viewed as the closed-shop nature of the Special Criminal Court.[8] If we assume that the jury model is something which will not be displaced, then it is worth evaluating the current way in which they are given information and to examine if the current model is the most effective way to do so.[9] While the selection of potential jurors is a random process by design, the way in which they are informed and the efficacy of same is something which should be regularly under review. For legal practitioners, it can be easy to underestimate how convoluted and incomprehensible legal concepts and the law itself can be to laypersons. This is a question of degree, and some will have more of an understanding than others, but notwithstanding such, there are a large number of those

[1] The author would like to thank Judge Sean Enright of Peterborough Crown Court who provided helpful information in regards how the practice operates in the U.K while sharing his own experience in utilising RTV's.
[2] Tom O'Malley, 'A Representative and Impartial Jury' (2003) 8 The Bar Review 1.
[3] ibid quoting Patrick Devlin, *Trial by Jury* (rev. edn, London, Stevens & Sons Limited 1966) 164.
[4] ibid quoting William Blackstone, *Commentaries on the Law of England* (Oxford 1765-1769), Book IV, ch 27.
[5] ibid quoting Trevor Gove, *The Juryman's Tale* (London, Bloomsbury 1998) 3.
[6] Simon Jenkins, 'Ladies and Gentlemen of The Jury, You Have Had Your Day' *The Times* (17 February 2006) <https://www.thetimes.co.uk/article/ladies-and-gentlemen-of-the-jury-you-have-had-your-day-5kczmnbqdd5> accessed 22 July 2022.
[7] Julian Roberts and Mike Hough, 'Public Attitudes to The Criminal Jury: A Review of Recent Findings' (2011) 50 The Howard Journal of Criminal Justice.
[8] Mary Carolan, 'Special Criminal Court Should Be Abolished, Rights Watchdog Says' *The Irish Times* (18 November 2021) <https://www.irishtimes.com/news/crime-and-law/courts/special-criminal-court-should-be-abolished-rights-watchdog-says-1.4732757> accessed 12 May 2022.
[9] The Constitution requires that the most serious offences are tried by a jury per Article 38.5.

who will find such terminology difficult to understand. This is only heightened when we consider the huge variety of criminal trials in terms of length and complexity.

The jury trial process is one based on the rationale that twelve people brought from diverse backgrounds and dispositions can come together bringing with them their common sense, knowledge and life experiences to look at the evidence in a particular case and decide on the facts. This expectation is underpinned by an expectation that each juror and the jury collectively fully understand what is being asked of them. Imagine 12 lay people being orally briefed by a consultant oncologist on potential courses of complex treatment for someone with an aggressive form of cancer, and those people then being sent away to the lobby to decide what was the best treatment for this patient. Wouldn't they be better off with some written guidance they could refer to? Should the written guidance be tailored for the people making the decision? This article evaluates the current method of charging the jury and looks at a somewhat recent measure introduced in the United Kingdom (UK) called a route or routes to verdict (RTV hereafter). This article examines what it is, and why its introduction in this jurisdiction may well be warranted when the empirical research from other common law jurisdictions is considered. It also recommends that written directions (i.e., a copy of the judge's charge) should be provided *as standard*.

What is it and where does it come from?

The basic premise of an RTV is that the presiding judge will, after charging the jury on the relevant facts and law, provide the jurors with a written aid which would contain a series of primarily factual questions that gradually lead the jury to a legally justified verdict. Each question should be tailored to the law, issues and evidence in the case. The idea being that they are clear enough that the defendant (and the public) may understand the basis for the verdict that has been reached.[10] It is, in some ways, a road map jurors should follow when deliberating.

The origin of their use relates to proactive members of the English judiciary who started using them organically to assist them in directing the jury. Their use was not automatic and they were only recently incorporated into guidance on how the judiciary should direct juries. May 1991 saw the publication, of the Crown Court Benchbook which contained what was coined 'Specimen Directions'.[11] It was primarily focused on assisting judges to get the law right and was in part a training manual.[12] In March 2010, a change in approach was embarked on focusing on maximising juror comprehension and these Specimen Directions were replaced by a Judicial Studies Board Crown Court Benchbook named: Directing the Jury.[13] The change was in response to what was seen as a ritualistic incantation of the directions which were being recited mechanistically by judges who were not engaging properly with the facts and issues in individual cases.[14] In 2016, the latest iteration of jury direction guides was created in what is known as The Crown Court Compendium, something which is updated regularly.[15] The use of RTVs is addressed in this guide and their use is now mandated by the

[10] Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (London, Judiciary of England and Wales 2015), paras 307 and 308.
[11] The Judicial Studies Board was the forerunner to the Judicial College. It was established following publication of the Report of Lord Justice Bridge's working party in 1978.
[12] David Ormerod, 'The Evolution of Jury Direction Manuals – Where next?' (Reading at Middle Temple November 15 2022).
[13] ibid.
[14] Successive Lords Chief Justice have variously underlined that the directions are not to be used 'mechanistically' (*per* Lord Taylor of Gosforth) and 'must be a servant, not a master', requiring always to be 'adapted to the circumstances of the individual case'. Roderick Munday, 'Exemplum habemus: reflections on the Judicial Studies Board's specimen directions' (2006) 70 (1) Journal of Criminal Law (2006) 27.
[15] Lord Chief Justice, 'Criminal Practice Directions [2020] EWCA Crim 1567' (UK Ministry of Justice 2022).

by the Criminal Practice Directions.[16] The following are two examples of RTVs, the first of which was received from a member of the English judiciary in the context of a murder case where self-defence was at play.[17]

Example 1

Q1. Are we sure that at that time of the incident, he did not have an honest belief that he was under threat?
If not sure, go to Q2.
If sure, self-defence fails, and you will ignore Q2 and go *straight* to Q3.

Q2 Are we sure the force he used was not reasonable and proportionate?
If not sure, self-defence is made out and your verdict against him is 'not guilty'. *Go no further***.**
If sure, then self-defence fails and go to Q3.

Q3 Are we sure that when the defendant unlawfully stabbed X they intended to cause death or really serious harm?
If sure, he is guilty of murder (but go straight Q5 and consider manslaughter route 2).
If not sure, consider Q4.

Q4 Are you sure that he intentionally stabbed X?
If yes, he is guilty of manslaughter only. *That is your verdict and go no further.*

Q 5 Has the defence proved on the balance of probability all of the following:
(a) did his abnormality of mental functioning give rise to a *substantial* impairment of his ability to exercise self-control?
If no, he is guilty of murder. Go no further.
If yes go to (b).

(b) Was this substantial impairment the cause, or a significant contributary cause for the killing?
If no, he is guilty of murder. *Go no further.*
If yes, he is not guilty of murder but guilty of manslaughter.

Example 2

This second example is also from the UK and was widely circulated online after a notorious cricket player was found not guilty of affray.[18] For context, an affray is statutorily defined in the following terms: 'A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety'.[19] The route to verdict provided to the jury was as follows:

[16] The latest version was published in June 2022: *The Crown Court Compendium, Part 1: Jury and Trial Management and Summing Up* (Judicial College 2022) <https://www.judiciary.uk/guidance-and-resources/crown-court-compendium/>
[17] Judge Sean Enright of Peterborough Crown Court.
[18] Caroline Davies, 'Ben Stokes Cleared of Affray After Brawl Outside Bristol Club' *The Guardian* (2018) <https://www.theguardian.com/uk-news/2018/aug/14/ben-stokes-trial-cleared-affray-brawl-outside-bristol-nightclub-england-cricketer> accessed 6 July 2022.
[19] S.3 Public Order Act 1986 <https://www.legislation.gov.uk/ukpga/1986/64/contents>

> Q1 Did he use, or threaten violence towards another?
> If no, not guilty, if yes move to Q2.
>
> Q2 Did he genuinely believe that it was necessary to use or threaten that violence so as to defend himself and/or another?
> If yes, was the force reasonable in the circumstances he perceived them to be? If it was, then the verdict is not guilty. If no, move to Q3.
>
> Q3 Was the conduct of all of them, taken together, such as would cause a person of reasonable firmness present at the scene to fear for his personal safety?
>
> If yes, the verdict is guilty, if no or it may not have been, the verdict is not guilty.[20]

There is no prescriptive format an RTV should take. Judicial discretion is retained in how it is produced and ultimately in the final form of the document. Judges adopt different styles; some judges present numbered questions while others prefer flowcharts.[21]

Is it Necessary?

The next logical question is whether employing such a tool is necessary? The appropriate response warrants answering two related questions. The first being what is the overarching purpose of the judges' charge with respect to explaining the legal rules the jury must apply? The second being whether the current format is the most optimal method of delivery when the empirical research is considered? These shall both be examined in detail.

The role of the judge's summing up/charge is seen as an impartial overview of the facts,[22] and a clear delineation of the legal rule(s) the jury must apply.[23] It is the second part of this which is most relevant here and something which could be improved on if you consider the purpose of summing up. Coonan in her book explains this purpose: 'The foundational principle for any summing up is that it must be sufficient to achieve its purpose (…) it should aim at precision and conciseness over prolixity'.[24] The need for clarity in summing up is something which has been affirmed in case-law.[25] The more complicated and long the case, the harder it is to for judges to adhere to this principle. This point was eloquently made in *R v Landy*:[26]

> A summing-up should be clear, concise and intelligible (…) This summing-up suffered from the fact that the judge was over conscientious, he seems to have decided that the jury should be reminded of nearly all the details of the evidence and directed as to every facet of the law which applied. 'He must

[20] Jon Ross, 'Ben Stokes-The Route to Verdict' (EBR Attridge LLP 2018) <https://www.ebrattridge.com/articles/ben-stokes-the-route-to-verdict> accessed 6 July 2022.
[21] David Ormerod and Cheryl Thomas, 'Routes to Verdict - What We Know and What We Need to Know' (2021) 8 Criminal Law Review 615-619, 616.
[22] *R. v Vincent Joseph Wood* [1996] 1 Cr. App. R. 207 'We do not doubt that the degree of adverse comment allowed today is substantially less than it was 50 years ago'.
[23] At common law there is no absolute requirement for summing up to be given in all cases. In practice judges do provide summations particularly the more complicated or serious the case. However, these vary widely in terms of length and detail.
[24] Brian Foley and Genevieve Coonan, 'The Judge's Charge in Criminal Trials' (Round Hall 2008) 15.
[25] *R v Woolin* [1999] 1 AC 82, 97. 'I attach great importance to the search for a direction which is both clear and simple'.
[26] *R v Landy* [1981] 1 WLR. 355, the judge gave a summing up which lasted for six days.

> have spent hours preparing his summing-up but in the end he got lost in the trees and missed the wood'.[27]

Now it should be stated that an overly protracted summation will not yield a successful ground for appeal if the content of the charge does not err in law or fact. *DPP v Hickey* is a case where a six-day charge was a feature but did not yield the same result.[28] It was held that: 'the charge while overlong was not such as would confuse the jury either as to the law, the evidence or the inferences to be drawn from the evidence'.[29] It is not necessary to dispute the learned judge's ruling in this regard. The charge may not have been so confusing as to warrant overturning the decision. However, this in no way precludes the idea that the charge could have been clearer, perhaps with a written aid in the form of an RTV; an RTV should be seen as a complement to the judge's charge, not a means to replace it.

The argued deficiencies in the current format of the judge's charge are eloquently put by Lord Justice Moses who addressed the issue of summing up in a speech delivered to the Inner Temple in 2010:

> The oral tradition proves hard to shift but we must surely have grown out of the belief that any good can be achieved by the ritual incantation of obscure utterance, expecting the jury to sit there saying nothing but absorbing all they are told like a sponge.
>
> And when they go out and wrack their brains trying to remember what they have been told, and come back to ask to be reminded, the judge re-reads his instruction, sometimes more carefully, possibly more slowly, or even in a louder voice. [Sometimes he is merely hurt, and responds in a tone of injured affront, rather as the Prime Minister of Italy might if you ask him the rules of 'Bunga-Bunga'].[30]

Humour aside, his point is rather persuasive. Repetition of a direction which has already garnered confusion will not always (even frequently) be the correct remedy. Of course, if jurors have failed to take an adequate note or were not listening to the charge, then this method will fill in the gaps so to speak. It is important that jurors are not relying on memory alone and therefore a written copy should be provided. The judge's charge can be long and drawn out over multiple days and while the jury are told they can come back to court for matters to be repeated or clarified it should not be underestimated how intimidating or reluctant jurors might be to ask for this. An issue arises where the confusion is more pronounced, as then repetition will do little to clarify matters to the jury and this is where an RTV would be of assistance.

Another consideration is the structure of jury deliberations. The general rule in European countries is that jury deliberations are conducted in private.[31] Anything else would run contrary to the well-established principle in this jurisdiction that the nature of the jury

[27] ibid [8].
[28] *DPP v Hickey* [2007] IECCA 98.
[29] ibid [17].
[30] Lord Justice Moses, 'Summing Down the Summing-Up' (Annual Law Reform Lecture, The Hall, Inner Temple, 23 November 2010).
[31] In some countries, this is not the case. For example, in Belgium a judge may be invited to the deliberation room to provide the jury with clarifications on a specific question, without being able to express a view or to vote on the issue of guilt per *Taxquet v Belgium* (2012) 54 EHRR 26 [54].

deliberation in a criminal case should not be revealed or inquired into.[32] This applies even if there is a legitimate doubt over whether the conviction of the accused is fully in accordance with what the jury agreed.[33] The argument being that the confidentiality requirement of jury deliberations is intertwined with the absence of reasons.[34] The issue of whether juries should have to give reasons for their verdict is for another article and is the subject to much debate.[35] However, it is clear that in this jurisdiction, the rationale is that the judge's directions to the jury are delivered in open court so as to compensate for the jury's lack of any reasoned judgment when returning the verdict. In this context, any way in which these directions can be refined must be thus refined. They are essentially the only safeguard to a legally justified verdict.

Empirical Research

Thus far the arguments advanced rest on the rather shaky ground of anecdotal experience. However, there are data and studies which have been conducted on the subject of jury comprehension which lend some weight to my assertions. Jury research is not a novel undertaking and yet considering the importance of jury decision making it is an underdeveloped area of research. In the US, it stems back as far as the 1950's where University of Chicago carried out its well-known jury project.[36]

Mock jury studies have been conducted in other jurisdictions with varying design processes dictated by convenience and cost. Common criticisms of some mock jury studies have been that they rely on unrepresentative student samples of jurors, rely on written stimuli rather than live re-enactments or videos, and have not always included deliberation as part of the research design.[37] Notwithstanding such limitations, valuable research has been done in the area of jury comprehension and that of particular utility conducted in other common law jurisdictions such as Australia, New Zealand and the United Kingdom. Before delving into this research, an important point to note is the difference between objective and subjective comprehension. Many studies which focus on subjective and self-reported comprehension yield extremely positive results. One study conducted in Australia found that 94.9% of 'actual' jurors stated that they understood the instructions 'mostly' or 'completely'.[38] A different study conducted in New Zealand found similarly positive results with 85% of 'actual' jurors believing that the instructions were clear.[39] This is to be expected. As Shakespeare said, 'the fool doth think he is wise, but the wiseman knows himself to be a fool'. Jurors who are not familiar with legal terminology and do not understand exactly what is being asked of them are not likely to admit such. As such, studies which focus on objective comprehension are of more utility.

An example of a study which looks to objective understanding was conducted by Cheryl Thomas in 2010 on the behest of the UK Ministry of Justice.[40] This study looked at *inter alia* 'an initial exploration of how well jurors actually understand judges' oral instructions on the

[32] Dermot Walsh, *Walsh on Criminal Procedure* (2nd edn, Round Hall 2016) ch 22, para 22-27.
[33] *People (Attorney General) v Longe* [1967] IR 369
[34] *Taxquet v Belgium* (2012) 54 EHRR 26 [79].
[35] For instance, see Tom Daly, 'An endangered species? The future of the Irish criminal jury system in light of Taxquet v Belgium' (2010) 20(2) Irish Criminal Law Journal 34-43.
[36] William Young, 'Summing Up to Juries in Criminal Cases - What Jury Research Says About Current Rules and Practice' [2003] Criminal Law Review 665-689.
[37] James Chalmers and others, 'Three distinctive features, but what is the difference? Key findings from the Scottish Jury Project' (2020) 11 Criminal Law Review 1012-1033.
[38] Blake M. McKimmie, Emma Antrobus and Chantelle Baguley, 'Objective and Subjective Comprehension of Jury Instructions in Criminal Trials' (2014) 17 (2) New Criminal Law Review 163–183, 167.
[39] ibid.
[40] Cheryl. Thomas, 'Are Juries Fair?' (Ministry of Justice Research Series February 2010).

law and whether certain tools may improve comprehension'.[41]A key finding from this study was that:

> When given a written summary during oral directions, there was also a closer relationship between jurors' perception of their understanding of the legal directions and their actual understanding[42](…) Most jurors believed they understood the judge's direction on the law. However, a substantial proportion of these jurors in fact did not fully understand the directions in the legal terms used by the judge.[43]

In numeric terms, when jurors had written directions, 60% of those who said the directions were extremely easy to understand correctly identified both legal questions. When jurors only received oral directions, 34% of those who said the directions were extremely easy to understand correctly identified both legal questions.[44]

The current Irish approach mirrors that in Scotland, which is distinct and separate to England and Wales, with a reliance on oral delivery of the charge exclusively. Thus, it is an interesting comparator. A key difference between Scotland and this jurisdiction is that the Scottish have been proactive in commissioning a review of empirical work which explores jury comprehension.[45] This comprehensive review which looked at studies conducted in a multitude of jurisdictions found that the most effective ways of enhancing juror memory and understanding was a combination of methods which included juror note-taking, pre-instruction, plain language directions and the use of written directions and structured decision aids (RTVs). It found that each of the methods benefitted different aspects with some improving memory and recall, with others improving understanding and assisting with the application of legal tests. In terms of the use of RTVs it found:

> There is a developing evidence base relating to structured decision aids (routes to verdict), which are a more recent innovation. The evidence that does exist (particularly from the better designed studies) suggests *that these are more effective than written directions* in improving applied comprehension – jurors' ability to correctly apply legal tests to the evidence. Oral directions should be tailored to the route to verdict provided, otherwise there is a danger that jurors ignore the route to verdict.[46]

Other Potential Advantages

The chief advantage of RTVs is aiding jury comprehension. This is particularly true for complex cases with multiple co-accused and multiple counts which would benefit greatly from reducing the information down to the most pertinent questions in reaching a verdict. Beyond this the drafting of an RTV has other advantages. As Ormerod and Taylor write, 'they cause counsel, judges and, crucially, juries to address more logically and systematically the legal bases for reaching their verdict'.[47] In the UK, Counsel make submissions and

[41] ibid 4.
[42] ibid 38.
[43] ibid 48.
[44] ibid 39.
[45] Fiona Leverick and James Chalmers, 'Methods of Conveying Information to Jurors: An Evidence Review' (Justice Directorate 2018) 6.
[46] ibid.
[47] David Ormerod and Richard Taylor, 'Agreement and Disagreement in Murder and Manslaughter Verdicts Practical Implications of The Above Analysis and Identifying Routes to Verdict' (2022) 3 Criminal Law Review 188-209, 188.

participate in the drafting of RTVs.[48] This is provided for in the Criminal Practice Directions: 'Such written materials may be prepared by the judge or the parties at the direction of the judge. Where prepared by the parties at the direction of the judge, they will be subject to the judge's approval'.[49] This benefit of active participation in drafting has been described by the English Court of Appeal: 'apart from the assistance which the end product will provide to the jury, the mental discipline of drafting a route to verdict in itself assists the court to identify the essential ingredients of the offences charged and the issues on which the jury must focus.'[50] If a similar method were introduced here, it could potentially prevent a number of requisitions and recharges of the jury. Counsel do of course address the judge about aspects of the charge, but the author suggests this is not done in such a proactive and detailed way as RTVs. Another advantage is that they enable appellate courts to readily and easily identify issues and appeal points.[51]

Interestingly, it appears that Court of Appeal Guidance can actually hinder juries being charged more succinctly. Madge argues that this coupled with the ever-increasing number of criminal statutes has added to the length and intricacy of directions on the law.[52] In Australia, before legislative intervention, surveys of judges consistently showed that judges felt they had to 'appeal proof' their charges, with many judges feeling their charges were 'drafted for the appellate courts rather than for the comprehension of jurors'.[53] This of course would be different if appellate courts prescribed the use of RTVs – something we will return to later in this article.

Other perceived advantages of RTVs are their potential to improve transparency, with accused persons, and indeed the wider public being able to see more clearly why a particular verdict was reached.[54] This may lead to greater confidence in the criminal justice process, although this perspective may be sanguine. A more tangible advantage of RTVs is that they may lead to cost savings through shorter deliberation times, as jurors spend less time attempting to understand their task.[55] This is borne out by one UK judges' perspective: 'Handing out written directions seems to have almost eliminated requests from juries for reminders or further guidance on the law. Juries also seem to be reaching verdicts more quickly'.[56] Clearly these potential advantages, while desirable, are subordinate to the ultimate advantage: aiding jury comprehension.

Disadvantages/Concerns

One concern expressed with respect to introducing RTVs is that by reducing everything to a series of questions presented concisely and simply, the subtleties of legal definitions might be lost or the law 'glossed' for convenience.[57] This danger is something which has been recognised by the English Court of Appeal in a judgment last year which while affirming the benefits of RTVs gave a word of caution also: [58]

[48] *R v Christopher Alexander* [2018] EWCA Crim 239: 'That had been approved by counsel before being given to the jury(…)it is not wise for a route to verdict document ever to go to a jury when counsel thinks there is something within it which is misleading or wrong'.
[49] Lord Chief Justice (n 15) para 26K.15 137.
[50] *R. v Atta-Dankwa (Abena)* [2018] EWCA Crim 320 [31].
[51] Ormerod and Taylor (n 47) 188.
[52] Nic Madge, 'Summing Up - A Judge's Perspective' (2006) 2 Criminal Law Review 817-827, 819.
[53] Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' (2020) 11 Criminal Law Review 1034-1056, 1041.
[54] Leverick (n 45) 38.
[55] ibid.
[56] Madge (n 52) 821.
[57] Ormerod and Thomas (n 21) 618 provides an example in the case of multi-handed murders.
[58] *R v Rowe* [2022] EWCA Crim 27.

> There is no doubt that routes to verdict (and written directions of law) have proved to be invaluable in assisting jurors to arrive at a true verdict according to the evidence. There is no doubt either that the questions that are formulated should be phrased in as straightforward language as possible and put in a way that is straightforward for the jury to understand. But there is a risk, and in our view this case is illustrative of it, of oversimplifying the questions to such an extent that they distort the issues the jury has to consider.[59]

This case is fact specific and more a criticism of that particular RTV which was created rather than on the concept more generally.[60] However, the simplifying of legal concepts in standardised instructions is not straightforward and care must be taken not to alter legal concepts in ways which would change their legal meaning.[61] Something to be mindful of is that one Australian study suggests that reducing the complexity of information, to make it more comprehensible, reduces people's reliance on heuristic cues because they are better able to engage in effortful processing.[62] Thus, there is a danger that providing a simplified instruction would mean that jurors would not engage with the information and the legal issues. This is certainly a possibility which should not be discounted, although equally it is true that one cannot engage with something correctly if they fail to understand it fundamentally. A correct balance between the two needs to be achieved.

One limitation to some of the studies conducted in jury comprehension is that they do not address objective understanding. There is a difference between feeling more confident that you understand something and actually having understood something. The most recent research has emphasised the importance of whether jurors can apply the instructions.[63] Jurors may think they have understood the instructions, but the litmus test is in their application.[64] This is a salient point in terms of aiding juror comprehension and should be considered when designing studies into the utility of simplifying jury instructions. However, what should not be discounted in terms of the benefit of RTVs is providing a more tangible link to a legally justified verdict in that it provides an easier guide to jurors for them to use in their deliberations. Moreover, while an empirical limitation, it does not preclude the possibility that their objective understanding has improved and other, better designed studies which have been referenced have yielded positive results.

Another potential disadvantage is the time and effort that would have to be expended by the trial judge. However, if sufficient guidance and training is provided this should not be an issue. Their use does pose some difficult questions such as, does the RTV's binary approach (i.e., 'if yes then guilty, if no then not guilty') make juries more likely to convict?[65] It is clear more research should be conducted into the consequences of their use in this regard. There

[59] ibid [73].
[60] ibid [76] 'care should be taken to ensure that the natural desire to pose a series of simple questions does not override the imperative that the questions should where necessary, be tailored to the individual circumstances of each defendant. In this case for example, there was no evidence whatever that Rowe was the shooter, yet the jury were invited to consider whether he was'
[61] Chantelle Baguley, Blake McKimmie, and Barbara Masser, 'Deconstructing the Simplification of Jury Instructions: How Simplifying the Features of Complexity Affects Jurors' Application of Instructions' (2017) 41(3) Law and Human Behavior Journal 284-304, 285.
[62] ibid.
[63] Chantelle Baguley, Blake McKimmie, and Barbara Masser, 'Re-evaluating how to measure jurors' comprehension and application of jury instructions' (2019) 26 (1) Psychology, Crime & Law 53-66.
[64] Ormerod (n 12).
[65] Ormerod and Thomas (n 21) 617.

has also been a lack of research looking into the impact of written directions distinct from RTVs and the effectiveness of different types in different scenarios.[66] The experience in England and Wales shows that their advantages significantly outweigh any disadvantage. Indeed, most judges in England and Wales have gone from being initially sceptical to very enthusiastic about their use.[67]

Other Jurisdictions

Much of the discussion thus far has referenced the situation in the UK as it provides a clear blueprint for how adoption of RTVs or something similar could be introduced here. Australia has also made a number of changes to how juries are directed but has opted for legislative reform.[68] Despite the differences in how the changes were implemented, there is cross-jurisdictional consensus that the objective in change is to ensure that jury directions are clear and comprehensible and are presented in a form which elucidates the issues to be decided.[69] The empirical work in jury comprehension laid the foundations, and wholesale change began in 2015 after Sir Brian Leveson published a *Review of Efficiency in Criminal Proceedings*.[70] One of his general recommendations was for: 'A change of culture so as to use the Criminal Procedure Rules to ensure that trials proceed expeditiously and commensurately with the issues in the case'.[71] In terms of assisting the jury, he recommended that judges should be ready to provide directions before evidence is given, where this would assist the jury to evaluate the evidence. Interestingly, research conducted in New Zealand identifies many complaints by jurors about the absence of clear guidance at the start of the trial as to the real issues in the case.[72] This is something that would be of great benefit if introduced in this jurisdiction. Juries are given general directions on the criminal process but are not armed with any explanation of the law which will dictate their ultimate decision. It seems logical that they would be given a roadmap by the judge of the particular legal issues at play before they hear from counsel.

England and Wales

In England and Wales, Leveson also renewed Auld LJ's recommendation that instead of summarising the evidence, the judge should devise and put to the jury a series of written factual questions (RTV).[73] These were subsequently implemented in the Criminal Procedure Rules and the first Crown Court Compendium.[74] While their use is strictly speaking discretionary,[75] 'a strong expectation has developed that an RTV will be provided to the jury in almost every case'.[76] An interesting development in UK jurisprudence is the consequences when an RTV is not utilised. Numerous Court of Appeal decisions have emphasised the importance and desirability of written directions and RTVs.[77]

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[66] ibid 619

[67] Douglas Thomson, 'Should Scotland Adopt The "Route to Verdict" In Criminal Jury Trials?' (2018) 31 Scots Law Times 131.

[68] Recommended by the in Victorian Law Reform Commission, Jury Directions, in its Report No 17 (2009).

[69] Maxwell and Byrne (n 53) 1055-1056.

[70] Leveson (n 10).

[71] ibid 74, para 281.

[72] Young (n 36) 682.

[73] Leveson (n 10) 79, para 307. Auld LJ recommended that there be a single instrument setting out, concisely and simply, all of the rules of criminal procedure, in a form which could be readily amended "*without constant recourse to primary legislation*": Lord Justice Auld, 'Review of The Criminal Courts of England and Wales' (Judiciary of England and Wales 2001).

[74] Published in May 2016.

[75] Only not to be used 'where the case is so straightforward that it would be superfluous', Lord Chief Justice, 'Criminal Practice Directions [2015] EWCA CRIM 1567' (UK Ministry of Justice 2022) 127, para 26K.12.

[76] Ormerod and Thomas (n 21) 616.

[77] For example, *R. v K* [2017] EWCA Crim 2214 and *R v N* [2019] EWCA Crim 2280.

A prime example is *R. v Atta-Dankwa (Abena)*.[78] The case concerned an alleged altercation whereby the appellant had knocked down the victim with their car. The jury had to consider three separate counts on indictment: assault by beating (count 1); whether the victim's injuries from being hit by the car amounted to wounding with intent (count 2), or in the alternative, whether it was unlawful and malicious wounding (count 3).[79] The trial judge opted to not utilise any written directions including an RTV. The jury requested clarification on whether the accused was guilty on count 2 if her intention had been to scare the victim rather than injure her. The trial judge mistook the enquiry as relating to count 3, and wrongly directed the jury that recklessness on the accused's part was sufficient to convict on count 2. The jury found the accused guilty on counts 1 and 2. This case illustrates how written directions can prevent mistakes of this nature –the grounds for appeal would not have arisen if an RTV had been provided to the jury. As Hungerford observes, the jury would have had a clear record, to which they could, if necessary, refer during their deliberations, of the approach they should have taken in deciding their verdicts.[80] Holroyde LJ made it abundantly clear that a written RTV should be seen as the norm and criticised the fact that it was not used in that case: 'There is a lesson to be learned from this case. It is that one should never be too quick to assume that a case is so straightforward that a route to verdict would be superfluous. Experience shows that problems can arise even in cases which seem straightforward'.[81]

The Irish Perspective

In this jurisdiction, the matter of RTVs has not been properly considered. The Law Reform Commission in a 2013 report looked at the issue of jury comprehension and noted research which suggested that juror comprehension of legal directions was aided by written directions.[82] However, instead of opting to make specific and detailed recommendations, it instead advocated for legislative intervention and for the provision of empirical research into the topic.[83] This appears to have fallen on deaf ears and no such legislative or empirical work has been embarked on thus far. One encouraging development has been the commencement of the Criminal Procedure Act 2021, which makes provision for written documents used in the trial to be provided to the jury.[84] The section is broad in scope in terms of what may be provided. However, while written copies of the judges' directions may be provided, they are not provided as standard. Furthermore, this does not resolve the problem discussed earlier whereby mere repetition is not a sufficient antidote.

The idea of utilising an RTV document to assist jury comprehension is something which has not been given proper judicial scrutiny or consideration by the appellate courts. There is only one case where it is mentioned,[85] and this was to provide context to an English decision where such a document was used: 'the concept of a "route to verdict" document is not one that has been adopted in Irish criminal procedure to date'.[86] No examination of why such a

[78] [2018] EWCA Crim 320.
[79] ibid [6].
[80] Peter Hungerford-Welch, 'Written Directions to The Jury: R. v Atta-Dankwa (Abena) Court of Appeal (Criminal Division): Holroyde LJ, Elisabeth Laing J And Judge Aubrey QC: 13 February 2018; [2018] EWCA Crim 320' (2018) 8 Criminal law Review 685-688, 685.
[81] *R. v Atta-Dankwa (Abena)* [2018] EWCA Crim 320 [31].
[82] Law Reform Commission, *Jury Service* (LRC 107-2013).
[83] ibid: 'The Commission recommends that (…) provision should be made in legislation for empirical research into matters such as jury representativeness, juror comprehension, juror management and juror capacity and competence'.
[84] The Criminal Procedure Act 2021 s. 2.
[85] *The Director of Public Prosecutions v Jose Lacerna Pena* [2022] IECA 15 which references the UK case of *R v. Shehu* [2001] EWCA Crim 1381.
[86] ibid.

document was used nor any evaluation as to the utility of same was made – a missed opportunity.

Conclusion

Juries are here to stay. In that context, it would be wrong to assume that the current way in which they are addressed on the law and how it should apply is beyond reproach. Surely where the stakes are so high, and a person's liberty is at stake, the utmost must be done to try and prevent perverse outcomes or indeed disagreements which stem from confusion. Beyond that, jurors are conscripted to perform what can be an onerous role, and thus is it not the case that the criminal justice system is obliged to provide as much assistance as is practicable so they can adequately discharge their function.[87]

Juries should be provided with a written copy of the judge's directions as standard to curtail any confusion about what is said. Moreover, and more critically, adopting the use of RTVs needs to be introduced to address more fundamental confusion that juries can experience, particularly in complex cases with a number of alternate verdicts and counts. At a bare minimum, more research into the topic needs to be conducted and any barriers to such lifted.[88] Notwithstanding the absence of such research in this jurisdiction, the Irish judiciary should take a more proactive approach in improving and refining the ways in which juries are charged.

[87] Ormerod (n 12).

[88] 'Unclear contours of the common law and constitutional restrictions on conducting empirical research with jurors have undoubtedly contributed to this research deficit' Mark Coen and others, 'Respect, Reform and Research: An Empirical Insight into Judge-Jury Relations (2020) 4(2) Irish Judicial Studies Journal 166-133.

THE SAFE USE OF EXPERT EVIDENCE

Abstract: Experts are indispensable to the administration of justice. Why? Because litigation ranges way beyond what judges or juries comfortably deal with as the facts of everyday life. Whether it is the diseases of the mind, or the chemical reactivity of pharmaceuticals or the obviousness of a contended-for inventive step in a patent case, without the assistance of experts, courts would be vastly under-equipped in making decisions of fact. But, here there is a real danger: that of over-reliance, or even of the surrender of the authority of the judge to experts; to those paid by litigants to testify helpfully on their behalf. Recognising that danger, the analysis of the law of evidence and the practical approach of the courts to expert testimony should both confine the use of experts within definable boundaries and also require judges to equip themselves with that ordinary distance from witnesses that will enable judicial independence to be seen to be upheld.

Authors: Peter Charleton is a judge of the Supreme Court and adjunct professor of criminal law and criminology in the National University of Ireland, Galway. Ivan Rakhmanin is a judicial assistant assigned to the Supreme Court.

Introduction

Experts are privileged witnesses; ones treated differently in terms of law compared to any others who testify before a court. They can express opinions and may go so far as to comment on the ultimate issue before the court, territory beyond the reach of any other testimony. Some experts are so central to judicial decisions that there is a danger that they become almost deciders of the case. Unlike other witnesses, experts are paid, some making a living from court appearances and investigations. While asserting independence, can this always be so depended upon for a court to defer to their views? The draw of finance poses a real danger as does the, perhaps, unconscious bias of supporting the team for whom experts are acting. It must be recognised that experts are both a danger to justice while also being an indispensable help. Without the explanation of science some cases would be impossible to try. How, therefore, should a judge analyse expert evidence? How should awareness of inherent dangers lead to a judicial mindset that can grasp and use expert testimony as opposed to surrendering authority to a most important kind of witness, one who is not sworn to be objective and who, if the expert were the judge, would be debarred from the case by reason of financial reward?

The purpose of this article is to examine expert evidence through the filter of the judicial mind. Fact-finding is often a hidden process of analysis, where scepticism is masked by detachment, but which all judges need to grapple with openly for fear of falling into the kind of trap that the deployment of experts in litigation may open up. The rules applicable, enabling only the calling of an expert where what is involved is beyond normal judicial experience, and the distinction as between evidence as to fact and evidence of opinion, how that plays out as between expert and ordinary testimony, the hearsay rule, and the tools for assessing evidence on a practical basis, are thereby brought into focus. Our central premise is to argue for the strict application of the rules as to expert testimony that have been shown to uphold judicial authority and to outline a fact-based approach to the analysis of what experts assert which returns to the courts the decision-making power which is obvious where a judge is dealing with ordinary witnesses.

The balancing-act of expert evidence

Expert evidence is invaluable to the administration of justice.[1] In some litigation it is indispensable. Without reliance on experts, many issues involving patent law, forensic pathology, psychiatry, engineering, medicine, and other areas beyond the knowledge of judges and juries could not reliably be assessed.[2] Nonetheless, the peril must be recognised: that of leaning on the view or interpretation of an individual of a scientific theory, when the duty remains on the judge or jury to actually decide the facts. The key issue of reliance on experts is of a court foregoing responsibility in their favour. Perhaps, more often than not, the experience with experts is a positive one, with highly skilled and knowledgeable professionals offering clear and unbiased analysis of an arcane discipline. But negative experiences can have a significant impact on the outcome of a trial,[3] or the expense incurred by the parties in litigation and the use of the courts' limited time.[4]

The pitfalls of expert evidence were instanced by the Canadian Supreme Court, in *White Burgess Langille Inman v Abbott and Haliburton Co*,[5] where the judges warned that 'expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers'.[6] Experts, experience indicates, far from invariably assisting the court, can becalm trials and may beckon the finders of fact towards error, curiously on their side of the case, through their support of untenable theories and their failure to recognise inconsistencies in partisan theories. These dangers, while recognised, are difficult to deal with by legal rules, though they have been the focus of numerous attempts at structural reform internationally.[7] In this context, judicial mindset in approaching an expert's testimony and in determinedly asserting judicial independence becomes more important than legal rules. The best experts are clear sighted, able to explain otherwise unfathomable concepts from their deep knowledge of their discipline and may be balanced in their conclusions through a consideration of all real possibilities.[8]

Judges should, however, always be aware of how dangerous expert testimony is. Expert evidence may be ruinously expensive and without a clear rule as to deployment and a limitation on numbers that may be deployed, the principle of equality of treatment risks being unbalanced in favour of those with the deepest pockets. As outlined by Collins J in *Duffy v McGee & Anor,* while the Irish courts do not have the same formal gatekeeping function as the courts in the United States under the *Daubert* rule,[9] 'in any given case the admissibility of

[1] This article is based on a lecture given by the first author to the Grange Conference for medio-legal professionals in Ridley Castle, North Yorkshire, England, in September 2022 <https://www.educationandtrainingnetwork.co.uk/wp-content/uploads/2022/03/Medicolegal_Conf_22_4March22.pdf> accessed 12 January 2023.

[2] As stated by Samuel R Gross in 'Expert Evidence' (1991) 6 *Wisconsin Law Review* 1113 at 1116, 'whole categories of cases are dominated by issues that can only be resolved with expert knowledge'.

[3] Gemma Davies and Emma Piasecki, 'No more *laissez faire*? Expert evidence, rule changes and reliability: can more effective training for the bar and judiciary prevent miscarriages of justice?' (2016) 80(5) J Crim L 327 at 328 cites *R v Clark (Sally)* [2003] EWCA Crim 1020 as an example of a case in which expert evidence was relied upon at trial and was subsequently found to be erroneous, leading to the overturning of a conviction due to the appellate court's view that the evidence central to the hearing could not be sustained upon further scrutiny at [181].

[4] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89–2000) 435.

[5] [2015] 2 SCR 182.

[6] ibid [1].

[7] The Canadian Supreme Court held in *R v DD* [2000] 2 SCR 275 at [52] that while experts were not biased in a 'dishonest sense', a 'lack of independence and impartiality can contribute to miscarriages of justice' and has done so in a number of 'notable cases'.

[8] The judgment of Noonan J in *Duffy v McGee & Anor* [2022] IECA 254 highlighted that the duty of impartiality 'imports a willingness on the part of the expert to remain open to alternative possibilities, and if necessary, to change his or her mind when confronted with new information' at [94].

[9] 509 US 579 (1993). The US Supreme Court in this case significantly altered the admissibility test for expert evidence from the original position in *Frye v United States* 293 F 1013 (DC Cir 1923), which had established a general acceptance rule. In *Daubert*, by contrast, the Supreme Court held that trial judges must consider whether expert evidence is to be admissible 'at

expert evidence may be challenged on the basis that it lacks a reliable scientific or methodological foundation', though the stage and manner in which this should be done is to be determined on a 'case-by-case assessment.'[10] Where is the fundamental line to be drawn? It is this: no court should surrender to any expert. As Collins J warned, even where an expert is uncontradicted, the court is not required to accept anything. He reminded judges that 'there is no principle that greater weight must be given to expert evidence than to ordinary evidence of fact'.[11]

Admissibility tests for expert evidence

Experts are confined, and should be so confined, to testimony only where the law permits. While other jurisdictions have considered, or allowed, an expansion in the admissibility of expert testimony, this may have the effect of increasing the cost of litigation and of requiring all litigants to have an expert even for the most mundane of issues. An expert in our system may only be called to offer testimony on an arcane discipline; meaning an area of fact outside general experience.[12] This does not extend to issues such as what may cause individuals to enter an uncontrollable rage or to act carelessly: but rather why a handwriting sample may be fraudulent or how paranoia may impact the mind of someone with a severe psychiatric illness.[13] There has been a significant pressure, largely due to the increasingly complex and niche litigation before modern courts, to expand the number of fields which may permit the assistance of expert evidence.[14] The rule permitting expert evidence only on matters 'upon which competency to form an opinion can only be acquired by a course of special study'[15] goes back as far as 1782 in England.[16] This is the classic rule applied in Ireland: 'The courts permit expert evidence in relation to all matters that are outside the scope of the knowledge and expertise of the finder of fact, whether judge or jury. The expert opinion evidence must be evidence which gives the court the help it needs in forming its conclusions.'[17] As a working rule, this has the advantage of clarity. It also keeps experts confined to those cases where their use is indispensable. Common law systems, however, continue to struggle to find the right test for admissibility.

An alternative approach to our jurisdiction has been proposed by the Australian Law Reform Commission, emphasising whether expert evidence would be of assistance to the trier of fact, as opposed to focusing on whether the topic addressed is within the scope of common knowledge.[18] But approaches differ in the common law world with a significant degree of uncertainty in practice as to when expert evidence is to be admitted, particularly in the United States. Federal Rule 702 states that 'the standard as to whether expert testimony is warranted is whether it will "assist the trier of fact"', a broad approach towards admissibility that is

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the outset' at 2796, applying a test of whether it constitutes scientific knowledge that 'will assist the trier of fact to understand or determine a fact in issue'. This created a higher threshold for the admissibility of expert evidence through emphasising scientific validity in admitting evidence before a trial court. In discussing the effect of this ruling, Bert Black, Francisco J Ayala and Carol Saffran-Brinks, 'Science and the Law in the Wake of *Daubert*: A New Search for Scientific Knowledge' (1994) 72 Tex L Rev 715 at 786 stated that this involves a 'far more searching inquiry into the merits of scientific evidence' on the part of the courts than was previously undertaken under *Frye*.

[10] [2022] IECA 254, [17].

[11] [2022] IECA 254, [18].

[12] In *Duffy v McGee & Anor* [2022] IECA 254, Collins J held at [4] in a concurring judgment that, despite the 'note of caution' sounded in previous cases such as *AG (Ruddy) v Kenny* (1960) 94 ILTR 185, 'the domain of expert evidence has continued its inexorable expansion' in this jurisdiction.

[13] *The People (DPP) v Kehoe* [1992] ILRM 481.

[14] Lirieka Meintjes-Van der Walt, 'The Proof of the Pudding: the Presentation and Proof of Evidence in South Africa' (2003) 47(1) Journal of African Law 88, 89.

[15] Hodge M Malek, *Phipson on Evidence* (20th edn, Sweet & Maxwell Ltd 2022) 1245.

[16] *Folkes v Chadd* (1782) 3 Doug 157. References henceforth to England as a jurisdiction means the jurisdiction of England.

[17] *The People (DPP) v Bowe* [2017] IECA 250, [104], per Birmingham P.

[18] Law Reform Commission, *Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117–2016) 73.

heavily influenced by the facts of the particular trial.[19] The trial judge in the US is viewed as a 'gatekeeper', determining such preliminary issues with reference to 'the qualification of witnesses, and the existence of any privileges'.[20] This can perhaps generate inconsistency with regards to the admissibility of experts opining on visual identification evidence, to adopt a paradigmatic example where the differences become stark, with some courts in the US opting to not adopt the liberal trend endorsed by the Supreme Court in *Daubert v Merrell Dowell Pharmaceuticals*,[21] and some critics viewing it as an invasion on the role of the jury in determining the weight to be given to such evidence.[22] In Australia, since the Evidence Act 1995 abolished the common knowledge rule, codification has resulted in an increase in the admission of expert opinion evidence on the soundness of a disputed visual identification.[23] The Canadian Supreme Court established a four-point test in *R v Mohan*, requiring the court to consider relevance, necessity, the absence of any other exclusionary rule, and a properly qualified expert[24]. It has, however, been clarified in subsequent Canadian judgments that 'even where these requirements are met, the evidence may be rejected if its prejudicial effect on the conduct of the trial outweighs its probative value',[25] thereby ushering in either the flexibility of judicial discretion or, some may argue, a case-by-case uncertainty. This wide range of approaches emphasises the myriad ways in which different jurisdictions have sought to strike the difficult balance between ensuring that juries and judges are given all the necessary information in relation to disputes of fact and preventing excessively long and costly litigation as a result of countless experts being called by each party.

In Ireland, the traditional rule, as in England and Wales, bars experts being called to give evidence with regards to the psychology of visual identification. Of itself, this example may seem peripheral but enabling expert testimony on an issue which jury-members and judges deal with in their everyday lives, highlights the dangers inherent in any loosening of the current test. Were that to occur, were the admission of expert testimony not based on a clear rule, but on something akin to judicial discretion, the nature of litigation, its cost and duration, becomes capable of expanding into more a contest of experts than judicial analysis. While the US has gradually expanded the number of issues which are viewed as benefitting from expert opinion,[26] in England and Wales and in Ireland courts have taken a restrictive approach; of which the psychology of identification is merely an example. Where an issue lies within the scope of ordinary knowledge, such as an individual's ability to recognise an individual and recall their appearance a number of months later,[27] such issues do not enable expert evidence assistance.[28] The approach has been to rely upon a direction to the jury in

[19] Angela D Slater, 'Federal Standards for Admissibility of Expert Evidence on Causation' (1994) 61 Defence Counsel Journal 51.

[20] Paul W Grimm, 'Challenges Facing Judges Regarding Expert Evidence in Criminal Cases' (2017) 86 Fordham L Rev 1601.

[21] 509 US 579 (1993).

[22] Robert J Hallisey, 'Experts on Eyewitness Testimony in Court' (1995) 39 Howard LJ 282.

[23] Australian Law Reform Commission, *Unform Evidence Law* (ALRC 102–2005) 312.

[24] [1994] 2 SCR 9.

[25] *R v DD* [2000] 2 SCR 275, [11].

[26] Paul W Grimm, 'Challenges Facing Judges Regarding Expert Evidence in Criminal Cases' (2017) 86 Fordham Law Review 1604 lists a number of other areas in which expert evidence is increasingly introduced in the United States to assist the finder of fact in increasingly complex factual issues in cases. These include issues relating to cryptocurrency, the operation of telecommunications towers and the reliability of field sobriety testing in drunk-driving cases.

[27] However, it is important to note that, per Robert J Hallisey, 'Experts on Eyewitness Testimony in Court – a Short Historical Perspective' (1995) 39 Howard Law Journal 237 at 282, some courts in the United States have remained reluctant to allow for the introduction of such evidence in spite of *Daubert*, though this is not the universal approach.

[28] It may also be highlighted that the Courts in this jurisdiction and others have consistently held that the burden in the first instance falls on counsel to ensure that expert evidence is 'relevant and likely to assist the court', per Collins J in *Duffy v McGee & Anor* at [23], and to 'assess whether the proposed witness has the necessary expertise and whether his or her evidence is otherwise admissible', per *Kennedy v Cordia (Services) LLP* [2016] UKSC 6.

criminal trials as to the potential inaccuracies with visual identification, rather than introducing an expert in this respect.[29] This view is largely founded on the understanding that there is a 'general awareness'[30] that evidence of this kind is public knowledge, and a recognition of the potential for 'unnecessary time-wasting and evidence that is potentially confusing and misleading'.[31]

Keeping to the arcane knowledge test strictly, which is the law in this jurisdiction, experts remain a rarity; though personal injury practitioners, almost by default, have enabled trials of experts in even the most mundane of fact issues. This may be questioned as may the judicial discipline that apparently enables that practice. Traditional focus on the core test of admissibility advantages the court since no litigant can then claim contradiction by a person supposedly more qualified than the judge.

In England and Wales, since the Woolf reforms of the late 1990s, courts may significantly restrict the number of experts permitted to give evidence, and the scope of the evidence given.[32] In Ireland, as noted in *Defender Ltd v HSBC France*,[33] Order 39, rule 58 of the Rules of the Superior Courts, states that expert evidence 'shall be restricted to that which is reasonably required to enable the Court to determine the proceedings' and prevents mushrooming expert evidence overwhelming trials.[34] One on each side is now the general rule. Despite such efforts at restriction, there remain countless cases in all jurisdictions of multiple experts being called in trials, all supposedly immersed in the same discipline but unable to agree anything beyond fundamentals. Courts are not obliged to be so burdened.

Insanity and psychiatric evidence

Once the admissibility threshold is passed for expert evidence, however, more challenging issues are faced by the tribunal of fact in hearing such testimony, including 'the effective comprehension of complex issues and their synthesis into the judicial determination'[35] or into a direction to a jury. Here, we use psychiatric evidence as the exemplar. But, in approaching any expert evidence, a judge is required to have the same mindset: that of self-equipping their analysis through absorption of the fundamental principles on which the expert testifies and of maintaining independence.

A truly difficult area, exemplifying the pitfalls awaiting a judge, emerges from criminal cases involving psychiatric evidence: such as where a plea of not guilty by reason of insanity is entered by an accused. In such cases, complex rules address the duty of the prosecution: if there is any evidence of insanity, that must be reported to the defence; if there has been an examination by a doctor, the defence must obtain any report, and any committal to a psychiatric hospital must also be reported.[36] Insanity, as defined initially in the *M'Naghten Case*,[37] requires that a person does not know the nature and quality of their act or does not

[29] *DPP v Maguire* [1995] 2 IR 286.

[30] Oliver P Holdenson, 'The Admission of Expert Evidence of Opinion as to the Potential Unreliability of Evidence of Visual Identification' (1987) 16 Melbourne University Law Review 521.

[31] ibid 531.

[32] PD 35 of the Civil Procedure Rules, introduced following Lord Woolf's reports on reform of the justice system, outlines procedure rules in respect of experts and assessors in civil procedure. Rule 35.4(3A) provides that for a number of claims, expert evidence will only be given 'from one expert on a particular issue'.

[33] [2020] IESC 37.

[34] Kelly P, writing in *O'Brien v Clerk of Dáil Éireann* [2016] IEHC 597, [2016] 3 IR 384, noted at [36] that Rule 58 'gives a measure of badly needed statutory control to the court in respect of expert evidence'.

[35] Nigel Wilson, 'Concurrent and court-appointed experts? From Wigmore's 'Golgotha' to Woolf's 'proportionate consensus'" (2013) 32(4) CJQ 493, 493.

[36] Peter Charleton and others, *Charleton and McDermott's Criminal Law and Evidence* (2nd edn, 2020) at [5.04], citing *McKevitt v DPP* (Unreported, Supreme Court, 18 March 2003).

[37] [1960] All ER Rep 229.

know that an action is legally or morally wrong, and was later developed to include that the actor was unable to refrain from committing the act due to insane compulsion. There may often be an amalgam of all three of these factors. In Ireland, this common law test is restated in s 5 of the Criminal Law (Insanity) Act 2006, and the same test was approved in England and Wales in *R v Sullivan*,[38] with the special verdict of an acquittal on the ground of insanity stemming from s 2 of the Trial of Lunatics Act 1883, guilty but insane and now revised as not guilty by reason of insanity.

In the case of diminished responsibility, a substantial diminution in understanding or control not caused by substance abuse must affect the accused.[39] In Ireland and England and Wales, the position is the same with regards to the burden of proof resting with the defendant.[40] To rely on insanity or diminished responsibility, the accused must prove such a defence as a probability, in stark contrast to other criminal defences such as duress, where the prosecution must disprove beyond a reasonable doubt that the defence might exist, with the accused only carrying an evidential burden;[41] meaning that he or she must point to some evidence from the entire body of evidence which makes such a defence reasonably tenable.[42] Civil cases invariably adopt that standard for experts since the duty of a pleader of a wrong is to establish a probability of that wrong.

Though it is impossible to determine what particular evidence, or combination thereof with facts-on-the-ground, convinces the jury to return a particular verdict, cases involving an insanity plea under the 2006 Act are oftentimes based largely on a forensic psychiatrist's evidence. Nonetheless, it is important to note that the Court of Appeal has confirmed that, as in all other areas of the law in which expert evidence is provided to a decider of fact, a jury is not bound by psychiatric evidence, even where that evidence is unchallenged.[43] This is based on the principle that expert evidence cannot replace the central role of the jury or the judge in any case, as set out by Hardiman J in *People (DPP) v Abdi (No 1)*,[44] in which he reaffirmed that 'the role of the expert witness is not to supplant the tribunal of fact, be it judge or jury, but to inform that tribunal so that it may come to its own decision'. Indispensable to the judicial role is the requirement under the Constitution for independence; Article 34.6.1°. But judges have remained live to the authority of an expert witness in such cases, leading to a potential instruction to juries in Ireland that no expert may operate as a thirteenth juror in a trial.[45] Nor may an expert become the judge.

The Supreme Court in *The People (DPP) v Abdi* outlined the built-in potential for mistaken or uncertain diagnoses in psychiatric evidence in particular, not as a result of any bias or negligence, but merely due to the very nature of such evidence:

> 'Experience indicates that psychiatry is not a science which unwaveringly yields precise and unassailable diagnoses. Diagnoses depend on what is reported by witnesses as to the circumstances of the commission of the action, on winning trust, on what family and others say as to the conduct of the accused, on mental health history, on medical history, on objective psychological testing, on alcohol consumption or substance abuse, on what

[38] [1984] AC 156, HL.
[39] This is discussed in the Irish context in *The People (DPP) v Buck* [2020] IESC 16, [15].
[40] Mark Lucraft, *Archbold Criminal Pleading, Evidence and Practice* (Thomson Reuters 2021) 2239.
[41] See *The People (AG) v Whelan* [1934] IR 518 and Peter Charleton (n 36) [21.01] for the Irish approach to the defence of duress.
[42] *The People (DPP) v Davis* [2001] 1 IR 146.
[43] *The People (DPP) v Tomkins* [2012] IECCA 82.
[44] [2004] IECCA 47.
[45] *The People (DPP) v Kehoe* [1992] ILRM 481.

> is reported by the accused at interview, on an analysis of consistency with objective fact, on gaining insight over time and on a fair analysis in matching or rejecting a diagnosis based on the application of clinical judgment'.[46]

The history of the common law demonstrates that 'scepticism is built into the approach to criminal responsibility and the defence of ostensibly criminal actions on an asserted basis of insanity'.[47] Rightly, judges should approach all experts with polite scepticism. Habitually, juries are instructed that the concept of 'innocent until proven guilty' requires them to only accept individual facts once they are proven beyond reasonable doubt and, at the conclusion of the trial, to examine all such facts so as to ascertain whether these accepted facts prove collectively that the accused committed the offence. Helpful experts will approach their task in the same way; without preconceptions, emphasising only investigation, analysis, fact and, where their opinion is required, this is based on rational deduction founded on experience and scholarship. This ability to draw inferences from facts presented on the basis of expertise is one of the key distinguishing factors between ordinary witnesses of fact and expert witnesses,[48] and remains a draw towards a court relinquishing control and the more significant danger of experts forming opinions in a way that suits the case of those engaging them.

The significance of trust

This privileged position that experts tend to be afforded before the courts has led to concerns regarding potential partisanship among witnesses, particularly with respect to an expert's remuneration.[49] The significant sums often paid to experts for their testimony can give rise to concerns, both from a perceived or actual 'pull of the team'[50] and this raises a stark warning that the result can be a potential inequality of arms between litigants.[51] While MacMenamin J in *O'Leary v Mercy University Hospital Cork Ltd* considered that substantial fees do not, as such, create a conflict of interest.[52] His judgment highlighted the importance for an expert witness to 'err on the side of maintaining his or her independence and objectivity' and to 'avoid conduct which renders them open to an allegation that they have become an advocate or "part of a legal team"'.[53] Recent judgments of the Court of Appeal have made clear that the onus of ensuring that expert witnesses are aware of their duty to the court rests with the parties calling such witnesses and that any failure to comply with such requirements risks both the exclusion of their evidence and adverse consequence in costs.[54] There are, however, a range of approaches between jurisdictions as to whether evidence will be excluded, or merely given less weight, where an expert's objectivity or impartiality is called into question, with the law in England and Wales and in Canada taking a similar approach to that seen in Ireland,[55] while in Australia, an emphasis is placed on weight rather than admissibility of the

[46] *The People (DPP) v Abdi* [2022] IESC 35, [31].
[47] ibid [32].
[48] Tristram Hodgkinson and Mark James, *Expert Evidence: Law and Practice* (5th edn, 2020) 26.
[49] For example, Gary Edmond in 'Secrets of the 'Hot Tub': Expert Witnesses, Concurrent Evidence and Judge-Led Law Reform in Australia' (2008) 27(1) Civil Justice Quarterly 51 at 52 noted that a survey of judges and magistrates in Australia found that 'bias' and 'partisanship' were two of the most pressing problems with expert evidence in that jurisdiction.
[50] Josefin Movin Østergaard, 'An Assessor on the Tribunal: How a Court Is to Decide When Experts Disagree' (2016) 35(4) CJQ 319 at 326 states that 'despite their overriding duty to the court, party-appointed experts carry with them a truth-hindering risk of bias'.
[51] Furthermore, disclosure by experts of the information they rely upon to other parties to the litigation has been emphasised as an important balancing requirement, per *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC).
[52] [2019] IESC 48.
[53] ibid [40].
[54] Per the judgment of Collins J in *Duffy v McGee* [2022] IECA 254, [38].
[55] See *Armchair Passenger Transport Ltd v Helical Bar Plc* [2003] EWHC 367 (QB) for the position in England and Wales and see *White Burgess Langille Inman v Abbott and Haliburton Co* [2015] 2 SCR 182 for the position in Canada.

evidence.[56] It also remains open to the judge or jury, even where only one expert testifies on a subject, as with any witness, to accept that evidence or reject it: in no sense is any witness simply because of the absence of contradicting testimony binding on the court.[57]

One attempt at addressing impartiality and the pull of finance has been through the introduction of a single joint expert who, through the independence offered by being the sole expert witness on a particular subject, is assumed to be less at risk of falling towards bias. Concerns regarding the duration of trials and the cost of litigation may be significantly alleviated where a single expert is appointed to a case. These considerations have led to such experts becoming the norm in England and Wales, in smaller cases in particular.[58] Lord Woolf in *Peet v Mid-Kent Healthcare Trust*[59] emphasised that the discretion given to the courts by Practice Direction 35.7 of the Civil Procedure Rules to direct for a single joint expert is not restricted and that the ordinary course of practice for judges should be to hear evidence from such an expert, as opposed to experts appointed by each party.[60] In Ireland, s 20 of the Civil Liability and Courts Act 2004 makes provision for agreement on a single joint expert between the parties, rather than one being imposed by the trial judge. That changed nothing; agreement in an adversarial system is always possible. In the 'Review of the Administration of Civil Justice' report, chaired by Kelly P, one of the key reforms in relation to expert evidence suggested was to confer a power on the court to appoint such an expert in this jurisdiction, adopting the procedure from England and Wales.[61] But even that procedure carries dangers, as even where subject to cross-examination, such an expert likely to have even greater sway with the court than in a contest as between party-nominated experts.[62]

Judging expert evidence, however, will remain focused on the testimony itself. Hence, the precepts set out by Stuart Smith LJ in *Loveday v Renton (No 1)* remain helpful in stating that the judge guides himself or herself as to accepting or rejecting expert evidence according to its 'internal consistency and logic', the 'precision and accuracy of thought as demonstrated' in answering, particularly in facing up to the logic of a contrary proposition, perhaps in 'searching and informed cross-examination', by not shying away from conceding 'points that are seen to be correct', and scrutinising 'the care with which' the issue was considered and the report to the court was prepared.[63] Another suggestion was set out in *Bolam v Friern Hospital Management Committee*,[64] in which it was held that a court, while having a duty to say why an expert's evidence is rejected,[65] and it might also be said is accepted, may dismiss what an expert says where:

(a) an expert's opinion is based on illogical or even irrational reasoning; or

(b) the expert's reasoning is speculative or manifestly illogical; or and perhaps and

(c) the evidence of the expert witness is so internally contradictory as to be unreliable.

[56] See the judgment of the Court of Appeal of the State of Victoria in *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33.
[57] *Griffiths v TUI (UK) Ltd* [2022] 1 WLR 973.
[58] Aoife Beirne, 'Expert Evidence: Lessons from Abroad' (2017) 22(2) The Bar Review 48.
[59] [2001] 1 WLR 210, [14].
[60] ibid [7].
[61] Peter Kelly, *Review of the Administration of Civil Justice Report* (October 2020) 14.
[62] Josefin Movin Østergaard, 'An Assessor on the Tribunal: How a Court is to Decide When Experts Disagree' (2016) 35(4) CJQ 319, 327.
[63] [1989] 1 Med LR 117.
[64] [1957] 1 WLR 582.
[65] *Loveday v Renton (No 1)* [1989] 1 Med LR 117, 125.

This, however, is just a list and cannot be more than suggestive. The reality of ascertaining whether or not expert evidence is to be accepted is much more complex. Factors such as 'clarity of reasoning' are considered also in determining whether a particular expert's testimony will be accepted, or whether it supports a proposition contrary to the testimony of another specialist giving evidence.[66] It may be a prime example of the psychology of the law to try to cover all eventualities through legal justification. It is therefore useful to consider how the judge in the court is reacting or assessing expert evidence as it is presented. Our suggested approach is based not only on experience but is posited as essential to opposing the privileges of experts with the safeguard of judicial independence. That is only possible through understanding and careful analysis.

The judicial approach to expert evidence

The area of specialisation of an expert witness may be as unfamiliar to the judiciary as to a jury.[67] Hence, firstly, the imperative focus of a trial judge is on grasping the fundamental elements of the very arcane discipline that has enabled the calling of an expert. Independence is central to the role of a judge, which requires ensuring that no expert may usurp their position during the hearing. Without a working grasp of the relevant scientific discipline, a judge can neither properly instruct a jury on issues such as psychiatric evidence, nor make a safe and valid decision in civil matters relating to scientific evidence.

For a judge, it is consequently essential for experts to refer to medical and other scientific reference texts. Thereby, quiet study outside of court is enabled and the judge may become master of at least the fundamentals. It is also important for experts to remember that a judge is a lawyer rather than a clinician or engineer, and that therefore the judicial mind tends to grasp towards definitions and descriptions. The legal mind looks for legal certainty; what is concrete, graspable, relatable, and workable. Law is a discipline which over centuries has tamped down instinctive human reaction to wrong and replaced emotion with a set of rules as to how a judge ought to react when faced with particular circumstances.[68] But these may conflict. Potentially, this conflict is in place in every case. The reason that all legal rules exist, such as those related to the defence of insanity that the accused must prove clearly that s/he was insane and that insanity is limited to a complete loss of understanding or control, is that all cases may benefit from the same approach.[69] In other words, the elusive chimera of legal certainty. Thus, a judge is interested in any expert's opinion but will require such opinion to be founded clearly on an explanation as to the science informing the final position.

The United States Supreme Court took the legal mindset to its apogee in developing a test in relation to the requisite reliability of expert evidence in *Daubert v Merrell Dow Pharmaceuticals Inc.*[70] Does this help? In this jurisdiction, there has been no test setting a legal rule as a

[66] Peter Heerey, 'Expert Evidence: the Australian Experience' (2002) 7(3) The Bar Review 166 at 168 provides a particularly helpful analysis of the judicial approach towards expert evidence in Australia.
[67] Indeed, one of the significant criticisms of the 'gatekeeping' function of judges under the *Daubert* test is based on the fact that 'judges lack the scientific knowledge and education' to know when to exclude unreliable or illogical expert evidence, per the Law Reform Commission (n 18) at 251.
[68] A particularly famous example in this jurisdiction can be seen in the judgment of Kingsmill Moore J in *Re Julian* [1950] IR 57, in which he held at [65] that, despite regretting the outcome of applying the law as it was clearly stated, he was bound to do so, resulting in the enforcement of what was likely a mistakenly, but clearly drafted will.
[69] The importance of certainty, particularly in criminal law, has been highlighted on numerous occasions by the Irish courts; see *King v Attorney General* [1981] IR 233, *Attorney General v Cunningham* [1932] IR 28, *The People (DPP) v Cagney and McGrath* [2008] 2 IR 111, *Douglas v DPP* [2011] IEHC 110 and *Dokie v DPP* [2013] IEHC 343.
[70] 509 US 579 (1993).

threshold of reliability,[71] though the Law Reform Commission recommended the introduction of such a test in its Consultation Paper on Expert Evidence.[72] In effect, the aim of any exposition in testimony of science is to return independence to the judge. Further, basic knowledge enables a judge who is required to summarise evidence for a jury to rephrase or simplify what might be difficult concepts into a form that they can approach, or if a judge must write a judgment, enables pages of transcript to be reduced to an understandable paragraph for an appeal court.[73]

The second thing that a judge is focusing on is the application of the science set out by an expert. As the expert is speaking, everything that is stated must be stored and compared with prior statements and reports.[74] This process of comparing the statements of witnesses to what others have said is done with non-expert witnesses as a matter of judicial habit; but the process of reasoning is more extreme in expert evidence case as the expert is the one laying the pathway which is to be followed to a particular outcome and which oftentimes the expert contends is the sole plausible outcome.[75] Whether this is in fact the case is always being asked in the judge's mind, and this cannot be done without a thorough understanding of the fundamentals of the discipline.

As with any witness, a judge, thirdly, is wary of deception. This is not to state that expert witnesses are more likely to mislead a court; but the risk is lessened by judicial mindfulness of the danger. Through the development of specialist language, experts may be faced with temptations to present more foggy testimony than would be accepted from other witnesses and to dish up a conclusion against a background where that conclusion cannot easily be analysed. As Collins J explained in *Duffy v McGee*,[76] it was concerns regarding the potential for bias or lack of independence that led to the development of duties and responsibilities of expert witnesses by Cresswell J in *The Ikarian Reefer*.[77] Hence, experience has shown that what tends to spotlight a true expert in their evidence is a willingness to impart knowledge freely. By opting to lay out the science as part of the satisfaction of knowledge, an expert signals that they have nothing to fear, and thereby their testimony becomes increasingly persuasive or significant.[78] Apart from that, grappling with knowledge of the science reasserts judicial control over the process of decision-making.

Fourth, as has been made clear by the myriad regulations and practice directions set out across several jurisdictions, judges, dimly or vividly, are aware of the potential dangers of experts. Often their evidence is the fulcrum of the case which may ultimately determine the result of the hearing. Strong views have been expressed in the past that experts may shift

[71] Declan McGrath, *McGrath on Evidence* (3rd edn, Round Hall 2020) [6-41].

[72] Law Reform Commission, *Consultation Paper on Expert Evidence* (LRC CP 52-2008) para 2.295.

[73] This has played an increasingly significant role in hearings in recent decades as 'the gulf between the background knowledge possessed by a typical juror or judge and the knowledge possessed by an expert in the field has widened', per John E Lopatka, 'Economic Expert Evidence: the Understandable and the 'Huh'?' (2016) 61(3) The Antitrust Bulletin 434, 436.

[74] Moffat Maitele Ndou, 'Assessment of Contested Expert Medical Evidence in Medical Negligence Cases: a Comparative Analysis of the Court's Approach to the *Bolam/Bolitho* test in England, South Africa and Singapore' (2019) 33(1) Speculum Juris 54 at 62 states that 'what is required in the evaluation of the expert evidence is to determine whether and to what extent the experts' opinions are founded on logical reasoning', albeit in the context of South African case law.

[75] The position of an expert witness was described as one of 'particular privilege before the courts' in *Condron v ACC Bank & Ors* and *Cuttle v ACC Bank Plc* [2012] IEHC 395.

[76] [2022] IECA 254, [20].

[77] [1993] 2 Lloyds Rep 68.

[78] This is particularly significant in relation to expert opinion evidence that has changed over the course of a hearing. Keith Rix, *Expert Psychiatric Evidence* (RCPsych Publications 2011) notes at 9, referring to changes in expert evidence in light of new information or due to a misunderstanding of a particular legal test, that 'if you change your opinion, the basis for doing should be crystal clear. If it is not and if the earlier version of your report has already been disclosed, or is disclosed inadvertently … you will be accused of being biased'.

theories or views to match the shape of a problem.[79] Therefore, a judge considers how any expert witness was identified and briefed. It is therefore useful for experts to include in a report as to how they were contacted and what the task was that they accepted.[80] It is important to remember that, at common law, the preparation of witness statements is subject to privilege against disclosure, so there is a great deal more mystery surrounding an expert than there is with a percipient witness. The law in England and Wales on this issue was confirmed by Longmore LJ in *Jackson v Marley Davenport Ltd*, stating: 'There can be no doubt that if an expert makes a report for the purpose of a party's legal advisers being able to give legal advice to their client, or for discussion in a conference of a party's legal advisers, such a report is the subject matter of litigation privilege at the time it is made.'[81] *Payne v Shovlin* confirms that the relevant rule[82] 'demands such production or disclosure of reports that will ensure that surprises do not occur, either in the course of examination-in-chief or in cross-examination of an expert witness'. [83]

Lastly, every judge listening to a case is looking for pivot points; the moments that the balance of a case tips one way or another. During both the examination-in-chief and the cross-examination, the judge is ideally silent, considering the particularly significant details and principles and making a mental list linking the science to the facts. That is being done whether the salient ideas are being gathered to instruct a jury or to justify a later written decision. An expert view may be reasoned out of the final conclusion or may inform a judicial decision. However, what a judge should never do is to interpose their own theory upon the expert's views; where the science is not backed explicitly by an expert, it should not be invented or inferred.

The rule against hearsay

Expert evidence is one of the exceptions to the rule against hearsay evidence being admitted, the general rule being that a 'statement other than one made by a witness while giving oral evidence in the proceedings is inadmissible as evidence of any facts stated'.[84] The purpose of such a general prohibition is that statements of this kind are both unsworn and 'cannot be tested by cross-examination',[85] and therefore the exception with regards to expert evidence is justified as providing 'the judge or jury with the necessary specialist criteria for testing the accuracy of their conclusions'.[86] In England and Wales, hearsay in criminal proceedings is governed by the Criminal Justice Act 2003,[87] while the rule against hearsay in civil proceedings was abolished by s 1(2)(a) of the Civil Evidence Act 1995, enacting recommendations of the Law Commission.[88]

[79] WM Best, *Principles of the Law of Evidence* (Sweet & Maxwell 11th edn, 1911) 491 and Pitt Taylor, *Treatise on the Law of Evidence* (The Blackstone Publishing Company 12th edn, 1931) 59.

[80] This is particularly important where they may be concerns regarding 'structural bias', as discussed by Deirdre M Dwyer, 'The effective management of bias in civil expert evidence' (2007) 26(Jan) CJQ 57 at 59, arising where bias arises not from personal interest in litigation, but rather from a pre-existing view of a particular expert resulting in their selection by a plaintiff or a defendant to support their position.

[81] [2004] EWCA Civ 1224, [14].

[82] Order 39, rr 42-51 of the Rules of the Superior Courts.

[83] [2006] IESC 5.

[84] Charleton (n 36) para 3.02.

[85] Hodgkinson (n 49) 276.

[86] (n 18) 219.

[87] Liz Heffernan, 'Hearsay in Criminal Trials: the Strasbourg Perspective' (2013) 49(1) The Irish Jurist 135 notes that the Criminal Justice Act 2003 in England and Wales has 'altered radically' the position in relation to hearsay in criminal matters, resulting in a 'substantial revision of the rule'.

[88] 'The Hearsay Rule in Civil Proceedings', Law Com No 216, Cmnd 2321 (1993).

Reference, at common law, to papers or research carried out by other experts are not hearsay;[89] provided these references are connected to the assessment of the expert witness in that particular area of study. In this jurisdiction, this was confirmed in *The People (DPP) v Boyce*,[90] in which it was stated that an expert 'can ground or fortify his or her opinion by referring to works of authority' and has since been supported in *Harrington v Harrington,*[91] and *The People (DPP) v Rattigan*.[92] Similarly, doctors relying upon notes of other treating physicians do not breach the rule against hearsay, though the courts in Ireland have generally noted that evidence given by individuals who have not examined the relevant patient, or other prime material, carry significantly less weight.[93] It is, however, important to note that hearsay evidence cannot be automatically rendered admissible due to its delivery by way of expert witness testimony.[94] Reliance on notes or scientific research is not only permissible in the case of expert evidence, but often required as an 'expression of an existing body of thought that informs an expert analysis',[95] and it is not necessary to produce formal corroboration in the same way as it might be in the case of non-expert witnesses.[96]

Practical science

Any judge or jury may find it difficult to grapple with the intricate scientific evidence produced at a trial. That evidence may be as variable as to the state of materials or, in the case of psychiatric evidence, may require a judge or jury looking into the mind of a person. To take the latter, while no one can fully do that, the psychiatrist certainly provides the most detailed analysis of this area and thus may be taken more seriously than any other witness in a case relating to insanity or diminished responsibility. Such an expert is not alone in the danger posed. This is of particular concern, as highlighted by the Law Reform Commission, due to the potential rise of a 'trial by expert', stemming from:

> a concern that jurors are ill-equipped to weigh the evidence on matters of great technical complexity and are liable to defer to whichever expert commands the most authority on the stand, a question which may not necessarily turn on the stand, a question which may not necessarily turn on the objective quality of his or her evidence.[97]

Over time, experience teaches that expert opinion is not enough, that science rests on facts and that sometimes the facts cannot support the theory being presented. As a professional fact finder, it is never the demeanour of the witness that determines the perceived validity of their testimony; as Shakespeare says, 'there's no art to find the mind's construction in the face'.[98] But there is an art in retaining and comparing proven fact and considering how that works with theory. Facts, where the judicial system works properly, rule cases more than expert opinion.

The ultimate issue

[89] In any event, the Supreme Court has left open the categories of testimony which may operate as an exception to the hearsay rule; *Ulster Bank v O'Brien* [2015] IESC 96, *Bank of Scotland v Fergus* [2019] IESC 91.
[90] [2005] IECCA 143.
[91] [2020] IEHC 72, [60].
[92] [2018] IECA 315, [61].
[93] This was the approach taken by O'Higgins J in *JWH (Orse W) v GW* [1998] IEHC 33 in the family law context.
[94] Law Reform Commission (n 18) 228.
[95] *DPP v C* [2021] IESC 74.
[96] See *Davie v Magistrates of Edinburgh* [1953] SC 34.
[97] Law Reform Commission (n 18) 228.
[98] William Shakespeare, *Macbeth*, King Duncan, Act 1 scene 4.

It is not the role of the expert to take over a court. But that is a real danger. Carl Jung described the human experience of extreme emotion as being like that of lovers who may readily tip from affirming each other to a state of mutual hatred. Enantiodromia was part of his concept that there is an unconscious opposite to every strong personality trait. One example given by him is of an intensely shy girl who, on a mountain hike, when her group was threatened by dense fog, suddenly sprang into a leadership role, barking orders and thereby bringing them back to safety, only to revert to her retiring self. This may also consist of the emergence of the unconscious opposite in the course of time.[99] The opposite is always a threat. Indeed, legal cases often come down to a clash of opposites.

Thus, wise advocates learn that in presenting a case it can help to slowly unravel the point. Persuasive testimony is about logically, and in well-defined steps, setting out the basis of an opinion, one all the stronger since it is only come to in consequence of thought and analysis that is discernible from the manner in which it is built up. But experts may effectively jump the gun. Experts are allowed to give opinion whereas non-experts generally are not.[100] Even in such cases, however, the expert is apparently limited since he or she is traditionally required to not occupy the ultimate issue.[101] The ultimate issue is the kernel of the case: was the employer negligent in not fencing a machine; was the accused insane at the time of killing; did a car crash through a red light; can scooters without lights be regarded as contributing to an accident.

Sometimes, a view on the ultimate issue is so bound up with the case as to render a view on it inescapable. In English law, a forensic psychiatrist may express the view that at the time of the killing the accused was legally insane.[102] In the US, in criminal cases, 'an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.'[103] The US Supreme Court in *United States v Elonis* held on this issue that:

> 'a [fine] line that expert witnesses may not cross." *United States v. Mitchell*, 996 F.2d 419, 422 (D.C. Cir. 1993). . . . Expert testimony is admissible if it merely "support[s] an inference or conclusion that the defendant did or did not have the requisite *mens rea*, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony." *United States v. Bennett*, 161 F.3d 171, 183 (3d Cir. 1998) (quoting *United States v. Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997)). "It is only as to the last step in the inferential process-a conclusion as to the defendant's mental state-that Rule 704(b) commands the expert to be silent." *United States v. Dunn*, 846 F.2d 761, 762 (D.C. Cir.

[99] Carl Jung, *Psychological Types* (1990) 426. In Two Essays on Analytical Psychology in Carl Jung, *Collected Works of CG Jung* (2nd ed, 1966) at 64-79, he wrote: 'Old Heraclitus, who was indeed a very great sage, discovered the most marvellous [sic] of all psychological laws: the regulative function of opposites. He called it enantiodromia, a running contrariwise, by which he meant that sooner or later everything runs into its opposite.'

[100] There are exceptions, but these are less encompassing, such as an opinion as to what speed a diver was doing.

[101] This is noted in Keith Rix (n 78) 93, stating psychiatric evidence 'is not admissible on the issue of whether or not an accused person had the *mens rea* for a particular offence'. The Law Reform Commission (n 18) at 237 notes that the reasoning for this rule is to ensure that the expert witness does not usurp the role of the trier of fact, though it has been abolished for civil proceedings by s 3 of the Civil Evidence Act 1972 in England and Wales.

[102] *R v Atkins* [2009] EWCA Crim 899.

[103] Federal Rules of Evidence 704b introduced after the trial of Ronald Hinckley who was found not guilty by reason of insanity in the attempted murder of President Regan; *United States v Hinckley* 525 F Supp 1342 (DDC 1981). For further discussion of the developments in relation to the ultimate issue rule in the United States in the aftermath of the trial of Hinckley, see Anne Lawson Braswell, Resurrection of the Ultimate Issue Rule Federal Rule of Evidence 704(b) and the Insanity Defense (1986-1987) 72 Cornell L Rev 620.

> 1988). Rule 704(b) may be violated when [counsel's] question is plainly designed to elicit the expert's testimony about the mental state of the defendant, *Boyd*, 55 F.3d at 672, or when the expert triggers the application of Rule 704(b) by directly referring to the defendant's intent, mental state, or mens rea, *United States v. Lipscomb*, 14 F.3d 1236, 1240 (7th Cir. 1994). Rule 704 prohibits "testimony from which it necessarily follows, if the testimony is credited, that the defendant did or did not possess the requisite *mens rea*." *Bennett*, 161 F.3d at 182 (quoting *Morales*, 108 F.3d at 1037)'.[104]

The ultimate issue rule rests as a protection for the court. Again, if it is abided by then no litigant can claim that the judge ignored expert advice. Thereby, a judge maintains independence. One of the most helpful and neutral approaches that can be taken by an expert witness is that of a sliding scale of strength whereby, for instance, forensic scientists express a view – does not support, supports, strongly supports, very strongly supports – a connection, for example, as between an object found at the scene of a crime and an object found in the accused's possession. For civil cases, a similar approach helps. Certainly, the enforcement of the ultimate issue rule leads to a situation of pin-head analysis: the expert is brought to the cliff edge but does not declare the precipice but, instead, delineates the drop and the angle of descent; something English law has firmly rejected.[105] Thus, new areas of expertise are being discovered and admitted:

> 'We conclude that where a photographic comparison expert gives evidence, properly based upon study and experience, of similarities and/or dissimilarities between a questioned photograph and a known person (including a defendant) the expert is not disabled either by authority or principle from expressing his conclusion as to the significance of his findings, and that he may do so by use of conventional expressions, arranged in a hierarchy, such as those used by the witness in this . . . We think it preferable that the expressions should not be allocated numbers, as they were in the boxes used in the written report in this case, lest that run any small risk of leading the jury to think that they represent an established numerical, that is to say measurable, scale. The expressions ought to remain simply what they are, namely forms of words used. They need to be in an ascending order if they are to mean anything at all, and if a relatively firm opinion is to be contrasted with one which is not so firm. They are, however, expressions of subjective opinion, and this must be made crystal clear to the jury charged with evaluating them'.[106]

Ultimately, then, the expression of a definite view may be possible.[107] This is to be guarded against but may be inevitable. It is the manner in which that is done that may be dangerous to the trial process and the confidence of litigants that a judge has truly assessed the case, as opposed to there being a danger of evidence being excluded and litigants disappointed in the fairness of the process. There is, indeed, a fine line as between pushing an opinion and saying all that is necessary to support an opinion. The latter is what a court both needs and should require.

[104] *United States v Elonis*, 841 F.3d at 596.
[105] *R v Stockwell* (1993) 93 Cr App R 260.
[106] *R v Atkins* [2009] EWCA Crim 899, [31].
[107] Landon (1944) 60 LQR 201.

Opinion

Though it has often been, falsely, suggested that experts are present in court cases to express an opinion, as they are the sole witness who can legally do so, the reality is more nuanced: opinion is expressed by witnesses frequently. It is on this basis that Lardner J held in *RT v VP* that 'an expert who does not have first-hand knowledge of the facts upon which his opinion is based may nevertheless state a hypothesis on assumed facts'.[108] Exceptions to the rule against the general admissibility of opinion include both the exception for experts[109] and matters which cannot be exactly observed.[110] But the courts have equally accepted that, where evidence is of probative value and likely to be of assistance to the judge or jury, this is to be viewed as an overriding principle.[111] Often it is virtually impossible to disentangle a bundle of facts from the expression of an opinion, such as where a witness states that a photograph is of a person who attacked them. Such an approach is necessary as it is the foundation for the rules of evidence:

> 'apart from identity of person, things and handwriting are age; speed; temperature; weather; light; the passing of time; sanity; the condition of objects – new, shabby, worn; emotional and bodily states; and intoxication. The law's hostility to opinion evidence is partly supported by the fact these are all cases where it is very easy for witnesses to make mistakes'.[112]

Opinion is, after all, woven into everyday discourse.[113] The term may be defined broadly as a belief, judgement, or view that a person forms, and seeks to express, either through objective or subjective reasoning, about any topic, issue, person, or thing. But it is important to distinguish between the everyday use of the term and the legal approach towards the definition; an opinion, as introduced before a court by an expert may, instead of actually being an opinion, be a fact. It may be a rational and scientific expression of fact using an arcane discipline that takes years of study and experience to acquire. The judge or jury must then find the fact and on that basis assess the hypothesis. For an expert, reaching the point of expressing a viewpoint, often incorrectly described as an opinion, may engage the application of knowledge and professional judgment and the comparative study of relevant literature. That is much more fact than opinion and may be pure fact.

It is difficult to draw a clear line as between opinion and fact, causing difficulties for the rules of evidence in separating between what testimony may be given by experts and non-experts. What appears to be an opinion may be as much a statement of fact as a mathematical result. Rules have therefore developed to empower finders of fact to determine the foundations of any opinion expressed, such as requiring an expert's report to give details of any information relied upon, as seen under Criminal Procedure Rule 33.3(1) in England and Wales.[114]

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[108] [1990] 1 IR 545.

[109] This exception has roots in cases such as *Folkes v Chadd* (1782) 3 Douglas 157, 99 ER 58, in which Lord Mansfield accepted that in some circumstances, the court could hear evidence of 'opinions of men of science'.

[110] McGrath (n 71) para 6-162 cites s 81(5) of the Road Traffic Act 2010 as an example of such a matter, requiring corroboration regarding opinion evidence of the speed of a vehicle.

[111] *AG (Ruddy) v Kenny* (1960) 94 ILTR 185 views a particularly wide scope of non-expert opinion evidence as admissible; see McGrath (n 71) para 6-165.

[112] John D. Heydon, *Cases and Materials on Evidence* (Butterworths, 1975) 370. Rupert Cross and Nancy Wilkinson, *An Outline of the Law of Evidence* (Butterworths 1964) (referred to here because of the exposition of the common law) note that: 'In many cases, although the answer to a question does not call for specialised knowledge, it would be difficult or impossible for a witness to give his evidence without referring to his opinion. … It is impossible to draw up a closed list of cases falling within the second exception to the general rule prohibiting the reception of evidence of opinion. Items frequently included in it are speed, the identify of persons, things, and handwriting, age and the state of the weather.'

[113] *The People (DPP) v C* [2021] IESC 74.

[114] Per Tony Ward, 'Hearsay, Psychiatric Evidence and the Interests of Justice' (2009) 6 Crim LJ 415 at 416, 'experts may cite scientific works, reference books, and unpublished material generally relied upon in their field, and doctors may rely on

Nonetheless, any such resulting fact or finding may be challenged, in the same way as it could be where stated by any other witness.

As a result, the manner in which evidence was tested, or results of experimentation obtained, as well as the state of scientific literature as supportive or contradictory, are vital information for the court. These stay on the line of fact and do not cross into opinion. This, again, requires not just listening to but absorbing the principles and application of an arcane discipline. Jacob J in *Routestone Ltd v Minories Finance Ltd & Anor*, stated that 'what really matters in most cases is the reasons given for the opinion'.[115] Experts may further be challenged as to their objectivity,[116] but, where it is shown that any theory is based on prior analysis of fact, this is a safe foundation for the expression of an opinion. But these intermediary facts may often be omitted during testimony or in a report, in the interests of brevity; truncated principles are expressed, but this does not make such evidence unassailable. The expert may be cross-examined on any of the relevant steps, principles, contradictory literature or possible other causes and, thereby, the tribunal of fact is further informed and will not just be looking at the demeanour of the witness but the soundness of the underlying science and its proper application in the formation of the conclusion.[117] It might be cautioned, however, that without an ability to analyse the basis for an apparent opinion, a judge endangers judicial independence. Without that, is there any true analysis? An opinion from an expert, no more than an opinion from any other witness, cannot be just accepted.

This principle of an apparent opinion being a fact, in reality, is further illustrated in cases where expert statements have the appearance of predicting the future; cases in which there is a particular probability of the litigant developing a form of illness, for example. While this appears to be mere speculation, such statements are often statements of fact on a review of scientific literature which analyses multiple prior instances. That is fact. Similarly, where psychiatric literature indicates a severe risk of a particular disorder developing, this may be a fact determined by way of empirical study.

Hot tubbing

In civil cases, where two opposing experts appear, some systems enable the experts to appear in the role of advocates; a process known as 'hot tubbing'[118] or 'concurrent expert evidence'.[119] While counsel may be permitted to examine the witnesses after this process, this is generally restricted to clearing up any questions that were not asked. The main purpose of this process is to aid focus, and is generally viewed as being 'quicker, and more focused, than the traditional sequential format'.[120] Proponents of this procedure also suggest that it makes evidence easier for expert witnesses to deliver, rendering them of greater assistance to the court and potentially resulting in more agreement between witnesses than would generally

what their patients tell them about their present symptoms or mental state (which they are better placed than the jury to interpret), but not about the causes of those conditions)'.

[115] [1997] BCC 180.

[116] Remme Verkerk, 'Comparative aspects of expert evidence in civil litigation' (2009) 13(3) E&P 167 at 186 states that the US jurisdiction in particular sees extensive cross-examination of expert witnesses in a manner 'unknown to Continental systems', but cross-examination as to objectivity is common across all jurisdictions.

[117] This is also applicable to the 'hot tubbing' procedure, as held in *A Local Authority v A (No 2)* [2001] EWHC 590 at [22].

[118] A recent discussion of a trial judge's perspective on the 'hot-tubbing' process in England and Wales can be seen in Fordham J's judgment in *R (on the application of Richards) v Environment Agency* [2021] HRLR 18 at [5].

[119] In England and Wales this is facilitated by PD 35 of the Civil Procedure Rules, while in Ireland it is Order 63 of the Rules of the Superior Courts.

[120] Gary Edmond, 'Assessing Concurrent Expert Evidence' (2018) 37(3) CJQ 344 at 346.

arise in the standard adversarial process.[121] Furthermore, is has been suggested that hot tubbing is particularly useful to judges in the process of parsing expert testimony to determine where experts disagree, thereby ascertaining where the key scientific disputes lie in the case.[122] Nothing stops a judge, apart from hot tubbing, insisting that experts opposing each other be taken out of turn so that an immediate comparison is enabled.

However, this process also has its limitations, such as its potential to magnify 'the impact of experts' personality differences and quirks on the presentation and discussion of evidence'.[123] These limitations may have restricted the expansion of this procedure to civil cases alone, but it does highlight that an expert is generally part of a team, as opposed to an independent figure.[124] This is a particular issue due to the lack of financial or time-saving benefit from the hot tubbing procedure, as most supporters of the procedure have tended to emphasise the increased utility of evidence provided in this manner, as opposed to its ability to deal with the practical issues arising as a result of lengthy expert-focused hearings.[125] It has been recognised that, most concerningly, where the 'hot tubbing' ideal of wholly independent experts finding extensive common ground during the process of concurrent testimony does not arise, the same problematic outcomes are likely to arise as in the traditional adversarial model of expert evidence: either two equally convincing theories remain following the process, or the expert more capable in presenting their evidence on the stand might convince the judge, independently of the factual basis for their theory.[126]

It is this former issue, particularly where numerous expert witnesses are called in a trial, where witnesses for either side cannot find any common ground whatsoever, that incurs the most cost and delay. This is in part due to the adversarial system which has been suggested by some to incentivise parties to litigation to select experts with particularly strong or polarised views, which are then further distanced from one another through the process of cross-examination by the emphasis placed on where experts differ in opinion or contradict one another.[127] If people are genuine experts, then there should be a base of indisputable knowledge and of prior empirical analysis.[128] If the groundwork is contested unnecessarily, the entire foundation of opinion is undermined for both sides. Then the danger emerges of a case spinning out of control, of a jury or judge being left to their own devices to pick up what they can. The result in a civil case will be a readily contestable appeal but in a jury case the errors may never be picked up because of the laconic nature of the verdict. Thus, the task of every expert is to identify the troughs and the peaks of where any contest may lie and to brief counsel as to the science behind any difference in opinion.[129]

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[121] Andrew Burr, 'Hot-Tubbing with Witnesses of Opinion: Current Best Practice for Delay and Quantum Analysts' (2017) 33(8) *Const LJ* 523 at 523.

[122] Helen Blundell, 'Whatever happened to hot tubbing?' (2022) 2 JPI Law 110 at 114, citing *SSE Generation Ltd v Hochtief Solutions AG* [2016] CSOH 177.

[123] Hazel Genn, 'Getting to the Truth: Experts and Judges in the 'Hot Tub'' (2013) 32(2) CJQ 275, 297.

[124] One of the central limitations of this procedure, particularly where compared to that of a single joint expert, is that it remains a 'partisan procedure which has a high risk that adversarial bias will distort the result', per Nigel Wilson, 'Concurrent and court-appointed experts? From Wigmore's 'Golgotha' to Woolf's 'proportionate consensus'' (2013) 32(4) CJQ 493, 497.

[125] Gary Edmond, Ann Plenderleith Ferguson and Tony Ward, 'Assessing concurrent expert evidence' (2018) 37(3) CJQ 344, 345.

[126] Geoffrey L Davies, 'Recent Australian developments: a response to Peter Heerey' (2004) 23(Oct) CJQ 396, 399.

[127] Josefine Movin Østergaard, 'An Assessor on the Tribunal: How a Court is to Decide When Experts Disagree' (2016) 35(4) CJQ 319, 326.

[128] O'Donnell J in *Emerald Meats Ltd v Minister for Agriculture* [2020] IESC 48 noted that, where the process by which opinion evidence is given to the correct functions properly, 'there should not be wide and unbridgeable gaps between the views of experts' at [28].

[129] The role of an expert at trial is described by Charleton J in *DPP v C* [2021] IESC 74 as being to 'explain the reasons for and logic behind an opinion and not every single step in reaching it'.

A Warning

In conclusion, one thing often blandly asserted as to the duty of an expert is that experts should not disagree. Thus, some argue, all experts should be distrusted. But lawyers disagree and dissenting judgments in final courts of appeal abound. Disagreement is not to be equated with deceit. All professionals deserve that epithet on the basis of not only knowledge but truthfulness. Some perhaps suspect that the draw of reward may influence reports or opinions, whether in law or in other fields of expertise. Others may cavil at experts routinely reciting 'I realise my duty is to the court and not to the parties.'[130] In reality, in any area of expertise that is well beyond the exploratory or the theoretical, such as chemistry, physics, psychiatry or pathology, common ground should exist to be explained to the tribunal of fact and its assessment should be slow to shift radically. The most helpful testimony is given where points of difference are explained since it may be here that the fulcrum of the case is found. There, of course, remain rare instances in which experts may stray towards contradiction or place excessive emphasis on a particular theory without clarifying the purpose for such a focus.[131] Experts for hire may have their day but it used to be thought that they would soon enough be found out. The cynical might assert that being found out as contradicting a patient's woes or declaring a multitude of cases irrecoverable may lead to continual professional engagement. But there are also, and they are indispensable to any tribunal, the genuinely well-prepared, helpful and modest masters of science without whom the courts could not function.

Yes, 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, but more readily by a proper mindset on the bench. Judicial analysis remains sound where an expert is quietly listened to, the science is absorbed, analysis proceeds on the basis of comparison to the facts and to the fundamental principles of the discipline under discussion. Expert witnesses are not to be afforded a celebrity status but are, instead, to be assessed from a distance. Where the judge remains determined through using as much as is possible of what is explained to the court to retain and assert objectivity and independence, experts are both kept at a distance and their help is engaged. There are dangers in expert evidence. But the perils outlined here need not, and should not, overwhelm the judicial function.

[130] This duty is referred to by Charleton J in *James Elliott Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269 at [13], noting that 'it is a natural aspect of human nature that even a professional person retained on behalf of a plaintiff or defendant may feel themselves to be part of that sides team'.

[131] Keith Rix (n 78) 41 states that it is vital for experts giving evidence to make clear to the Court where any issue falls outside the expertise of a particular expert.

COSTELLO V IRELAND AND AN IRISH CONSTITUTIONAL IDENTITY

Abstract: This article interrogates the use of 'constitutional identity' language in the recent Supreme Court decision of Costello v Ireland. It outlines the concept's role in the case, its place in European Union law, and how it fits with prior constitutional interpretation. Important questions should be asked in the wake of this development, such as who will be tasked with defining constitutional identity and how it may be applied. It is argued that introducing this concept into Irish law could cut against the principle of popular sovereignty, previously held by the courts to be the fundamental bedrock of Bunreacht na hÉireann.

Author: Seán Rainford BA, LLB, MA (University of Galway), PhD Researcher at Dublin City University.

Introduction

In the recent Irish Supreme Court case of *Costello v Government of Ireland,*[1] a majority of four judges to three held that the Irish Constitution prohibited Ireland's ratification of the Comprehensive Economic & Trade Agreement ('CETA') between the European Union and Canada. The majority held that the agreement's investor-state dispute settlement mechanism would infringe on Irish juridical sovereignty. In particular, because these investor tribunals' awards would have virtually automatic effect in domestic Irish law without the possibility of appeal to the High Court, a parallel system of justice would be created – abrogating the sovereignty of the judicial branch of government.[2] The case is the Supreme Court's boldest assertion of state sovereignty against an international treaty since *Crotty v An Taoiseach* in 1987[3] and may yet prove to be one of the most consequential decisions – constitutionally and politically – in the court's history.

In a spirit of constitutional cooperation between branches of government, one of the majority judges, Hogan J, did not leave this decision as the final word. His judgment included a proposal for the executive and legislative branches to cure CETA's unconstitutionality without having to call a referendum to amend the Constitution.[4] Since the automatic enforcement of CETA tribunal awards would arise due to Ireland's domestic Arbitration Act 2010 ('the 2010 Act'), he proposed an alteration to this Act that would allow the High Court to stop a tribunal award that threatened Ireland's *constitutional identity*, as well as our obligation to give effect to EU law. Six of seven judges held that this would negate any infringement of juridical sovereignty that CETA presents.

This article seeks to address the implications and consequences of introducing 'constitutional identity' into Irish jurisprudence. It begins by outlining the background of the *Costello* case and the role played by constitutional identity, the concept's place in European Union law, as well theoretical perspectives on constitutional identity generally. It then looks at Irish caselaw and scholarship on an Irish constitutional identity. Although not integral to the overall

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[1] *Patrick Costello v The Government of Ireland and the Attorney General* [2022] IESC 44.
[2] ibid [280] (Dunne J); [227] (Hogan J).
[3] *Crotty v An Taoiseach* [1987] 1 IR 713.
[4] *Costello* (n 1) [233] (Hogan J).

finding of *Costello*, important questions should be asked in the wake of this development. What is Ireland's constitutional identity? Who is tasked with defining it? How is it to be applied? This article argues that there is an inconsistency in the suggestion to amend the Arbitration Act. Since a fundamental *grundnorm* of constitutional jurisprudence has been that 'the People' are sovereign and thus decide what the Constitution consists of through amendment referendums, it must be questioned whether introducing constitutional identity into Irish law – having the practical effect of *avoiding* a referendum – coheres with this principle, especially given the central role that the judiciary would presumably play in defining this identity.

Background of *Costello v Ireland*

CETA and juridical sovereignty

CETA is a trade agreement negotiated between the European Union and Canada designed to remove tariff barriers between these two customs areas and create the conditions for free trade. Similar to many bilateral investment treaties and multilateral trade agreements negotiated during the 2000s and 2010s – such as the (subsequently dropped) Trans-Pacific Partnership ('TPP') – it includes an 'investor-state dispute settlement' mechanism. These investor tribunals are designed to ensure compliance with the terms of the agreement among signatory states towards investors. They would allow investors to take legal action for damages against a host state that infringes the terms of the agreement. The party in question would have a choice of taking legal action through the CETA investor tribunal system or the domestic legal system of the relevant state; they could not do both.[5] This tribunal mechanism was what was at issue in *Costello v Ireland*.

Having lost his case in the High Court, Patrick Costello, a Green Party TD, appealed this outcome to the Supreme Court. His argument against CETA was that the investor tribunal mechanism abrogated Irish juridical and legislative sovereignty. It abrogated the former by establishing an alternate or parallel system of justice separate from courts established or permitted by the Constitution, whose awards of damages would be enforceable within the State. It abrogated the latter due to the effect that awards of damages would have on legislation in Ireland, as well as the ability of the CETA Joint Committee to change the agreement's terms. He contended that the practical effect of these tribunals would be to produce a 'regulatory chill' in policy areas like the environment. The threat of a costly award of damages against the State for such regulations may make legislators reluctant to enact them.

While the argument on legislative sovereignty was not accepted by a majority in the Court, four judges out of seven held that this tribunal mechanism would be a violation of juridical sovereignty and would thus be incapable of being ratified under Art 29 of the Constitution. As outlined by Dunne J, the mechanism would create a parallel jurisdiction where a party could choose to pursue legal action through a CETA tribunal which would otherwise be under the jurisdiction of Irish courts. This parallel system would also benefit from virtually automatic enforcement of any award of damages within the State.[6] These two elements taken together amounted to an unacceptable subtraction from the judiciary's jurisdiction under the Constitution.

[5] Article 8.22.1, Consolidated Text of the Comprehensive Economic & Trade Agreement (CETA) (2016).
[6] *Costello* (n 1) [246] (Dunne J).

Both the subject matter and judgment of *Costello* make it a highly significant case in the line of jurisprudence following the *Crotty* case. In that seminal decision, it was held that parts of the Single European Act ('SEA') fettered the executive branch's sovereign ability to conduct foreign policy, which would make ratification without constitutional amendment impossible. Ratification of the SEA (as well as all subsequent major European treaty changes) required constitutional amendment so that the pooling of national sovereignty with European institutions would be compatible with Bunreacht na hÉireann.[7] What *Costello* adds to the *Crotty* legacy is to define the boundaries of Irish juridical sovereignty by excluding the possibility of Investor-State Dispute Settlement (ISDS) tribunals that retain the final appeal on parts of Irish law. It is for this reason that Hogan J asserts that the case 'may yet be regarded as among the most important which this Court has been required to hear and determine in its almost 100-year history.'[8]

Hogan J's proposal

Ireland's dualist approach to international law is laid out in Article 29.6: no international agreement can have domestic legal effect without its terms being transposed into domestic legislation by the Oireachtas.[9] In this context, the automatic enforcement of a CETA tribunal award of damages is due to the fact that, under s. 25 of the Arbitration Act, the High Court would be unable to refuse enforcement of these decisions. Hogan J, a judge in the majority, described the role that s. 25 plays:

> [T]he Act serves as a sort of make-shift pontoon bridge by which a CETA Tribunal award is enabled to cross that legal Rubicon from the realm of international law into an enforceable judgment recognised as such by our own legal system on a more or less automatic basis.[10]

In effect, what Hogan J contends is that it is a piece of *domestic Irish legislation* which would make CETA constitutionally unacceptable. Without legislative changes, the full terms of CETA could not be ratified by the government. With this in mind, what Hogan J proposes to the other branches of government is that in order to 'cure' CETA's unconstitutionality, an amendment could be made to the Arbitration Act as follows:

> While not wishing to be prescriptive, it would be necessary at a minimum to move from the present virtually automatic enforcement procedure to a situation where the High Court, when called upon to give effect to a CETA Tribunal award (as distinct from an ordinary commercial arbitration award) under either the ICSID Convention or New York Convention and s. 25 of the 2010 Act, was expressly empowered by that new legislation to refuse to give effect to that award where it considered that:
>
> (a) the award materially compromised the *constitutional identity of the State or fundamental principles of our constitutional order*, or
> (b) the award materially compromised our obligation (reflected in Article 29.4.4 of the Constitution) to give effect to EU law (including the Charter of

[7] *Crotty* (n 3).
[8] *Costello* (n 1) [9] (Hogan J).
[9] Art 29.6: 'No international agreement shall be part of the domestic law of the State sabe as may be determined by the Oireachtas.'
[10] *Costello* (n 1) [84] (Hogan J).

> Fundamental Rights and Freedoms) and to preserve its coherence and integrity.[11]

Five of Hogan J's six other Supreme Court colleagues accepted that this would remove any question of unconstitutionality from CETA – thus opening the door for the government to ratify the trade agreement without being required to call a referendum to amend the Constitution.[12] Central to this proposal is that the High Court would be tasked with protecting Ireland's 'constitutional identity' and the 'fundamental principles of our constitutional order' in the face of investor tribunals, restoring the final appeal on legal matters which affect the State to domestic Irish courts – a key aspect of sovereignty from the Court's point of view.

MacMenamin J's substantive identity

Hogan J was not the only judge to engage in language of constitutional identity. The dissenting judgment of MacMenamin J also employs the concept. While Hogan J believes that changes are required to the 2010 Act in order to give the High Court the final say in enforcement of a tribunal's award, both MacMenamin J and O'Donnell CJ believe that the High Court can *already* refuse enforcement of any decision which threatens the State's constitutional identity. MacMenamin J's judgment is notable for specifying what, to him, this *substantive* identity consists of:

> First, Article 5 of the Constitution is *fundamental to the structure of the State*. It provides that Ireland is a sovereign, independent, democratic state. Second, Article 6, equally significantly, states that all powers of government derive under God from the People. Article 6.2 provides, in terms, that the powers of government are exercisable only by, or on the authority of, the organs of State established by this Constitution. *What is provided in both Articles are part of the constitutional identity of this State*.[13] [14]

He also elaborates on the powers he believes the High Court already enjoys vis-à-vis investor tribunals:

> Were it to be found that some action or actions, or decisions on foot of CETA did offend against fundamental constitutional values or the constitutional identity of the State, *such as judicial independence, or the finality of judgments*, a court, acting under the Constitution, would have no alternative but to refuse to enforce such an award.[15]

Costello is notable for the extent to which both majority and dissenting judgments engage with a theoretical concept not yet entertained by Irish courts explicitly. Both sides of the Court seem to agree: Ireland has a core constitutional identity which ought to be guarded jealously. The disagreement, then, is whether or not the judicial branch already has the power

[11] ibid [233] (Hogan J) (emphasis added).
[12] Dunne and Baker JJ (majority) as well as O'Donnell CJ and MacMenamin and Power JJ (dissenting) agreed with Hogan J's position that amending the Arbitration Act 2010 would remove any question of unconstitutionality from CETA; Charleton J dissented on this point at [53].
[13] *Costello* (n 1) [9], [10] (MacMenamin J) (emphasis added).
[14] Art 5: 'Ireland is a sovereign, independent, democratic state.'; Art 6: 'All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good'.
[15] *Costello* (n 1) [163] (MacMenamin J) (emphasis added).

to guard it – specifically, juridical sovereignty – from the decisions of investment tribunals such as those of CETA.

The Identity Concept
Constitutional identity in EU law

Although 'constitutional identity' is a phrase which has not been used explicitly by Irish courts before,[16] it is a concept which has taken on a life of its own across the European Union since the Treaty of Lisbon. The textual source of the concept is found in what is usually called the 'identity clause' of the Treaty on European Union ('TEU'), first introduced in the Maastricht Treaty and now expressed as follows in Article 4(2) TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.'

The motivation for including this guarantee, along with the principle of subsidiarity, is to caveat the project of 'ever closer union', to ensure that European integration cannot override unique national and constitutional arrangements.[17] While it is not inconsistent with the primacy of EU law from a Court of Justice perspective,[18] the identity clause has been used by national judiciaries in furtherance of their general effort to restate the primacy of their own constitutions, as they see it, over EU law. Its most notable and extensive use has been by Germany's Constitutional Court, the *Bundesverfassungsgericht* (BVerfG). The BVerfG has used the eternity clause of the German Basic Law (Article 79.3) as the primary source of Germany's constitutional identity. As Art 79.3 makes the principles in Articles 1 and 20 unamendable (human dignity, federalism, republicanism etc),[19] they constitute the most important values of Germany's constitutional order. Although the Basic Law's core identity is not limited to this, Art 79.3 provides a clear source for the BVerfG to look to when grounding their understanding of Germany's constitutional identity.[20]

The *Solange I* case of 1970 outlined the position of the BVerfG regarding the relationship between the Basic Law and EU. The Court asserted that: 'Article 24 of the Constitution deals with the transfer of sovereign rights to inter-state institutions. This […] does not open the way to amending the *basic structure of the Constitution, which forms the basis of its identity*, without formal amendment to the Constitution.'[21] *Solange I* and *II* articulated the BVerfG's position that EU law enjoys primacy '*so long as*' it is consistent with the principles of the Basic Law, particularly fundamental rights. 'Constitutional identity' took on considerable importance following the *Lisbon* case of 2009, when the BVerfG employed Art 4(2) TEU directly. Since this decision, German courts have held that EU law is subject to an 'identity lock', described in the following way:

> [T]he Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article

[16] Oran Doyle, 'Trojan Horses and Constitutional Identity' *Verfassungsblog,* (23 November 2022) <https://verfassungsblog.de/trojan-horses-and-constitutional-identity/> accessed 09 January 2023.
[17] Diane Fromage and Bruno De Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) 27(3) European Public Law 413.
[18] Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) 279.
[19] Article 79.3: 'Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.' *Grundgesetz für die Bundesrepublik Deutschland* (1949).
[20] Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart 2011) 29.
[21] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540, [22].

> 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected […] The identity review makes it possible to examine whether, due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect.

The BVerfG's identity jurisprudence has also had considerable influence outside Germany. The approach of grounding constitutional identity in unamendable clauses is also found in the Czech Republic.[22] Article 9.2 of the Czech constitution makes the 'substantive requisites of the democratic, law-abiding State' unamendable. The Czech Constitution Court has thus held that EU law must be consistent with this constitutional identity in order to enjoy primacy.[23] Using similar language, the Italian Constitutional Court has held that EU law primacy can only have effect as long as the 'fundamental principles of our constitutional order or the inalienable rights of man' are respected by EU institutions.[24]

Other national courts have used the identity clause to challenge European integration using more nationalistic interpretations, choosing to defend those aspects of a constitutional system that are *unique* to the given country. In France, for example, national constitutional identity constitutes those aspects of the constitutional order that are distinctive to France.[25] It is also worth mentioning that states like Hungary and Poland have employed the identity clause in ways which have attracted significant political and academic criticism.[26] German identity jurisprudence has been used by courts in these jurisdictions to place their own limits on the powers of EU institutions, and in the context of a 'rule of law crisis' in Europe constitutional identity is a tool which many argue is being used to bolster rising authoritarianism.[27]

Overall, whether national courts choose to ground constitutional identity in unamendable provisions or unique constitutional structures, identity is defined in *substantive* terms – some institutions, values, and principles can be defined as part of this core identity, implicitly placing others outside it. Its application as a concept has been to reassert the interpretive power of national courts vis-à-vis European institutions – in other words, as an assertion of national juridical sovereignty.

Constitutional theory

[22] Decisions Pl. ÚS 19/ 08 and Pl. ÚS 29/ 09; cited in Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) 120.
[23] Decision Pl. ÚS 50/04; see Craig and De Búrca (n 18) 308.
[24] *Frontini v Ministero della Finanze* [1974] 2 CMLR 372, [21].
[25] Fromage and De Witte (n 17) 417.
[26] See R. Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies 59; Gabór Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43(1) Review of Central and East European Law 23.
[27] R. Daniel Kelemen and others, 'National Courts Cannot Override CJEU Judgments' (26 May 2020) *Verfassungsblog* <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/?utm_source=pocket_reader> accessed 26 January 2023; Suteu (n 22) 121.

From a theoretical point of view, constitutional identity is conceptually close to constitutional entrenchment, the idea of a 'basic structure', and an unchangeable constitutional core.[28] The implication of having a constitutional identity is that some parts of a constitution are more essential to the document's overall coherence than others and should be guarded from change more closely.[29] The possibility of amendment is a persistent problem for those analysing constitutional identity – can a constitutional identity be amended as easily as technical aspects of a constitution, or can it be amended at all? It is perhaps for this reason that entrenchment and/or tiered amendability are seen as expressive of constitutional identity when they appear.[30] As explained by Richard Albert, 'by identifying a constitutional feature of statehood as unamendable, entrenchment signals to citizens just as it does to observers what matters most to the state by fixing the palette of non-negotiable colors in its self-portrait.'[31]

European Union law is not only relevant when discussing this concept; India's 'basic structure doctrine' – a judiciary-initiated doctrine which limits the scope of constitutional amendability – hinges to a significant degree on the idea of a core identity of the Indian Constitution. When the Indian Supreme Court defined the limitations on how far the Constitution could be changed, it articulated these limits by invoking the idea of a constitutional identity that India was endowed with in 1949. Technical aspects of the text could be amended and updated at will by the Indian parliament, but the core identity – or the 'basic structure' of the constitutional order – was beyond the amending scope of this body. As Chandrachud J of the Indian Supreme Court said to parliament in the *Minerva Mills* decision: 'Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity.'[32]

This type of identity jurisprudence was qualitatively different from that seen in Germany; it was based on judicial initiative rather than looking to an textual source in the Constitution – India has no eternity clause.[33] In the tense political climate of the 1970s, the Supreme Court took it upon itself to limit how far Parliament could alter the Constitution. This has been a core feature of India's political and constitutional culture ever since.[34]

Constitutional identity in Ireland

While some constitutions explicitly state which parts make up its core identity, often through eternity clauses or scaled thresholds for amendment, Bunreacht na hÉireann does not. In lieu of this, constitutional academics and experts may speculate that this or that feature is more important than another – e.g., that the legislative role of the Oireachtas might be more important than the length of the President's term of office. But this kind of assessment is, in the end, subjective. One analyst will value one institution or practice more than another given his/her own beliefs. Defining the substance of Ireland's constitutional identity – whether

[28] The *Solange I* case from the BVerfG treats 'basic structure' and 'constitutional identity' as almost synonymous, with one being the basis of the other (n 22). See also Gary J. Jacobsohn, 'An unconstitutional constitution? A comparative perspective' (2006) 4(3) International Journal of Constitutional Law 460, 480.
[29] Jacobsohn (n 28) 476.
[30] Suteu (n 22) 101-102.
[31] Richard Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State Law Journal 663, 700.
[32] *Minerva Mills Ltd. v Union of India*, AIR 1980 SC (Chandrachud J at 1798); quoted from Jacobsohn (n 28) 476.
[33] Art 368.1: 'Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.' *Constitution of India* (1949) [2022].
[34] See Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 Journal of Civil Liberties 46-73.

that is parliamentary democracy, fundamental rights, or the finality of judicial decisions – is a subjective, value-driven exercise in the absence of any textual definition.

To date, the Irish courts have rejected the route taken by superior courts in other countries to define unchanging substantive constitutional principles. Rather than finding there to be an unamendable basic structure to Bunreacht na hÉireann, they have reiterated on numerous occasions that any part of the Constitution can be changed, replaced, or jettisoned as the people see fit through referendum. Even throughout the courts' historic oscillation between legal positivism and belief in the supremacy of natural law,[35] they have never challenged the validity of an amendment which was properly enacted through national referendum. Indeed, they have upheld the sovereign right of the people to amend the Constitution in any way they wish.[36] Such a right was, according to Hamilton CJ, 'sacrosanct'.[37] In the words of Barrington J, '[t]here can be no question of a constitutional amendment properly before the people and approved by them being itself unconstitutional.'[38]

Numerous constitutional scholars have remarked on the quasi-religious significance that this principle holds for Irish courts.[39] The principle that the Constitution can be changed in any way is seen by the courts as the highest expression of popular sovereignty, taking precedence over any substantive aspect of the Constitution – express or implied. Even those rights explicitly described in natural law terms are, for the courts, secondary to the overriding right of the constituent power to do away with them.[40] Any aspect can be amended, even the State's sovereignty itself. As Walsh J explained regarding Title III of the SEA in *Crotty*:

> If it is now desired to qualify, curtail or inhibit the existing sovereign power to formulate and to pursue such foreign policies […] it is not within the power of the Government itself to do so […] To acquire the power to do so would, in my opinion, require a recourse to the people "whose right it is" in the words of Article 6 "...in final appeal, to decide all questions of national policy, according to the requirements of the common good." In the last analysis it is the people themselves who are the guardians of the Constitution. In my view, the assent of the people is a necessary prerequisite to the ratification of so much of the Single European Act as consists of title III thereof.[41]

In the course of his *Costello* judgment, Hogan J echoes Walsh J in asserting this central constitutional philosophy:

> [A]t all relevant stages the Irish People have assented to this sharing and pooling of sovereignty [with other EU member states] in a series of constitutional amendments from 1972 onwards. If, however, there is to be any further material transfer of that sovereignty, it is essential to our system

[35] *State (Ryan) v Lennon* [1934] (Kennedy CJ); *McGee v Attorney General* [1974] IR 284, [310].
[36] Eoin Daly, 'Translating Popular Sovereignty as Unfettered Constitutional Amendability' (2019) 15(4) European Constitutional Law Review 619, 625.
[37] *Hanafin v Minister for the Environment* [1996] 2 ILRM 61.
[38] *Riordan v An Taoiseach (No 1)* [1999] 4 IR 321, at 330.
[39] Colm O'Cinneide, 'The people are the masters: the paradox of constitutionalism and the uncertain status of popular sovereignty within the Irish constitutional order' (2012) 48 Irish Jurist 249, 256; Eoin Daly, 'Constitutional Identity in Ireland: National and Popular Sovereignty as Checks on European Integration' in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (2019 Cambridge University Press) 183; Jacobsohn (n 28) 469.
[40] *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 (Hamilton CJ at [38]).
[41] *Crotty* (n 3) [62] (Walsh J).

> of constitutional democracy that the further consent of the Irish People is obtained.[42]

Summing this position, he says '[a]s Article 5, Article 6 and Article 47 all in their own way demonstrate, this, at any rate, is *the theory upon which the Constitution is founded*.'[43] In other words, procedural popular sovereignty, embodied in unfettered amendability through referendum, is Ireland's *grundnorm*. If this line of judicial interpretation is followed to its logical conclusion, it seems reasonable to say that this philosophy is a leading candidate for Ireland's constitutional identity. Indeed, it has been the one relied upon by the courts whenever cases to do with involvement in supranational organisations or treaties have arisen.[44] Importantly, as Daly has explained in his exegesis of constitutional identity in the Irish context, this is a *procedural* identity only; the courts have resisted attempts to define a substantive identity made up of specific principles or institutions as other jurisdictions have.[45]

The shift in Irish social and religious values from 1937 to today is well-known. When Bunreacht na hÉireann was adopted, consensus would have arguably held that Ireland's substantive constitutional values were aligned with Roman Catholicism and Irish nationalism. Indeed, grounds for that Catholic-nationalist identity can be seen in the text of the Constitution to this day. However, as these influences have weakened, our Constitution has developed to track shifting values.[46] It is for this reason that Jacobsohn – a leading scholar on constitutional identity – argued that Ireland's constitutional identity lies in the idea of *expressiveness*,[47] that the Constitution articulates society's changing norms and values. This expressive quality has allowed the judiciary to interpret the Constitution as a 'living document' which can develop with the changing needs of the society it serves.[48]

An important reiteration of this constitutional philosophy came from O'Donnell J (as he then was) in a 2017 lecture. Speaking on the topic of judicial activism and social change, he argued that innovative judicial interpretation that tried to change the meaning of the Constitution from the bench may usurp the power of the people to democratically amend their Constitution through Article 47.[49] He warned that '[t]he power of amendment is the power of the People and interpreting the Constitution to reshape the Constitution in an innovative way and *to avoid the need for amendment* is arguably to *encroach upon the People's prerogative*.'[50]

The consequences of *Costello*

With the foregoing in mind and remembering O'Donnell J's warning, it must be considered whether the proposed cure to CETA's unconstitutionality, by introducing constitutional

[42] *Costello* (n 1) [60] (Hogan J).
[43] ibid [61] (Hogan J) (emphasis added).
[44] See *Crotty* (n 3) [62] (Walsh J).
[45] Daly (n 39) 185-186.
[46] Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart 2018) 212.
[47] Gary J. Jacobsohn, 'The Formation of Constitutional Identities' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 129, 130; quoted from Suteu (n 22) 93.
[48] Walsh J: 'no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.' *McGee* (n 35) 319 (Walsh J); *Sinnott v Minister for Education* [2001] 2 IR 505 [664] (Denham J); *NECI v Labour Court* [2021] IESC 36 [69] (MacMenamin J).
[49] Art 47.1: 'Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.'
[50] Donal O'Donnell, 'The Sleep of Reason' (2017) 40(2) Dublin University Law Journal 191, 211 [emphasis added].

identity as part of a solution to *avoid* the need for a referendum on CETA, 'encroaches upon the People's prerogative.' The crux of Hogan J's proposal is that the acute reason for CETA's unconstitutionality is a piece of domestic legislation, the Arbitration Act 2010; updating this to fit the needs of CETA would be more straightforward than the ordeal of holding a referendum on the issue. His proposal to the other branches of government is that the 2010 Act be changed to allow the High Court to stop the enforcement of an investor tribunal decision that violated the 'constitutional identity of the State'.

Whenever sovereign powers are delegated/pooled with/given to supranational institutions, the superior courts have consistently held that such delegations are acceptable to the extent that such constitutional changes are approved by way of referendum. Thus, the delegation of sovereign powers is approved by the constituent power (the people) in which, the courts maintain, ultimate sovereignty lies. Other values are important – whether they are our parliamentary system, the protection of fundamental rights by judicial review, or judicial independence. But each of these values is, as has been held by the courts, secondary to the fact that any aspect of the Constitution can be amended or removed by this sovereign authority if it so wills. Notwithstanding the logical and theoretical problems that this position can present,[51] this is the position the courts have come to.

On the one hand, it is clear why Hogan J's suggestion won the support of most of his Supreme Court colleagues, both those in the majority and dissenting on the main question of the case. The vital piece of the jigsaw is an Irish statute, the Arbitration Act 2010. Pointing out this fact to the government and Oireachtas could be seen as a polite course of action by a member of the judiciary. The core idea in his proposal – providing for a final appeal to the High Court – is, of course, unproblematic from a constitutional point of view. The problem, however, is that introducing language of 'constitutional identity' alongside it mandates a consideration of what that identity consists of. A core component – perhaps, it is submitted, *the* core component – of this identity is the role of the people in amending the Constitution by referendum. Submitting this solution as a method of *avoiding* a referendum on the role of these investor tribunals runs contrary to this.

It should also be questioned whether the addition of this solution to CETA's unconstitutionality was strictly necessary or even in keeping with the separation of powers. If the government read the majority judgments of this case, the crucial role being played by the 2010 Act in this decision should be clear. If they then wished to amend the Act along lines which they believed would fix their problem, they could do so. The explicit proposal laid out to amend the Act seems to pre-empt the present government's political reluctance to hold a referendum on CETA.

Judicial empowerment

The practical consequences of this proposal, if implemented, should also be considered carefully. If s. 25 of the Arbitration Act were amended along the lines of Hogan J's suggestion, the High Court would determine whether to implement an arbitral tribunal's decision on the basis of whether it offends (among other things) Ireland's constitutional identity. Implicit in this proposal is that the power to define our constitutional identity would be left with the superior courts. The possibility exists that a CETA tribunal decision which

[51] For critiques of this position, see: Daly (n 36); Tom Hickey and Eoin Daly, *The Political Theory of the Irish Constitution* (Manchester University Press 2015); Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2018) 95-103.

only *partially* infringes the Constitution could be implemented, presumably in a way which is not significant enough to violate Irish constitutional identity. Some parts of the Constitution would be held as more important than others, and the body which defines this would not be the people through referendum but the judiciary.

Of course, the immediate scope of the High Court's interpretation of constitutional identity would extend to CETA investor tribunals and other arbitration mechanisms covered by the 2010 Act; it is possible that the concept may never be used beyond this. As well as this, it is important to state that none of this is to suggest that any of the current members of the Supreme Court wish to overturn Ireland's unrestricted scope of amendability or the centrality of popular sovereignty through referendums. Nothing in Hogan J's judgment gives this impression – as already seen, he forcefully asserts the principle. Nor should it suggest that the judges who accept this solution necessarily wish for the concept to be applied outside of the High Court's dealings with CETA investor tribunals. Their concern is with safeguarding Ireland's juridical sovereignty which the majority holds is threatened by this agreement's tribunal system.

However, although Irish courts have consistently rejected the notion of an unamendable constitutional core, by inserting constitutional identity into Irish jurisprudence Hogan J may have given the tools to a future court to interpret the Constitution in this way. 'Constitutional identity,' 'essential features', and 'basic structure' are phrases which have been used by judiciaries around the world to limit the scope of amendment. Courts invoking constitutional identity is unproblematic in itself. But if done in a way which is designed to 1) avoid the necessity of a referendum and 2) empower the judiciary to define this identity, it could cut against constitutional precedent in Ireland up until now.

It may be that Ireland's deep involvement in the EU project necessitates an engagement with the identity clause expressed in Article 4(2) TEU in order to protect our unique approach to constitutional governance. But the notion that our courts should be the sole branch of government to define this is arguably more important to consider. Doyle has suggested that *Costello*'s introduction of constitutional identity language into Irish caselaw may be motivated by a desire to engage in future dialogue with the European Court of Justice of the European Union on the limits of EU integration akin to the BVerfG.[52] However, a core difference, as noted earlier, would be that the essence of Germany's substantive constitutional identity was textually defined by its eternity clause in 1949. In Ireland, there is no textual definition – defining our constitutional identity would thus be left to judges.

A *substantive* constitutional identity?

If it is accepted that Ireland has a constitutional identity, concepts like sovereignty, democracy, judicial independence, and fundamental rights could all be accurately described as part of it. These are principles of substance which entail moral and political values, and Bunreacht na hÉireann contains many such principles. However, as the theoretical considerations above should illustrate, labelling one principle or value as part of a substantive constitutional identity entails an implicit hierarchy of values, with some as part of this identity and some not. Until now, the Irish judiciary has been clear: a procedural principle – popular sovereignty as expressed in the referendum – is highest. If a substantive principle is to sit atop this hierarchy, the judiciary should not be the sole institution to define it. In other words, a decision to enshrine some values or institutions as part of our constitutional identity akin

[52] Doyle (n 16).

to Germany should be done not through judicial interpretation but through democratic deliberation.

The procedural approach to constitutional identity in Ireland also has advantages when it comes to European integration compared to substantive approaches. As Suteu points out, it is questionable whether any large steps taken by Germany towards closer EU integration would be constitutional given the BVerfG's approach, especially in the wake of its *Lisbon* decision.[53] The Court's grounding of German constitutional identity in unalterable principles means that any move to a more federal European Union is probably ruled out as long as the Basic Law is in effect (and perhaps even after this). This is not the case in Ireland. If the people vote for such an arrangement through a legitimately enacted referendum, there is no substantive principle standing in its way. The political arguments for and against this would take place in the political arena rather than a courtroom.

Identity jurisprudence across Europe has been defined by judicial limitation on the scope of European policymaking. The 2020 BVerfG decision to stop the proposed 'Eurobond' scheme in the wake of the Covid-19 financial crisis by invoking the identity clause is a prime example of this.[54] Following this decision, politicians from Hungary and Poland – both noted for their recent experience of 'democratic backsliding' – applauded the decision, opening the door for states to invalidate whichever European Union laws they find unacceptable.[55] Constitutional identity is a tool for judiciaries which can be used in a variety of ways. How the Irish judiciary chooses to wield it is something that only time will tell.

Conclusion

In the wake of the judgment, the government will be understandably keen to carefully consider the proposed cure to CETA's unconstitutionality. The exact wording of an amendment to the Arbitration Act 2010 may differ from that found in the judgment. It may be that the Government's proposal would be more specific in listing the circumstances in which the High Court could refuse to enforce a decision of an arbitral tribunal. Perhaps the phrase 'constitutional identity' will be omitted in favour of more concrete and specific criteria: this may include tribunal decisions which threaten the legislative and juridical sovereignty of the State, or perhaps it may simply allow the Court to refuse enforcement of a decision which 'violates the Constitution' in general.

It must be questioned whether the consequences of Hogan J's proposal are worth the relative ease it will provide in avoiding a referendum. Leaving the power of defining our constitutional identity to the judiciary is something that should be avoided if we are to adhere to the democratic constitutional approach which has developed in Ireland until now. Perhaps the best course of action on foot of the *Costello* decision is that which the appellant, Mr Costello TD, has publicly advocated: a referendum on CETA.[56] Such a route may, ironically, be the best method of protecting Ireland's unique constitutional identity.

[53] Suteu (n 22) 118.
[54] Judgment of 5 May 2020 - 2 BvR 859/15.
[55] Federico Fabbrini and R. Daniel Kelemen, 'With one court decision, Germany may be plunging Europe into a constitutional crisis' *Washington Post* (7 May 2020) <https://www.washingtonpost.com/politics/2020/05/07/germany-may-be-plunging-europe-into-constitutional-crisis> accessed 26 January 2023.
[56] Daniel Murray, 'Ceta referendum is important for 'constitutional integrity', Costello says' *Business Post* (Dublin, 12 Nov 2022) <https://www.businesspost.ie/politics/ceta-referendum-is-important-for-constitutional-integrity-costello-says/> accessed 09 January 2023.

CONSENT IN IRISH RAPE LAW: RULES, REALITIES AND REFORM

Abstract: This paper considers the current rules on consent in Irish rape law and examines the realities of their operation in practice. This discussion is informed in part by the author's empirical research with legal professionals and court accompaniment workers who work within Irish rape trials who shared their views on the current law as part of the Realities of Rape Trials in Ireland: Perspectives from Practice research project. Having examined the operation of the current law in this area, the paper offers recommendations for both legislative and non-legislative interventions which may contribute to a better understanding of consent in Irish rape trials.

Author: Dr Susan Leahy, Senior Lecturer in Law, University of Limerick

Introduction

The introduction of a statutory definition of consent into Irish sexual offences law in 2017 was an important step in modernising and clarifying the law in this area. For the first time, the legislature issued a clear, positive statement of what is required for a legally valid consent to sexual activity. However, while the introduction of a statutory definition of consent is an important milestone in the development of Irish sexual offences law, it is very much a first step in ensuring that consent is properly understood by juries in rape trials.

This paper considers the current rules on consent in Irish sexual offences law and examines the realities of their operation in practice. This discussion is informed in part by the author's empirical research with legal professionals and court accompaniment workers who work within Irish rape trials who shared their views on the current law as part of the *Realities of Rape Trials in Ireland: Perspectives from Practice* research project (hereafter referred to as the *Realities of Rape Trials* project).[1] The discussion of the realities of the operation of the definition of consent is also informed by an analysis of the literature on the impact of societal attitudes on jurors' deliberations in rape trials.

Having examined the practical challenges encountered in ensuring that the new definition of consent is properly understood and applied by jurors, the paper concludes with some recommendations for both legislative and non-legislative interventions which may contribute to a better understanding of consent in Irish rape trials.

Consent: The Current Rules

Section 2(1) of the Criminal Law (Rape) Act 1981 defines rape as 'sexual intercourse with a woman who at the time of the intercourse does not consent to it'.[2] To prove that a rape occurred, the prosecution must show that: (1) there was sexual intercourse; (2) it was non-consensual and, (3) the defendant had the requisite *mens rea* regarding consent.[3] Prior to the

[1] Susan Leahy, *Realities of Rape Trials in Ireland: Perspectives from Practice*, (Dublin Rape Crisis Centre 2021) <https://www.drcc.ie/assets/files/pdf/leahyrealitiesreport.pdf> accessed 02 March 2023. This project was funded by the Irish Research Council's New Foundations Scheme. The research was conducted in partnership with Dublin Rape Crisis Centre.

[2] The definition of rape in section 2 is gender specific, that is, it punishes only the rape of a woman by a man.

[3] That is, that the defendant knew that the complainant was not consenting or was reckless as to whether or not she was consenting or that he did not hold an honest belief that the complainant was consenting: Criminal Law (Rape) Act 1981, section 2. The *mens rea* for rape is not discussed here and would require specific attention in its own right, particularly given ongoing efforts to reform this aspect of the law: see the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022; Law Reform Commission, *Report on Knowledge and Belief Concerning Consent in Rape Law* (LRC 122–2019).

introduction of a statutory definition of consent in Irish sexual offences law, guidance on what constituted a valid consent to sexual activity was primarily derived from case law. The only legislative guidance on consent was section 9 of the Criminal Law (Rape) (Amendment) Act 1990 which stated that: 'in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person any failure or omission on the part of that person to offer resistance to the act does not of itself constitute consent to the act.'

The purpose of this provision was to clarify that there was no resistance requirement in Irish sexual offences law.[4] Apart from section 9, prior to the 2017 reforms, common law guidance on consent provided that consent to sexual activity may be vitiated by force, fear of adverse consequences,[5] fraud as to the nature of the act,[6] or the identity of one's partner,[7] or incapacity[8] (eg through sleep,[9] unconsciousness or intoxication[10]).[11] Further, in *The People (DPP) v C*,[12] Murray J defined consent as: 'voluntary agreement or acquiescence to sexual intercourse by a person of the age of consent with the requisite mental capacity. Knowledge or understanding of facts material to the act being consented to is necessary for the consent to be voluntary or constitute acquiescence.'[13]

Section 48 of the Criminal Law (Sexual Offences) Act 2017 introduced the following definition of consent into section 9 of the of the Criminal Law (Rape)(Amendment) Act 1990:

> (1) A person consents to a sexual act[14] if he or she freely and voluntarily agrees to engage in that act.
>
> (2) A person does not consent to a sexual act if—
>
> > (a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,
> > (b) he or she is asleep or unconscious,
> > (c) he or she is incapable of consenting because of the effect of alcohol or some other drug,

[4] However, in practice, as discussed below, a failure to offer resistance is still something that is likely to be taken into account by a jury as evidence from which consent could be inferred: Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill and MacMillan 2015) 323.
[5] *R v Olugboja* [1982] QB 320.
[6] *R v Flattery* (1877) 2 QBD 410; *R v Williams* (1923) 1 KB 340.
[7] *People (DPP) v C* [2001] 3 IR 345.
[8] Capacity to consent requires that an individual be over the legal age of consent (17 years) and have the requisite mental capacity to consent. Where individuals lack capacity to consent due to age or limited decision-making capacity, sexual activity with them is prohibited.
[9] *R v Mayers* (1872) 12 Cox CC 311; *R v Larter & Castleton* [1995] *Criminal Law Review* 75.
[10] *R v Lang* (1976) 62 Cr App R 50.
[11] It is important to note that this common law guidance prevails, despite the introduction of statutory guidance in the 2017 Act.
[12] *People (DPP) v C* [2001] 3 IR 345.
[13] ibid 360.
[14] This is defined as: (a) an act consisting of sexual intercourse or buggery; (b) an act described in s 3(1) or s 4(1) of the 1990 Act (ie aggravated sexual assault or rape under s 4), or; (c) an act which if done without consent would constitute a sexual assault: s 9(6) (as amended).

> (d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act[15],
> (e) he or she is mistaken as to the nature and purpose of the act,
> (f) he or she is mistaken as to the identity of any other person involved in the act,
> (g) he or she is being unlawfully detained at the time at which the act takes place,
> (h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.

This definition became operative on 27th March 2017.[16] The two-tiered approach to defining consent mirrors the approach adopted in other common law jurisdictions,[17] providing a clear statement of what constitutes a legally valid consent to sexual activity, along with a list of circumstances where consent will be deemed to be absent. The latter largely replicates the guidance at common law focusing on traditional understandings of force, fraud, fear and lack of capacity due to sleep or intoxication but there are some welcome clarifications and notable extensions of the pre-existing rules. [18] For instance, section 9(2)(a) provides that force or the threat thereof which is directed towards a third party vitiates consent. The understanding of fraud is also extended beyond fraud as to the identity of the other party or the nature of the act to include fraud as to the purpose of the act (section 9(2)(e)). An example of a situation where the latter would apply is where 'an individual consents to what would otherwise be a non-consensual sexual touching because s/he has been led to believe it is a necessary medical procedure'.[19] Finally, section 9(2)(g) makes clear that an individual cannot consent to sexual activity when s/he is being unlawfully detained and 9(2)(h) clarifies that consent may only be validly provided by the parties to the act (ie that consent expressed by a third party is not valid).

A significant feature of the definition of consent in the first tier is that the focus on 'free agreement' may be seen as introducing the idea of 'communicative sexuality' into Irish law, that is, a requirement of mutuality in sexual encounters which is evidenced by effective communication. Positively stating what is required for a valid consent to sexual activity (ie freedom, capacity and choice) should in theory assist the prosecution in proving that consent to sexual activity was absent. This is because the definition focuses jurors on identifying that the elements of a valid consent (ie free agreement) are present, rather than requiring jurors to look for signs of non-consent (eg force, fraud or lack of capacity). However, as will be outlined in the discussion in the next section, the realities of how consent is understood and applied in practice mean that the introduction of a legislative definition of consent on its own is not enough to significantly impact jurors' deliberations on consent in rape trials.

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[15] Examples of individuals who might be affected by this provision are those suffering from conditions such as cerebral palsy or the effects of the stroke and who thus may experience difficulties in expressing themselves.
[16] Criminal Law (Sexual Offences) Act 2017 (Commencement) Order 2017 (S.I. No. 112 of 2017), art. 2.
[17] For example: England and Wales (ss 74, 75 and 76 of the Sexual Offences Act 2003); Northern Ireland (sections 3, 9 and 10 of the Sexual Offences (Northern Ireland) Order 2008); Scotland (ss 12-15 of the Sexual Offences (Scotland) Act 2009); Canada (ss 265(3) and 273.1 of the Canadian Criminal Code) and the Australian state of Victoria (section 36 of the Crimes Act 1958).
[18] Law Reform Commission (n 3), para 2.10.
[19] Susan Leahy, 'Sexual Offences Law in Ireland: Countering Gendered Stereotypes in Adjudications of Consent in Rape Trials' in Lynsey Black and Peter Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform* (Hart Publishing 2019) 11. An example of this may be seen in *R v Tabassum* [2000] 2 Cr App R 328. In that case, the defendant falsely represented himself as a breast cancer specialist and in this context women consented to him examining their breasts. All of the women testified that if they had known that he was not a specialist, they would not have consented to the examinations. The defendant was found guilty of indecent assault.

Ongoing Challenges: Exploring the Realities of the Operation of the Current Law

Some practical insights on the definition of consent may be found in empirical research conducted for the *Realities of Rape Trials* project. This research involved interviews with 16 legal professionals[20] and 12 court accompaniment workers[21] who work within Irish rape trials about their views on how the current law on sexual offences is operating.[22] Participants were asked for their perspective on whether the statutory definition of consent was having, or was likely to have, an impact on the operation of rape trials. At the time of interview (July to September 2019), the legal professionals had not encountered the definition in operation. Nevertheless, in general, the legal professionals interviewed were ambivalent about the definition's likely impact on trials.

> 'I don't think so, not hugely, because it is what it is. There is more words to be used in explaining it to a jury, but I think people have an idea in their own heads as to what is involved in consent. So they could listen to the words, but I don't know that the expanded definition will make a huge difference.' (LP3)

> 'Personally, I don't think it moves the matter forwards or backwards enormously.' (LP4)

> 'So what impact will it have? I'm not too sure that it will have an enormous impact except I suppose that it just emphasises that there isn't a grey area on those particular things. So, it's not I think that it extends anything. I think it just makes it a little bit crisper.' (LP11)

Given the ways in which the second tier of the definition of consent largely aligns with the pre-existing common law rules, the views of the legal professionals on the limitations of the introduction of a definition of consent are to some extent understandable. However, their perspective arguably overlooks the potential for an imaginative and progressive interpretation and application of the legislative definition which, in focusing on the requirement for 'free agreement', could assist jurors in more progressive deliberations about consent. As noted above, the positive orientation of the new definition, especially the focus on 'free agreement' and its implied requirement of effective sexual communication, should encourage jurors to more closely evaluate the relevant incident to look for the presence of the elements of a valid consent to sexual activity. This contrasts with the position under the common law rules which was more focused on the factors which vitiated consent, thereby allowing for more shallow analyses of the evidence which were oriented around identifying the presence of a vitiating factor such as force, fear or fraud.

Like the legal professionals, the court accompaniment workers interviewed also commented that, at the time of interview, it was too early to see the impact of the statutory definition of consent on trials. However, in contrast to the legal professionals, many of the court

[20] The legal professionals included barristers and representatives from the Office of the Director of Public Prosecutions.
[21] Court accompaniment workers were recruited from Dublin Rape Crisis Centre and Victim Support at Court.
[22] Questions focused on issues such as the functioning of the legislative definition of consent and whether it has had a positive impact on the operation of trials and relevant issues relating to the rules of evidence (eg the extent to which sexual experience evidence and complainant's counselling records are introduced in trials). Participants were also asked for their perspectives on potential future reforms: Leahy (n 1) 6.

accompaniment workers were keen to emphasise the importance of social understandings of consent, beyond the legal definition. In this regard, they highlighted that more work is needed to ensure that consent is more readily understood in society.

> 'I think there are a lot more issues surrounding consent than just the legal definition and I don't think that just by defining consent, that automatically that's meaning that all jurors…that you will fully understand or overcome their own biases surrounding that area as well. … it's a very small part of the overall reforms that need to be enacted…' (AW1)

> '…people that I accompany have a great sense of what consent is to them. Maybe not the actual lawful definition of it but what consent is and their kind of take on it is.' (AW2)

The comments of the accompaniment workers highlight how societal attitudes about rape and sexual consent will continue to influence jurors, regardless of the introduction of a legislative definition. Broader interventions are required to ensure that consent and the complexities of sexual violence are fully understood by jurors. As noted Patricia Smyth J (County Court Judge in Northern Ireland), 'regardless of the nuances of the definition [of consent], powerful arguments based on myth masquerading as common sense are likely to prevail in this area unless more is done to educate and inform juries'.[23] As discussed below, research supports the contention that, in jury deliberations in rape trials, social understandings of consent can be just as influential as legal definitions.

The Social Realities of Consent: The Impact of Societal Attitudes on Jurors' Deliberations in Rape Trials

The potential impact of stereotypical or prejudicial attitudes about rape and rape victims on juror deliberations has been widely documented in academic literature, which highlights the impact of 'rape myths' on the operation of rape law.[24] As this author has previously noted:

> Commentators like Estrich [suggest] that the problem with rape law [is] "not the wording of statutes per se but rather our understanding of them…how a judge interprets and directs a jury, the 'common sense' understandings of rape against which a juror will assess a rape allegation'.[25] Unfortunately, these "common sense" understandings are often imbued with misperceptions about rape and rape victims.[26]

Simply put, rape myths may be defined as 'common prejudicial attitudes about rape'.[27] Perhaps the most frequently referenced rape myth is the 'real rape' stereotype. This

[23] Judge Patricia Smyth, 'Sexual offence trials: The practical challenges for a judge tasked to deliver justice' in Rachel Killean, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge 2021) 73.

[24] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Fawcett Books 1987); Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard University Press 1987); Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (Open University Press 1997); Sue Lees, *Carnal Knowledge: Rape on Trial* (2nd edn, The Women's Press 2002); Joan McGregor, *Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Ashgate 2005); Jennifer Temkin, *Rape and the Legal Process* (2nd edn, Oxford University Press 2002).

[25] Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard University Press 1987) 4.

[26] Susan Leahy (n 19) 4.

[27] Nina Burrowes, *Responding to the challenge of rape myths in court. A guide for prosecutors* (nbresearch 2013) 5. For a detailed discussion of the potential influence of rape myths on the operation of Irish sexual offences law, see: Susan Leahy, 'Bad

stereotype suggests that a genuine rape allegation involves 'a sudden surprise attack by an unknown, often armed, sexual deviant' and 'occurs in an isolated, but public, location and the victim sustains serious physical injury, either as a result of the violence of the perpetrator or as a consequence of her efforts to resist the attack'.[28] Available research on Irish attitudes to rape demonstrate some evidence of the 'real rape' stereotype in Irish society. A 2016 Eurobarometer survey of 1,002 Irish participants[29] found that 24% of those surveyed agreed that women are more likely to be raped by a stranger than someone they know.[30] Statistics on sexual violence demonstrate that the 'real rape' stereotype is quite at odds with the reality of rape cases, which typically are committed by persons known to the victim, in private locations and generally do not entail the infliction of serious injury other than the harm of the non-consensual sexual activity itself (ie 'injuries similar to grievous bodily harm, such as broken bones, open wounds, injury resulting in permanent disability or visible disfigurement').[31]

Recent statistics from Dublin Rape Crisis Centre show that of the clients who availed of their services in 2021, the offender was a stranger in 16% of cases of adult rape or sexual assault.[32] Similar statistics may be seen in the *Rape and Justice in Ireland (RAJII)* study.[33] A national survey of 100 victims for that study found that 34% had been raped by a stranger.[34] Analyses of files from the Office of the Director of Public Prosecutions (DPP) and Central Criminal Court found, respectively, that the defendant was identified as a stranger in 10.9%[35] and 17.58%[36] of cases. This study also found that rape is more likely to occur in private rather than public locations. The survey of victims found that the 'majority of rapes occurred indoors', with approximately one third occurring in the victim's home.[37] The analysis of DPP files found that '[r]ape was most likely to occur in the complainant's own home (30.1%) followed by the suspect's home (22.4%) or in another private setting[38] (16.5%)'.[39] In the Central Criminal Court cases studied, the location was recorded as a 'public place' in 22.65% of incidents.[40] Finally, the *RAJII* findings demonstrate that the level of injury sustained in Irish rape cases does not correlate with societal expectations of 'real rape'. While 71% of the victims surveyed reported that the offender used physical force against them,[41] in the majority of cases (44%), the injuries sustained were classified as 'minor' (eg bruises, cuts, scratches).[42] Severe injuries

Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland' (2014) 14(1) Irish Journal of Applied Social Studies, Article 3, <https://arrow.tudublin.ie/ijass/vol14/iss1/3> accessed 9 March 2023.

[28] Estrich (n 25) 6

[29] European Commission, *Special Eurobarometer 449 Report: Gender-Based Violence* (European Commission 2016). The study involved surveying EU citizens in the 28 Member States of the EU; 1002 Irish adults were surveyed.

[30] ibid 57.

[31] Genevieve F. Waterhouse, Ali Reynolds and Vincent Egan, 'Myths and legends: The reality of rape offences reported to a UK police force' (2016) 8(1) The European Journal of Psychology Applied to Legal Context 1, 3.

[32] This figure is based upon 289 clients who commenced therapy with Dublin Rape Crisis Centre in 2021: Dublin Rape Crisis Centre, *Statistics Supplement 2021* (Dublin Rape Crisis Centre 2022) 17.

[33] This large-scale study on attrition involved three strands of research, which focused on the primary attrition points for rape cases: (1) the victim's decision to report to the Gardaí; (2) the decision to prosecute; (3) the trial: Conor Hanly, Deirdre Healy and Stacey Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press 2009).

[34] ibid 133.

[35] A quantitative analysis of materials received from the Office of the Director of Public Prosecutions analysed 597 reported rapes received by the Office from the beginning of 2001 to the end of 2004: ibid 220.

[36] The researchers reviewed 173 rape case files received by the Central Criminal Court between 2000 and 2005 and analysed 35 trial transcripts: ibid 269.

[37] ibid 132.

[38] For example, a hotel room or a friend's home.

[39] ibid 220.

[40] ibid 270. The most frequently cited locations were the defendant's residence (19.89%) and complainant's residence (19.89%): ibid.

[41] ibid 135.

[42] ibid 137. No injuries were reported in 37% of cases.

(eg loss of consciousness, broken bones or internal injuries) were reported in 15% of cases.[43] Similarly, in the Central Criminal Court files reviewed, while 70% of complainants about whom medical reports were prepared reported sustaining physical injuries,[44] '[o]nly a small minority of complainants reported serious injuries such as broken bones,[45] strangulation marks,[46] and knife wounds[47]'.[48] Based on the foregoing statistics, it would seem fair to say that 'the typical rape in Ireland is quite unlike the "real rape" stereotype'.[49]

Another common stereotype which persists in relation to rape is that of the 'real victim'. This contributes to creating an expectation that genuine complainants should have certain characteristics (eg be 'consistent, rational and self-disciplined')[50] and/or should have behaved 'appropriately' at the time of the alleged incident (eg not have engaged in what might be perceived as 'risky' behaviour such as drinking alcohol to excess or taking illegal drugs). 'Real victims' are also generally expected to have complained promptly, with any delay in doing so often being associated with a perceived lack of veracity. Research on Irish attitudes to sexual violence display some evidence of the 'real victim' stereotype in Irish society. In the 2016 Eurobarometer survey, 11% of respondents believed that if someone is intoxicated (as a result of the consumption of alcohol or drugs), that may make having sexual intercourse with them without consent justified.[51] Nine per cent believed that voluntarily going home with someone or wearing provocative or sexy clothing could justify non-consensual sexual activity.[52] The reality of rape of course is that there is no such thing as a 'real' or 'ideal' victim, with individuals responding in a variety of different ways which may be influenced by any number of factors or characteristics individual to that person. Such factors or characteristics might include 'their individual experiences and personal history, their domestic circumstances, their cultural beliefs, their ability to access support, the type of trauma that they have suffered and whether they perceived a threat to life'.[53] Further, beliefs relating to so-called 'risky' behaviour essentially equate to victim blaming which has no place in an assessment of a complainant's credibility.

Despite the erroneous nature of the misperceptions about sexual violence created by rape myths, research with mock juries has shown that stereotypes of 'real rape' and the 'real victim' can impact on juror decision-making. Although to date there are no Irish mock jury studies, findings from UK studies demonstrate how prejudicial attitudes and stereotypes can surface in juror deliberations on the presence or absence of consent. The most recent, and largest, UK mock jury study was undertaken by Chalmers, Leverick and Munro in Scotland.[54] This research found 'considerable evidence of jurors expressing unfounded assumptions

[43] ibid.
[44] ibid, 274.
[45] 3.70%.
[46] 2.78%.
[47] 2.78%.
[48] Hanly, Healy and Scriver (n 33) 274.
[49] Leahy (n 19) 5.
[50] Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) Feminist Legal Studies 27, 37.
[51] European Commission (n 29) 64.
[52] ibid.
[53] Law Commission, *Review of Evidence in Sexual Offences: A Background Paper* (London 2021) 11 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/02/Evidence-in-sexual-offences-background-paper.pdf> accessed 1 March 2023.
[54] The study 'involved 64 mock juries, comprising 863 individual participants, viewing a film of a simulated trial (for either rape or assault) and then deliberating': James Chalmers, Fiona Leverick and Vanessa E. Munro, 'The Provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials' (2021) 48(2) Journal of Law and Society 1. The discussion here focuses on the findings outlined in an article which focuses on 'the tone, content, and outcome of discussions specifically within the 32 juries that observed the rape trial': ibid, 2. These juries comprised of 431 participants: ibid, 7.

regarding how "real" victims typically react during and after a sexual assault'.[55] In particular, the authors highlight 'the persistence of the view across the [mock] rape juries that a lack of physical resistance is indicative of consent, and the extent to which [mock] jurors asserted that rape allegations are "easy" to make and frequently unfounded'.[56] With respect to the expectation of physical resistance and consequent injury to the complainant, the researchers found that '[i]n 28 of the 32 juries, the view was expressed that a failure to physically resist an attack may be indicative of consent'.[57] Further, although the complainant in the mock trial scenario 'had bruising and scratching to her thighs and upper body', 'many jurors suggested that the complainer's injuries could have been sustained in alternative ways and so were of limited probative value, and/or maintained that they would have expected her to have sustained more serious injuries'.[58] There is also evidence of the 'real victim' stereotype in operation in the mock jury deliberations, particularly with regard to 'appropriate' behaviour. For example, '[t]he belief that a "real" rape victim would shout for assistance was expressed in half of [the] 32 juries'.[59] Further, the fact that the complainant in the trial scenario 'had delayed calling the police –albeit by only 40 minutes – was seen by some jurors as suspicious'[60], with this being 'raised as a concern in 13 of the 32 juries'.[61] Finally, '[t]he suggestion that false allegations of rape are common arose in 19 of the 32 juries (59 per cent) often linked to a suggestion that the complainer's allegation could have been fabricated'.[62]
The findings in this study echo those of previous mock jury research conducted in England and Wales which also found evidence of rape myths influencing deliberations in mock juries.[63] For example, mock jury research conducted by Ellison and Munro found that participants 'exhibited a strong and, in many cases, unshakeable expectation that a genuine victim of rape would engage in vigorous physical resistance against her attacker, and that, as a result, there would be corroborative evidence of injury on the body of either the complainant or defendant, or both'.[64] Research by Ellison and Munro has also highlighted mock jurors' negative reactions towards what is perceived to be a delay in reporting. A three-day delay presented in the trial scenario in one of their studies 'proved to be a significant stumbling block for many of the jurors, who were quick to state that it had, in their view, seriously weakened the prosecution case'.[65] Finally, mock jury research in England and Wales has also shown that participants perceived evidence and approached their deliberations

[55] ibid 2.
[56] ibid 2.
[57] ibid 11.
[58] ibid 11.
[59] ibid 15.
[60] ibid 18.
[61] ibid 18.
[62] ibid 20.
[63] See: Emily Finch and Vanessa E. Munro, 'Breaking boundaries? Sexual consent in the Jury Room' (2006) 26(3) Legal Studies 303; Emily Finch and Vanessa E. Munro, 'The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants' (2007) 16(4) Social and Legal Studies 591; Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude?* (Hart Publishing 2008); Louise Ellison and Vanessa E. Munro, 'Turning Mirrors in Windows? Assessing the impact of (mock) juror education in rape trials' (2009) 49(3) British Journal of Criminology 363; Louise Ellison and Vanessa E. Munro, 'Reacting to Rape: exploring mock jurors' assessments of complainant credibility' (2009) 49(2) British Journal of Criminology 202; Louise Ellison and Vanessa E. Munro, 'A Stanger in the Bushes, or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Juror Study' (2010) 13(4) New Criminal Law Review 781; Louise Ellison and Vanessa E. Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) International Journal of Evidence and Proof 299.
[64] Louise Ellison and Vanessa E. Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) International Journal of Evidence and Proof 299, 315.
[65] Louise Ellison and Vanessa E. Munro, 'Reacting to Rape: exploring mock jurors' assessments of complainant credibility' (2009) 49(2) British Journal of Criminology 202, 209.

differently where the defendant was someone previously known to the complainant, as opposed to a stranger.[66]

The foregoing research clearly indicates that understandings of consent in rape trials are influenced and shaped by much more than legal rules and definitions. This raises problems for the prosecution when seeking to prove that consent was absent as jurors are not responding to the evidence dispassionately. Instead, legal rules such as the definition of consent are interpreted and applied against a complex backdrop of societal beliefs and attitudes about what a genuine allegation of rape or a 'real victim' of rape should look like. The new definition of consent has the potential to ameliorate the influence of such beliefs and attitudes by clearly identifying what is required for a legally valid consent to sexual activity (first tier) and setting out situations where consent will definitively be absent (second tier). However, as the mock jury research detailed here demonstrates, rape myth acceptance can exert a significant influence on jurors' deliberations and the expectations about 'real rape' and 'real victims' will colour how jurors interpret and apply legal provisions. Consequently, the introduction of a statutory definition of consent in itself is not enough to yield practical changes in the operation of Irish rape trials. Further reforms are necessary to bolster the current legislative guidance on consent and to directly tackle the potential negative impacts of stereotypical attitudes upon jurors' deliberations in these cases.

Reform: Legislative and Non-Legislative Proposals for Change

While legislative clarification can serve to prompt a deeper understanding of consent, jurors require explicit instruction and education to ensure that carefully drafted legislative guidance is applied appropriately and progressively in practice. For this reason, the reforms proposed here focus on both legislative and non-legislative interventions in the form, respectively, of further strengthening the legislative definition of consent and introducing judicial directions which instruct jurors on consent and the avoidance of reliance on stereotypical or prejudicial beliefs about rape in their deliberations.

Legislative Reform: Strengthening the Definition of Consent

Although legislative reform in itself is not sufficient to ensure that consent is readily and dispassionately understood by jurors, the current definition could be strengthened in order to better reflect the realities of rape and tackle the influence of the rape myths outlined above. This could be effectively achieved by adding to the list of situations where consent will be deemed to be absent. Admittedly, the list of situations included in section 9(2) is non-exhaustive, thereby allowing situations other than those listed to be deemed to vitiate consent. However, given the conservative development of the rules relating to consent to date, to expedite development of the law, legislative intervention would seem sensible.

Arguably the most obvious starting point for such expansion is the guidance on force or threats thereof. Currently, section 9(2)(a) provides that a person does not consent to a sexual act if:

[66] For example, Temkin and Krahé found that mock jurors were more convinced that a defendant should be held liable and blamed the complainant less in stranger rapes than in rapes by acquaintances, and in particular, rapes by ex-partners: Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude?* (Hart Publishing 2008) 48. See also: Louise Ellison and Vanessa E. Munro (n 64) 299.

> he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person.

While this guidance is beneficial, it largely replicates the pre-existing common law guidance (save for the inclusion of reference to the application or threatened application of force to third parties). Thus, 'the legislature did not stray far from the traditional, indeed stereotypical, understandings of force which are found within the common law'.[67] The statutory guidance should go further and seek 'to provide a broader understanding of sexual coercion, thereby acknowledging that there are a number of threats other than those of force which can obviate sexual choice'.[68] Examples might include threats to: abduct or detain a third party;[69] expose a secret that could be highly damaging to the complainant's interests;[70] or withdraw financial support where the complainant is wholly dependent on the defendant for survival[71].[72] Explicit recognition of what may be defined as non-violent coercion in Irish sexual offences law is timely considering the recent introduction of an offence of coercive control in the Domestic Violence Act 2018.[73] This has resulted in a somewhat 'incongruous situation where coercive and controlling behaviour is recognised in the context of domestic abuse but its role in vitiating consent in the context of sexual offences law remains difficult to prove within a criminal trial'.[74] Thus, it is recommended that the second tier of the definition of consent in section 9(2) is extended to provide that a person does not consent to a sexual act if: 'he or she submits to the act because of a threat or fear of serious detriment such as intimidation or coercive or psychological oppression to himself or herself or to others'.
This wording is adapted from a recommendation by Sir John Gillen in his review of the law on sexual offences in Northern Ireland, where he proposed that similar guidance be included in the definition of consent in the Sexual Offences (Northern Ireland) Order 2008.[75] In Gillen's view, such expansion of the statutory guidance on consent 'expressly recognise[s]' contexts of 'severe poverty, familial or intimate abuse, economic oppression or other forms of abuse of circumstances' where a complainant might give an 'apparent', as opposed to a genuine consent to sexual activity.[76] In doing so, 'it would challenge on a statutory level [the] limited understanding of rape that relies on "real rape" stereotypes'.[77] The inclusion of a provision along the lines proposed here would thus make a welcome addition to the second tier of the definition of consent in section 9(2) of the 2017 Act.

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[67] Leahy (n 19) 12.
[68] Leahy (n 1) 14
[69] Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press 2002) 101
[70] ibid.
[71] Susan Leahy, 'Reform of Irish Rape Law: The Need for a Legislative Definition of Consent' (2014) 43(3) Common Law World Review 231, 254.
[72] Leahy (n 19) 12.
[73] The offence of coercive control is provided for in section 39 of the 2018 Act. Section 39(1) states that: 'A person commits an offence where he or she knowingly and persistently engages in behaviour that: (a) is controlling or coercive, (b) has a serious effect on a relevant person, and; (c) a reasonable person would consider likely to have a serious effect on a relevant person'. A person's behaviour has a serious effect on a person if it causes that person: (a) to fear that violence will be used against him or her, or; (b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities: s 39(2).
[74] Susan Leahy, 'Effectively Recognising and Punishing Sexual Coercion: Proposals for Reform' in Hannah Bows and Jonathan Herring (eds), '*Rough Sex' and the Criminal Law* (Emerald 2022).
[75] John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland: Part 2* (Department of Justice 2019) <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf> accessed 2 March 2023.
[76] ibid 375.
[77] ibid 369.

Extra Legal Measures: Developing Model Judicial Directions for Irish Rape Trials

Judicial directions are an excellent mechanism to guide jurors on the meaning of consent and advise them on the realities of rape, thereby minimising the potential for reliance on prejudicial stereotypes about rape in juror deliberations. Calibrating such instructions can be difficult as a judge needs to ensure that any direction given is appropriately neutral and does not impinge on defendants' fair trial rights.

Participants in the *Realities of Rape Trials* project were asked for their views on whether Irish judges could benefit from assistance in directing jurors in rape trials. To inform their responses, participants were presented with an excerpt from the English *Crown Court Compendium* which includes guidance for judges when directing juries on issues such as consent and on the avoidance of reliance on stereotypes in deliberations. [78] The extract provided is outlined below:

> **Avoiding Assumptions about rape:**[79]
> It would be understandable if some of you came to this trial with assumptions about rape. You may have ideas about what kind of person is a victim of rape or what kind of person is a rapist. You may also have ideas about what a person will do or say when they are raped. But it is important that you dismiss these ideas when you decide this case.
>
> From experience we know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people. And people who are raped react in a variety of different ways. So you must put aside any assumptions you have about rape. All of you on this jury must make your judgment based only on the evidence you hear from the witnesses and the law as I explain that to you.

The majority of the legal professionals interviewed agreed that the introduction of guidance similar to the *Crown Court Compendium* would be useful in Ireland. However, some legal professionals did express reservations about the suitability of the introduction of this type of guidance. For example, LP4 indicated that sample directions would not make too much practical difference as judges already give instructions on these issues where this is appropriate: 'The judge will tell them in every case that they're not entitled to speculate but equally as importantly…you don't bring your sympathy, you don't bring your emotion, you don't bring your prejudice to play or to bear in any of the decisions that are about to be made.'

LP14 raised the point that there may be a danger in introducing such sample directions as they may introduce prejudicial lines of thinking to jurors where they did not have those ideas to begin with: 'I think probably in relation to the perception it would be very beneficial. But

[78] *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial College 2022).
[79] It should be noted that the *Crown Court Compendium* has been updated since these interviews took place. The extract provided here is updated and worded slightly differently in the current version. The version presented in the research is included here as the views of participants are based upon that wording. For the updated version of the *Crown Court Compendium*, see: <https://www.judiciary.uk/guidance-and-resources/crown-court-compendium/> accessed 3 March 2023.

then I don't know, then it could be a double-edged sword, because if they didn't have those perceptions to begin with and now you are planting the seed.'

Two of the legal professionals emphasised the importance of carefully wording such guidance in order to avoid any potential prejudice to defendants.[80] For example, LP16 recommended that: 'The terms of such a direction would have to be couched carefully in an explanation of the presumption of innocence lest it be misread by a jury as giving a subliminal message such as "he doesn't look like a stereotypical rapist but he is a rapist".' One means of neutralising the risk of prejudice which might attach to the provision of such guidance by the judge is for prosecution counsel to provide instructions on issues like consent and the avoidance of reliance on stereotypical attitudes in deliberations. The potential for prosecution counsel to provide the direction was mentioned by LP6 and LP9. Finally, four of the legal professionals highlighted that any guidance must be sufficiently flexible so that judges retain discretion to tailor it to suit the circumstances of individual cases. [81] These practitioners emphasised that such guidance should not be 'prescriptive' or a 'script' (LP12) or 'too formulated' (LP15).

Participants were also asked when the proposed judicial directions should be given in a trial: at the beginning; at the end, or; at both the beginning and the end. There were differing views on this. Six of the 15 legal professionals who felt that guidance similar to the *Crown Court Compendium* would be useful in Ireland were of the view that such guidance should be given at the end of the trial.[82] Concerns were raised that the provision of such guidance at the start of a trial may potentially be prejudicial or encroach upon the rights of the defendant. For example, LP13 questioned whether giving guidance like this at the start of the trial may 'risk loading it against the defence'. Significantly, the legal practitioners who recommended that such guidance be offered at the end of the trial did so on the basis that such instruction would be most helpful when jurors had heard the evidence in the case. For example, LP13 questioned whether providing guidance on rape myths and consent at the start of the trial could be helpful when jurors are not yet appraised of the facts of the case: '…if you talk about consent and these nebulous concepts at the start of the trials, then you have nothing practical to hang them on.' Similarly, LP3 spoke of the importance of such guidance being 'tailored to the evidence' at the end of the trial and LP5 noted that providing the guidance at the end means that jurors 'can apply it to what they have heard'.

Four of the legal professionals[83] recommended that such guidance be given at the beginning of the trial, with a further three[84] suggesting that such guidance could be given at both the beginning and the end.[85] Those who recommended that it should be given at the beginning of the trial spoke of the importance of clarifying issues for jurors from the start of the trial. This is articulated well by LP4 who commented that 'there's no harm in inputting information before the process begins lest somebody have to self-correct later on'. It was also suggested that such guidance might fit well within the general instructions which are already given to jurors at the start of trials (LP9). Those who recommended that such guidance be given at both the beginning and the end all emphasised the specific importance

[80] LP9; LP16.
[81] LP1; LP12; LP13; LP15.
[82] LP3; LP5; LP6; LP13; LP14; LP16.
[83] LP9; LP2; LP1; LP4.
[84] LP7; LP8; LP10.
[85] Two of the legal professionals in favour of the adoption of guidance similar to the *Crown Court Compendium* did not provide an opinion on when the direction should be given.

of having such guidance at the start but that revisiting it at the end would be helpful. This is articulated well by LP8:

> …it would be no harm to reiterate it [at the end of the trial] because sometimes people look absolutely terrified when they sit in the jury box. …it is a fairly intimidating scenario if you're not used to it… . So I would think probably to repeat it. …What harm in repeating it again to reiterate it. It could be three weeks later, you know?

All of the accompaniment workers interviewed agreed that guidance similar to the *Crown Court Compendium* should be introduced in Ireland. The majority of these participants (8) recommended that this guidance should be given at the beginning and the end of the trial.[86] Notably, accompaniment workers were particularly keen to emphasise the importance of such guidance at the beginning of trials.

> 'I think at the beginning, I would say at the end as well. But definitely the beginning so that they…otherwise their minds will be set I think. If the trial goes through, because they have so much in here when the trial is over, they are trying to absorb so much that it may be a little bit too late. They can be reminded of it at the end, but definitely start off with it.' (AW4)

> 'I certainly think that in the beginning because I mean are [we] going to ask people to question their beliefs at the beginning of a trial or are we going to shoehorn [it] in at the end? Are we saying look, this is a sexual violence case and that brings with it an awful lot of issues and perhaps you've never thought about what a rape victim looks like? But they don't behave a certain way. They don't look a certain way.' (AW9)

The accompaniment workers who recommended that such guidance be provided at the beginning and at the end highlighted the amount of information jurors are required to retain and the length of trials. For these reasons, re-iterating the guidance or reminding jurors about it at the end of the trial was seen to be important*:* '…a trial can go on for the guts of two weeks, well 10 days sometimes. It's a long time to be listening intently and to have something, a reminder of what you heard at the beginning at the end, may be useful.' (AW6)

Overall, the views of the respondents here indicate broad support for the introduction of guidance similar to the *Crown Court Compendium* in Ireland. The likely benefits of such guidance are clear, providing nuanced templates for guiding jurors which judges can easily adapt to suit the facts of individual cases. Importantly, the fact that such directions are not mandatory and may be altered as individual judges see fit obviates any possibility of interference with judicial independence. Thus, it is recommended that guidance similar to the *Crown Court Compendium* should be introduced in Ireland.

[86] AW3; AW4; AW6; AW7; AW8; AW10; AW11; AW12. The remaining four accompaniment workers felt that such guidance should be given at the beginning of the trial: AW1; AW2; AW5; AW9.

Proposals for Formulating Model Judicial Directions for Rape Trials in Ireland

It is proposed that the Judicial Council could take responsibility for the creation of an Irish version of the *Crown Court Compendium*.[87] Drafting effective guidance appropriate to this jurisdiction would require consultation with experts, practitioners and stakeholders in the area. The drafting process should also be informed by authoritative research on societal attitudes towards sexual violence and how this might impact jury deliberations. Trialling draft guidance on members of the public via mock jury research or focus groups would also be advisable to make sure that it is readily understood and conveys the intended message to potential jurors appropriately and efficiently.

Once drafted, it will be necessary to decide when the newly created judicial directions should be provided to jurors, that is, whether guidance should be given at the beginning or end of the trial, or, potentially, at both the beginning and the end. As outlined above, the participants in the *Realities of Rape Trials* project had differing views on this and outlined clearly the advantages and disadvantages of each option. Assessing the responses of the participants in the study, it seems that the best approach is to allow for such directions to be given at both the beginning and the end of the trial, with trial judges determining (in consultation with prosecution and defence counsel) what is appropriate in individual cases. For example, the point made by some of the legal professionals that the provision of guidance may be prejudicial to defendants' fair trial rights is a very valid one. However, this is unlikely to occur where jurors are instructed only on the meaning of consent and/or the avoidance of assumptions as they hear and deliberate on the evidence. This would also address the concerns raised by some legal professionals regarding the need for specific guidance to be linked to the facts of the case (eg on specific assumptions such as those relating to intoxication or delay). This can naturally only be done at the end of the trial when all of the evidence has been produced. Thus, it would seem that a suitable approach would be to allow guidance to be given at both the beginning and the end of the trial, with generalised guidance being provided at the beginning and individualised guidance relating to the specific facts of the case being provided at the end. This would address the concern raised by the majority of the accompaniment workers that, due to the length of trials, jurors can benefit from guidance at both stages. Consequently, it is recommended that trial judges should utilise the proposed model directions on the premise that such instruction could be offered meaningfully at both the beginning and end of trials.

Conclusion

The introduction of a legislative definition of consent in 2017 was undoubtedly a significant, and long overdue, development of Irish sexual offences law. However, while positively defining consent represents an important statement of principle, further interventions are required if the principle of this reform is to have a practical impact on how consent is understood and applied in practice in Irish rape trials. The findings of the *Realities of Rape Trials* project and UK mock jury research show that the reality of the operation of the law in this area involves much more than a straightforward application of legal rules. Rather, the law is interpreted and applied against a complex backdrop of social understandings and, often, misunderstandings about rape and rape victims. The reforms proposed here seek to

[87] In England and Wales, the *Crown Court Compendium* is produced by the Judicial College and is written by senior members of the judiciary and academics: Law Commission (n 53) 13.

bolster the definition of consent, providing greater detail on how the definition should be applied in practice and actively seeking to inform jurors about the realities of sexual violence. The proposed extension of the definition itself would use the law to directly tackle the continuing influence of the 'real rape' stereotype on adjudications of consent. More broadly, the introduction of judicial directions such as those provided in the *Crown Court Compendium* would assist judges in directing jurors on the complexities of consent and the realities of sexual violence. Both proposals would ideally be supported by training for judges and legal professionals, particularly on how to make the most effective use of judicial directions within trials. While both proposals would require further investment and effort at both legislative and policy levels, they are necessary prerequisites[88] to ensure that the promise of the statutorily defining consent generates real changes in how consent is understood and applied in Irish rape trials.

[88] There are, of course, other reforms which are necessary in this area. An obvious reform which is clearly relevant to the discussion here is reformulation of the honest belief defence, which has been reviewed by the Law Reform Commission: *Report: Knowledge Or Belief Concerning Consent In Rape Law* (LRC 122–2019). Reform of the rules of evidence to control the potential for irrelevant and prejudicial information which might contribute to victim-blaming to be inappropriately admitted in trials is also pertinent. A discussion of these potential reforms is outside the scope of this piece but issues such as the admissibility of sexual experience evidence and disclosure of counselling records have been considered in the *Realities of Rape Trials* report.

ALFRED THOMPSON DENNING: A 20TH CENTURY ENGLISH LEGAL ICON RE-EXAMINED[1]

Abstract: The author contends that while Denning was one of the greatest judges in the English-speaking world in the 20th century, his best work was done in the High Court and Court of Appeal between 1944-1957. His rise to fame – prompted in part by the acclaim afforded to his Profumo Report in 1963 – seems to have affected the quality of his writing style and the thoroughness of his judgments. At the same time his iconoclastic view of the common law and his impatience for change awakened the common law from its slumbers and his judgments drove and inspired a new generation of lawyers, ushering in the process a new golden age of both English private and public law.

Author: Gerard Hogan, Judge of the Supreme Court of Ireland

Introduction

In the Autumn of 1705, a 20-year-old youth walked some 250 miles from Arnstadt to Lübeck with a view to seeing an ageing and elderly composer organist with a legendary reputation. The organist in question was Dietrich Buxtehude: the callow youth was one Johann Sebastian Bach.[2] It was in much the same spirit that a 20-year-old callow law student travelled from Tipperary to London in early October 1978 with a view to seeing a venerable and ageing English judge with a legendary reputation. The legal figure was Lord Denning, and the callow youth was… well, me.

It is at this point that this altogether extravagant comparison must immediately end: Bach stayed several months with Buxtehude. The latter, astounded by the young lad's precocious organ playing and compositional skills, promised him that he shortly would be Kapellmeister at Lübeck if only he would stay. You will not be surprised to learn that I had no such luck and Denning certainly did not promise me the reversion to the Master of Rolls if I only I could prolong my stay in London. But in October 1978, none of this mattered to me. I had got to see Denning who, I seem to recall, sat on that occasion with Shaw and Eveleigh LJJ. Nor was the day particularly interesting in itself. My recollection is that Denning delivered a judgment to which the others assented. He then dealt with a series of personal litigants with striking courtesy and remarkable patience, often adding a touch of local knowledge regarding such diverse matters as the train timetables and local church services. I knew immediately I was in the presence of greatness and to have seen him in action was sufficient. In the words of the poet Omar Khayyám, 'And Wilderness were Paradise enow…'

What had prompted all of this? Our lecturer in contract in my undergraduate BCL class at University College, Dublin, Professor Robert Clark, was himself English. He liked to profess indignation at the latest Denning judgments, muttering that the common law would take 300 hundred years or more to recover. And yet one could, I think, at the same time detect a faint touch of national pride: it was, after all, not everywhere where you could encounter such a remarkable and distinctive legal figure. Thus, when approaching Denning, we all, so to speak,

[1] This is a version of a lecture delivered to the Denning Society of Lincoln's Inn delivered at Lincoln's Inn on 22 November 2022. I am very grateful to the Under-Treasurer, Jonathan Crow KC, for the very invitation to speak at the event and to Christian Zabilowicz, Barrister, for helping to organise it.

[2] See Eliot Gardiner, *Music in the Castle of Heaven: A Portrait of Johann Sebastian Bach* (Penguin 2013) 175-176.

have to go through the Red Channel: we all have something to declare. For me Denning was a judicial genius, his failings notwithstanding. If his reputation is presently somewhat eclipsed, a more rounded view of this great judge will surely emerge. In this article, therefore, I propose to examine just why he was great and to explore why Denning's judicial oeuvre and style changed so markedly in the second part of his career.

Denning's early years: High Court and Court of Appeal

Denning was first appointed to the High Court in March 1944 where he was assigned to what was then the Probate, Divorce and Admiralty Division. But thanks to the insight of the incoming Labour Lord Chancellor Jowitt, Denning was first transferred to the King's Bench Division in October 1945 and then subsequently promoted by him to the Court of Appeal in October 1948. While Denning was then in turn promoted to the House of Lords in 1957, I think that it was the period between 1945 and 1957 which shows Denning at his very best. Any number of cases could be cited from this period which marked the arrival of an important, new, and distinctive voice which would help not only to modernise and transform the common law, but whose judgments would come to define it.

I will just shortly mention but three. Although Denning had as counsel appeared for the party relying on an exemption clause in *L'Estrange v Graucob*,[3] he gave the first of many judgments[4] which sought to curtail the effect of such clauses in *Curtis v Chemical Cleaning and Dyeing Co.*[5] Here a shop assistant had negligently misrepresented the effect of the clause to a customer and this, Denning held, was sufficient to disentitle the defendant from relying on the exemption clause.[6] One can see here that Denning was prepared, if necessary, to go further and to create an estoppel in favour of the customer. In *Royal Crown Derby Porcelain Co. Ltd v Russell*,[7] Denning authoritatively re-stated one of the specialist rules of statutory interpretation in clear and authoritative terms:

> I do not believe that whenever a Parliament re-enacts a provision of a statute it thereby gives statutory authority to every erroneous interpretation which has been put upon it. The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms. But if a decision is, in fact, shown to be erroneous, there is no rule of law which prevents it from being overruled.[8]

[3] [1934] KB 394.
[4] See *Karsales (Harrow) Ltd. v Willis* [1956] 1 WLR 936; *Photo Production Ltd. v Securicor Transport* [1978] 1 WLR 863 (but reversed [1980] AC 827); and *George Mitchell Chesterhall v Finney Lock Seeds* [1983] 2 AC 803. The latter case was Lord Denning's last judgment delivered on 29 September 1982. On appeal, Lord Diplock delivered the following touching tribute ([1983] 2 AC 803 at 810): 'I cannot refrain from noting with regret, which is, I am sure, shared by all members of the Appellate Committee of this House, that Lord Denning M.R.'s judgment in the instant case, which was delivered on September 29, 1982 is probably the last in which your Lordships will have the opportunity of enjoying his eminently readable style of exposition and his stimulating and percipient approach to the continuing development of the common law to which he has himself in his judicial lifetime made so outstanding a contribution.'
[5] [1951] 2 KB 805.
[6] '…any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption': [1951] 2 KB 805 at [808]-[809].
[7] [1949] 2 KB 417.
[8] [1949] 2 KB 417, 429.

While the law reports from this period bear ample testament to Denning's remarkable gifts, in some ways one need look no further than Denning's widely praised and magisterial dissent in *Candler v Crane Christmas & Co.*[9] Here, the plaintiff had been invited to invest in a small private company. He first took the precaution of seeking to inspect the company's accounts. He was shown the books at a meeting at which a representative of the auditors was present. The plaintiff's investment was, however, lost as it transpired that the accounts had been negligently prepared.

There is here so much to admire. Denning's judgment holding that *on these facts* the accountants owed a duty of care 'to all those whom they know will rely on their accounts in the transactions for whom they accounts have been prepared'[10] is not only the bridge which carried the law of negligence from *Donoghue v Stevenson*[11] onto *Hedley Byrne v Heller & Co.*[12] and beyond, but it was expressed authoritatively in language of pellucid clarity. Denning himself explained his methodology at the time in an article he wrote in 1957 entitled 'The way of the Iconoclast':

> What, then, is the way of an iconoclast? It is the way of one who is not content to accept cherished beliefs simply because they have long been accepted. If he finds that they are not suited to the times or that they work injustice, he will see whether there is not some competing principle which can be applied to the case in hand. He will search the old cases, and the writers old and new, until he has found it.[13]

Candler is Exhibit A of the early Denning methodology. Denning's immense knowledge of the case-law enabled him 'to search the old cases' and to navigate his way through the 19th century cases from *Winterbottom v Wright*,[14] through to *Le Lievre v Gould*,[15] and on to *Donoghue v Stevenson* itself. One possibly incidental feature of *Candler* might be mentioned here. The judgment is famous for the 'timorous souls'[16] remark to which the majority led by the genial Asquith LJ reacted with commendable equanimity.[17] But it was not all plain sailing. Denning's expansive approach to issues of statutory interpretation[18] and frustration of contract[19] led to his 'verbal beheading'[20] on at least two occasions by Lord Simonds. Both

[9] [1951] 2 KB 164.
[10] [191] 2 KB 164 [185].
[11] [1932] AC 562.
[12] [1964] AC 465.
[13] (1957) *5 Journal of the Society of Public Teachers of Law* 77, 89.
[14] (1842) 10 M & W 109.
[15] [1893] 1 QB 491.
[16] Whether by coincidence or otherwise, the same phrase is to be found in the final aria in Bach's cantata *Es ist ein Trotzig und versagt Ding* (BWV 176), 'Ermuntert euch, furchtsam und schüchtterne Sinne' ('Have courage, fearful, timorous souls'). This is a cantata for Trinity Sunday, containing reflections on how the timorous Nicodemus would only meet Jesus at night. One suspects that this concept of "timorous souls" has deep roots in Protestant eschatology and that Denning may well have unconsciously absorbed this language from this source.
[17] 'I am not concerned with defending the existing state of the law or contending that it is strictly logical – it clearly is not. I am merely recording what I think it is. If this relegates me to the company of 'timorous souls', I must face that consequence with such fortitude as I can command': [1951] 2 KB 164 [195].
[18] *Magor & St. Mellons RDC v Newport Corporation* [1952] AC 189.
[19] *British Movietown News Ltd. v London and District Cinemas Ltd.* [1952] AC 166.
[20] 'I, too, was accused of heresy - and verbally beheaded - by Lord Simonds. You can read it in *Midlands Silicones Ltd. v. Scruttons Ltd.* [1962] AC 446.' per Denning, *The Family Story* (London 1981) 202.

Harman LJ[21] and Lord Hodson[22] also took issue with Denning in direct and highly personalised terms regarding the so-called 'deserted wife's equity'. Heuston states that some senior legal figures from that period were simply not prepared to repeat all that they had seen and heard: one suspects, however, that these comments of Simonds, Harman and Hodson were just the tip of a very large iceberg of resentment, impatience and downright jealousy on the part of some other senior judges. If this is so, then it must have taken considerable personal courage for Denning to remain steadfast in the face of such personalised attacks - both public and private - from his colleagues.

The impact of the Profumo Report

Confidence and courage were, however, qualities which Denning possessed in abundance. About a year after he had returned to the Court of Appeal as Master of the Rolls, he agreed to a request from Prime Minister Macmillan to conduct an inquiry into the Profumo affair.[23] If Denning found the details of the sexual proclivities of the Ward/Keeler circle so personally upsetting that 'he sent the lady shorthand typists from the room',[24] the striking headlines in parts of the report such as 'The man in a mask' and 'The man without a head' nonetheless ensured that Denning would thereafter be a public figure.[25]

In some ways the Profumo Report was a turning point in Denning's career. Note that I am not here concerned with the correctness of the findings, or the propriety of the assurances regarding confidentiality given by Denning to the participants to the effect that their evidence would never be published or even the procedure which was followed.[26] No: what is striking for me is that the publicity had affected Denning; he had become a famous judge whose pronouncements were now newsworthy. One might say that thereafter the pure clear water hewn from the springs of the common law which had heretofore characterised the classic judgments of the late 40s and the 50s such as *High Trees*[27] and *Candler* was allowed over time to become diluted with a certain fizziness borrowed from Fleet Street.

There is here, I think, a comparison between post-Profumo Denning and the psychological torment which publicity and fame brought to the Finnish composer, Jean Sibelius. Both came from respectable middle-class stock, but neither could be said to have come from privileged backgrounds. Both had made their reputations through their own genius, hard

[21] In *Campbell Discount Co. Ltd. v Bridge* [1961] 2 WLR 596 at 605 where Harman L.J. is reported as having said: 'Since the time of Lord Eldon, the system of equity for good or evil has been a very precise one and equitable jurisdiction is exercised on well-known principles. There are some who would have it otherwise, *and I think that Lord Denning is one of them. He, it will be remembered, invented an equity called the equity of the deserted wife. That distressful female's condition has really not been improved at all now that this so-called equity has been analysed.*' (emphasis added). One may suspect that somebody must have had a word with Harman subsequent to the publication of the judgment in the WLRs but because the version in the Official Reports omits these highlighted words ([1961] QB 445, 459) and replaces them with a more anodyne version: 'There are some who would have it otherwise, but as at present advised I am of opinion that, at any rate in the instant case, there is no equitable principle that can be called in aid.'

[22] '[I was] one of the wicked men who was a member of that section of your Lordships' House which made the decision [in *National Provincial Bank v. Ainsworth* [1965] AC 1175] which my noble and learned friend Lord Denning dislikes so much...Lord Denning moves us to tears every time he mentioned a deserted wife, the poor woman he has been protecting in the Court of Appeal for years…' HL Debs vol. 275, col. 649.

[23] *Lord Denning's Report: The Circumstances leading to the Resignation of the Former Secretary of State for War, Mr. JD Profumo* (HMSO, London Cmnd. 2152 1963).

[24] D.R. Thorpe, *Supermac: The Life of Harold Macmillan* (London 2010) 544.

[25] When the Profumo report was published on 26 September 1963, over 4,000 copies were sold in the first hour at HMSO in Kingsway: see Thorpe (n 23) 545.

[26] Dyson states that Lord Mackay LC had subsequently 'modified the undertaking and reduced the length of the embargo to 100 years.' John Dyson, *A Judge's Journey* (Hart 2019) 153. Dyson further records that in 2013 the embargo date was further reduced following a decision of the National Archive Advisory Council.

[27] *Central London Property Trust v. High Trees House Ltd.* [1947] KB 130.

work, and effort. By the 1930s Sibelius had reached the height of his (unexpected) fame, especially in the English-speaking world. He had achieved an undreamt of standing in the musical world and his audience quested for - and demanded - more. Sibelius's response was one of acute self-doubt, retreating to reclusiveness and alcoholism and finally burning his long-awaited 8th symphony along with some other works in an auto-da-fé in the family stove at Ainola sometime in 1943 or 1944. [28] I think that we may be fairly confident that no such fire of reserved judgments ever took place at Whitchurch. In fact, the Profumo Report induced exactly the opposite response in Denning. The Report was a great popular success, laden as it was with gossipy details regarding the activities of the Establishment. But this very success and his newly acquired - if hitherto unexpected - status as a national figure seems to have encouraged Denning to abandon some of the traditional, orthodox features of judging. In contrast to the self-doubt of Sibelius, the success of Profumo and the popular acclaim which went with it seems to have encouraged and enhanced his self-confidence to the point where at times it slipped into self-righteous conviction, a trait which is perhaps visible in the later tussles with the Houses of Lords regarding matters such as exemplary damages in defamation cases[29] and trade union activity.[30]

Denning's writing style also changed. The clear, vivid and elegant language of such early classics as *In re Wingham,*[31] where Denning rejected the idea that the phrase 'actual military service' contained in s. 11 of the Wills Act 1837 should be construed by reference to Roman law practice,[32] gave way at times to a language of populist simplicity in which respect for cadence, style and form – the hallmarks of elegant English prose – seems to have diminished.[33]

Denning's later judicial output

In the period between 1962 and 1982 – roughly the post-Profumo era – Denning delivered thousands of judgments, most of them of supremely high quality. I will take five judgments to highlight aspects of this distinctive oeuvre.

In *Jarvis v Swan Tours,*[34] Denning awarded damages for disappointment, distress and frustration caused by a disappointing holiday experience which itself amounted to a breach of contract. This is still really the leading contemporary authority for damages for disappointment occasioned by a breach of contract. This is an example of Denning's almost unrivalled ability to march through a thicket of somewhat unhelpful authority in order to craft a fair result and an effective remedy, though it is true that many have criticised Denning

[28] See Daniel M. Grimley, *Jean Sibelius: Life, Music, Silence* (London 2021) 199-202.
[29] *Broome v. Cassell & Co.* [1971] QB 354; [1972] AC 1027.
[30] See *Duport Steel v. Sirs* [1980] 1 WLR 142; and *Express Newspapers v. McShane* [1980] AC 672.
[31] [1949] Ch. 187.
[32] Here the Court of Appeal held that a testamentary document made by an RAF trainee based in Canada had been made on active military service and was thus exempt from normal statutory formalities for execution. As Denning put it ([1949] 187, 195): 'If I were to inquire into Roman law, I could perhaps after some research say how Roman law would have dealt with its soldiers on Hadrian's Wall or at the Camp at Chester…. Rid of this Roman test, this Court has to decide what is the proper test.'
[33] It would be difficult to improve on Heuston's words: 'Denning's style had always been unusual: by the mid-seventies it was not quite so admired as it had been. The structure of the judgments was as clear and sound as ever, and often praised by his fellow judges, but a certain striving after effect had become noticeable in the style rather than in the arrangements. There were few or no subordinate clauses and sometimes no verb in the sentences.' For a not atypical example of this later Denning style, see the following passage from *Hubbard v Pitt* [1976] QB 142, 175: 'But there was nothing in the nature of a public nuisance here. No crowds collected. No queues were formed. No obstruction caused. No noises. No smells. No breaches of the peace. Nothing for which an indictment would lie, nor an action on the relation of the Attorney General. And if there was no public nuisance, there can be no question of any individual suing for particular damage therefrom.'
[34] [1973] QB 233.

for inconsistency in terms of traditional liberties.[35] Perhaps we should not be altogether surprised that someone who was prepared to send the female stenographers from the room during the course of the Profumo inquiry would also be prepared to excuse the peremptory expulsion of a female student who had allowed a boyfriend to stay overnight at a teacher training college.[36] And Denning's endeavours to restrict and constrain the operation of trade unions and the operation of the pre-Thatcher industrial relations legislation deserve a separate series of lectures in their own right.

But deep-down Denning stood for the traditional liberties cherished by the common law, and this is why his dissent in *Hubbard v Pitt* is an important manifestation of his belief in the right of free speech and free assembly.[37] Here, left-wing picketers protested on the street outside the offices of an estate agent who, it was said, was responsible for encouraging the 'gentrification' of Islington. Denning refused to grant the interlocutory sought to restrain picketing, saying:

> [The courts] should not interfere by interlocutory injunction with the right to demonstrate and to protest any more than they interfere with the right to free speech; provided that everything is done peaceably and in good order. That is the case here. The only thing of which complaint can legitimately be made is the placards and leaflets. If it turned out at the trial that the words on the placards and leaflets were untrue, then an injunction should be granted. But not at present when, for aught we know, the words may be true and justifiable. And if true, it may be very wholesome for the truth to be made known.[38]

The Birmingham Six

There is no getting away from the fact that Denning's judgment in *McIlkenny v Chief Constable*[39] has entered popular consciousness in my home country and not for reasons that do him much credit. His 'appalling vista' comments are presented as evidence of the fact that 'British Establishment judiciary' were prepared to keep innocent men in jail rather than face up to the truth. Here the plaintiffs had been convicted of murder following the appalling Birmingham bombs of November 1974 in which 21 persons were killed. It was accepted that the plaintiffs had been seriously assaulted while in custody. The key question was whether they had been assaulted by the police or whether they had subsequently been assaulted by

[35] 'It has often been said that on a breach of contract damages cannot be given for mental distress', thus in *Hamblin v. G.W.R.* 1 H. & N. 441; Pollock CB said that damages cannot be given for the disappointment of mind occurring by the breach of a contract And in *Hobbs v. London & South Western Railway* (1875) LR 10 QB122, Mellor J said that 'for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages'. The courts in those days only allowed the plaintiff to recover damages if he suffered physical inconvenience, such as, having to walk five miles home, as in *Hobbs'* case; or to live in an over-crowded house, *Bailey v. Bullock* [1950] 2 All ER 1167. I think that those limitations are out of date. In a proper case, damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset, and frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities. Take the present case. Mr. Jarvis has only a fortnight's holiday in the year. He books it far ahead and looks forward to it all that time. He ought to be compensated for the loss of it.'?': see *Jarvis v Swan Tours Ltd* [1972] EWCA Civ 8, [1973] QB 233 at 237-238..

[36] 'This is a fine example to set for others! And she a girl training to be a teacher!' *Ward v Bradford Corporation* (1970) 70 LGR 27.

[37] [1976] QB 142.

[38] [1976] QB 142.

[39] [1980] 1 QB 283.

prison officers. This was critical because if they had been assaulted while in police custody then the confessions which they had made in such custody would not have been admissible. During their trial the police officers denied that they had been assaulted by them. This evidence was accepted by the jury. During the subsequent prosecution of the prison officers for assault, a specialist in forensic evidence gave evidence that the six accused had been assaulted *both* while in police custody *and* in the custody of the prison officers. The plaintiffs sought to rely on that evidence in their action for civil damages against the police. Following a learned disquisition on the law of estoppel and abuse of process, Denning was quite correct to say that one cannot *generally* seek to mount a collateral attack on a criminal conviction by means of civil proceedings. Yet if justice has any place in a legal system, this principle cannot be converted into an absolute rule. Denning nevertheless continued:

> If the six men win, it will mean that the police were guilty of perjury and threats; that the confessions were involuntary and were improperly admitted in evidence; that the convictions were erroneous. That would mean that the Home Secretary would either have to recommend that they be pardoned, or he would have to remit the case to the Court of Appeal…This is such an appalling vista that every sensible person in the land would say: it cannot be right that these actions would go further.

As I have previously written:

> These deeply unfortunate words would later haunt Denning, not least when these convictions were later quashed.[40] It is, perhaps, easy to be wise after the event, but a judge as experienced as Denning ought surely to have been sufficiently astute to realise that there was then – even by 1980 - a considerable body of evidence to show that the police had assaulted the six men, not least the specialist medical evidence which the prison officers had led in their subsequent criminal trial to which he alludes in his judgment.[41]

Denning and Diplock tussles

It is interesting to compare the respective approaches of Denning and Diplock to two key procedural issues which are at the heart of, respectively, private international law and administrative law. In the first of these, *The Siskina,*[42] raised a problem which was particularly acute for London as a world centre for international trade. Could one obtain a *Mareva*-injunction to restrain the disbursement of insurance moneys where the potential judgment creditor had a cause of action not in England, but abroad? Here The Siskina had sunk in somewhat mysterious circumstances in Greek waters and the London insurers had paid out a large sum by way of compensation. Denning,[43] reversing a strong judgment of Kerr J in the High Court, was robust in his belief that the court had such a jurisdiction to grant such an injunction:

> The shipowners are a 'one ship' company, whose one ship *The Siskina* is sunk beneath the waves. They have no other ship. They have no business and have no intention of carrying on any business. They have no assets except the insurance moneys of $750,000 payable by London underwriters

[40] See the later judgment of the Court of Appeal: *R v McIlkenny* (1991) 93 Crim.App.Rep. 278.
[41] Gerard Hogan, 'Holmes and Denning: Two 20th Century Legal Icons Compared' (2007) 42 Irish Jurist 119, 133.
[42] [1979] AC 210.
[43] Jointed by Lawton LJ; Bridge LJ dissenting.

> for the loss of the *Siskina*.… The cargo-owners want the insurance moneys of $750,000 retained in England - or a sufficient part of it - until their claim for damages is settled. Otherwise, they are afraid - with good reason - that the $750,000 will be paid out to the shipowners and deposited in Switzerland, or in some foreign land: and the cargo-owners will have no chance of getting anything for all the damage they have suffered.[44]

On appeal, however, the House of Lord reversed Denning.[45] Lord Diplock took the view that an interlocutory injunction could only be granted in aid of proceedings that could have been commenced in the English courts:

> Since the transfer to the Supreme Court of Judicature of all the jurisdiction previously exercised by the court of chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was first laid down in the classic judgment of Cotton LJ in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39-40, which has been consistently followed ever since.[46]

It is striking that in a very recent decision, *Broad Idea International v Convoy Collateral*[47] a (bare) majority of the Privy Council concluded[48] that the law had taken a "wrong turn"[49] in *The Siskina,* thereby restoring the original judgment of Denning in preference to that of Diplock. The other great case is *O'Reilly v Mackman.*[50] Could one effectively challenge a public law decision by a form of declaratory action proceeding by writ, thereby by-passing the special procedure for judicial review challenges contained in Ord. 53 RSC? This, like *The Siskina,* presented a type of knotty procedural issue for which Denning had generally little patience.

Both the judgments of Denning in the Court of Appeal and Diplock in the House of Lords can be regarded as masterpieces in their elegant exposition of the development of post-war administrative law. But whereas Denning only laid down a general rule to the effect that it was an abuse to proceed by action 'when he would never have been granted leave to go for judicial review'[51], Diplock appeared to have gone further – and perhaps too far – in saying, more or less, that this was automatically the case when one proceeded by action when one could have gone by judicial review. This itself has given rise to much (needless?) disputes as

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[44] [1979] AC 210, 228. Denning closed his judgment in classic-late Denning style ([1979] AC 210 at 236: 'To the timorous souls I would say in the words of William Cowper:

> 'Ye fearful saints, fresh courage take,
> The clouds ye so much dread
> Are big with mercy, and shall break
> In blessings on your head.'

Instead of 'saints' read 'judges'. Instead of 'mercy' read 'justice.' And you will find a good way to law reform."

[45] As Lord Leggatt JSC put it in *Broad Idea International v. Convoy Collateral* [2022] 2 WLR 703 at 710: 'Lord Denning afterwards wrote that, although well used to reversals by the House of Lords, they were "never so disappointing as this one", particularly because he felt the decision was unjust to the buyers of cargo in the Middle East: see Denning, *Due Process of Law* (1980) 141.'

[46] [1979] AC 210, 256.

[47] [2021] UKPC 24, [2002] 2 WLR 703.

[48] Over dissents from Lord Reed PSC, Lord Hodge DPSC and Sir Geoffrey Vos MR.

[49] 'The shades of *The Siskina* have haunted this area of the law for too long and they should now finally be laid to rest': [2022] 2 WLR 703,744, per Lord Leggatt JSC.

[50] [1983] 2 AC 237.

[51] ibid 258.

to characterisation and perhaps in this respect it is Denning rather than Diplock who has won the verdict of history.

Conclusions

What, then, made Denning such a remarkable judge? He was certainly gifted with all the talents: creativity, insight, judgment, erudition, courtesy, patience, a penchant for hard work and an elegant writing style. But there was something else as well: Denning loved the common law in the same way as he loved the Book of Common Prayer. Just as the characters in Trollope's Barsetshire novels are consumed by ecclesiastical politics and the doings of the cathedral chapter, Denning was devoted to the English legal system in much the same way as Rev. Septimus Harding was to the rituals and practices of the Church of England. For both, their respective institutions represented not only a way of life but were also a matter of national pride. And I think it is this which fundamentally explains Denning's impatient iconoclasm: he so wanted the common law to be fairer and better that he was determined to drive fundamental change. This not only explains *Candler* (and a host of other duty of care cases), but it is at the heart of much of his approach to private law generally, ranging from the approach to exemption clauses on the one hand to the deserted wife's equity on the other. In some ways it was all the reverse of *Barchester Towers*: when Denning came to the bench the 'Low Church' virtues of formalism, literalism and precedent were in the ascendancy. By the end, however, after what Rev. Arabin might have called 'hard fighting', Denning almost single-handedly re-took Hiram's Hospital on behalf of a 'High Church' of judicial creativity, innovation and a certain disdain for precedent and thereby awakened the common law from its slumbers.

And so in closing I may be allowed to claim the privilege of the outsider by giving a detached assessment: Denning's liberation of the common law ushered in a new golden phase of creativity and growth in English law in both private and public law, inspired a new generation of stunning judicial talent and paved the way for necessary constitutional reform such as the creation of the UK Supreme Court. If Denning had his faults - faults which perhaps were accentuated with the passage of years - one can nonetheless say as Posner said of Holmes, that he was not perfect, only great.[52] It has been a special privilege in this place and on this occasion to have been allowed to pay tribute to that greatness.

[52] Richard Posner, *The Essential Holmes* (University of Chicago Press, 1992) xxx.

BOOK REVIEW

Lyndon Harris and Sebastian Walker: Sentencing Principles, Procedure and Practice (3rd edn, Thomson Reuters Sweet & Maxwell 2023) ISBN 9780414108875

Author: Bláithín O'Shea, LLB (UL), LLM (UCD), PhD Candidate (UL)

Prior to the publication of *Sentencing Principles, Procedures and Practice*, Lyndon Harris and Sebastian Walker were lead lawyers on the Law Commission of England and Wales' Sentencing Codification project wherein they instructed Parliamentary Counsel on the drafting of the Sentencing Code and gave evidence to the Joint Committee during its passage through Parliament. These engagements ultimately resulted in the enactment of the Sentencing Code on 1 December 2020 which witnessed the consolidation of fifty Acts of Parliament into a single Sentencing Act. While this exercise may not have resulted in any substantive changes to the law, Harris and Walker claim that the Sentencing Code nevertheless 'makes numerous changes to improve and harmonise the law' and 'marks a new dawn in the in the area of sentencing'.[1] In drawing, then, upon their unique, first-hand knowledge of the central principles underpinning this new era, Harris and Walker have presented readers with a hitherto absent, comprehensive textbook mapping the changing sentencing landscape of England and Wales.

Significantly, *Sentencing Principles, Procedures and Practice* succeeds, not only in yielding a detailed doctrinal account of both the legal principles and procedures which shape contemporary sentencing practice across the Irish Sea (an impressive feat in and of itself, it must be said), but it also crucially frames these developments within a normative discourse that is alert to critical scholarship and empirical studies in the field. The result, in the words of the Honourable Mr. Justice Hilliard, is a 'work of considerable depth and practical utility'.[2] Since its first edition, *Sentencing Principles, Procedure and Practice* has been described as an 'invaluable resource for anyone engaged in sentencing research',[3] and has been cited in the Court of Appeal (Criminal Division).[4] The third edition continues to contribute to the changing sentencing landscape, with additions such as the Police, Crime, Sentencing and Courts Act 2022, recent cases from the Court of Appeal (Criminal Division) and new Sentencing Council guidelines.

In a reflection of its vast breadth of analysis, the book is split into two parts. Part A discusses sentencing in England and Wales, including sentencing principles, procedure and purposes as well as sentencing guidelines under the Sentencing Code. Part B, meanwhile, goes deeper into how courts determine the appropriate sentences for specific criminal offences. Due to the book spanning 18 chapters (in excess of 1,900 pages), the proceeding review naturally reflects a selective account of the salient features of the text.

In Chapter A1, the authors set out general sentencing provisions and principles in England and Wales. They outline how the jurisdiction's sentencing scheme is 'principally' retributive in nature (this is reflected in the availability of custodial and non-custodial sanctions

[1] Lyndon Harris and Sebastian Walker, *Sentencing Principles, Procedure and Practice* (Thomson Reuters, Sweet & Maxwell 2023) vii.
[2] ibid ix.
[3] Tom O'Malley, 'A superb new book on English sentencing law and practice' (*Sentencing, Crime and Justice,* 2 March 2021) <https://sentencingcrimeandjustice.wordpress.com/2021/03/02/a-superb-new-book-on-english-sentencing-law-and-practice/> accessed 3 March 2023.
[4] See *R v Channer* [2022] 1 Cr. App. R. (S.) 3 [47]-[48].

necessitating offences to be serious enough to justify their use) and they observe how accounting for the seriousness of an offence assists in the determination of the sentence to be imposed.[5] The authors address the purpose of sentencing guidelines (namely, to 'supplement' and 'not replace' the general statutory duty of proportionate sentences and to 'guide' the sentencer's discretion).[6] They use academic analysis to explore the relationship between harm and culpability in the absence of guidance on this matter from the Sentencing Code.[7] They also provide a contextual insight into sentencing guidelines and their current provision and application under the Sentencing Act 2020.[8]

Following the introduction to sentencing in England and Wales given in Chapter A1, the remaining Chapters in Part A focus on the different stages of sentencing in more detail. Chapter A2, for instance, addresses the pre-sentence stage in England and Wales. The authors' analysis of this topic is focused on the following: the applicability and limitations of the 'Goodyear' procedure (whereby defendants may ask the court for an advance indicate of the sentence); the limited circumstances in which a deferment order can be imposed under the Sentencing Act 2020; the legislation governing committal for sentence (i.e., the transfer of cases from the magistrates' court to the Crown Court); remission for offenders under the age of 18; and adjournment procedures. Chapter A3 through to Chapter A6 highlight the sentencing hearing, primary and secondary sentencing disposals and the sentencing procedure for children and young persons. Chapter A7 focuses on the consequences of conviction with a specific reference to notification requirements which apply to sexual offences and terrorism offences.

In Chapter A8, the authors discuss how section 2 of the Sentencing Code 'drastically' simplifies the law applying to non-recent offences committed on or after 1 December 2020.[9] Essentially, for any convictions before this date, 'reference must be made to previous preserved regimes' as the Sentencing Code will not apply. At this juncture, the authors also consider the complexities surrounding Article 7 ECHR and the Sentencing Code. The former states that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Thus, in order to ensure compliance with Article 7, the Sentencing Code's 'clean sweep' policy cannot apply in circumstances where 'to do so would expose the offender to a heavier penalty than that which applied at the date of the offence'.[10] In this regard, the authors highlight three situations in which there will need to be 'careful reference' to the date of the offence in order to ensure compliance – offences of murder; life sentences; and minimum sentences.[11] The authors provide further guidance on Article 7 ECHR in circumstances in

[5] Harris and Walker (n 1) para A1-009.
[6] ibid para A1-011.
[7] ibid para A1-012. On this point, the authors argue that 'the weight to be given to culpability and harm should vary with the offence in question, the purpose of criminalisation and the extent to which the assessment of either is built into the actus reus or mens rea requirements.'
[8] ibid paras A1-030 – A1-049.
[9] ibid paras A8-001 – A8-004. For any conviction before this date, reference must be made to 'previous preserved regimes, even where re-sentencing'.
[10] ibid para A8-004. Harris and Walker describe this 'clean sweep' as 'the removal of the need to refer to previous layers of legislation that have been repealed but partially saved by unnecessarily complicated transitional provisions.' – (n 1) vii.
[11] ibid.

which a defendant crosses an age threshold and they also clarify what constitutes a heavier penalty.[12] In the final section of Chapter A8, the authors expound on their argument that 'the question of whether a sentence is lawful… and whether a sentence is appropriate are two distinct questions' by providing the example of a robbery – although it may be *lawful* to impose a life sentence for this offence, it does not mean that it is *appropriate* to impose a life sentence for it. The authors finish the chapter by discussing current approaches in determining the appropriate sentence for an offender with specific reference to the Court of Appeal (Criminal Division), before providing a critical analysis on how to improve this approach.[13]

Chapter A9 details the sensitive and complex issue of sentencing offenders with significant mental health issues or disorders. As the authors themselves note, 'mental health issues or disorders exist on a spectrum'.[14] Accordingly, the specific and separate consideration of offenders falling within this categorisation is welcome as it allows a discussion on how a sentence should vary depending on a person's mental illness or disorder. By splitting the section into three (pre-sentence; disposals available for offenders on conviction; and disposals available where the defendant has been found unfit to plead but to have done the act or omission alleged, or found to be not guilty by reason of insanity), the authors write about this topic with great clarity. The final chapter in Part A focusses on post-sentence issues such as variations in sentences, reviews of sentences, release/recall procedures and breach, amendments and discharges in primary and secondary disposals.

The Chapters contained in Part B are written by the authors in a way that mirrors the modern approach to sentencing in England and Wales for specific offences (i.e., violent and sexual offences, property, drug and driving offences, regulatory offences and offences against justice). More specifically, it explores the imposition of sentences and the application of the sentencing guidelines (and when there are no guidelines applicable, the authors stipulate what the 'general' guideline is) in a practical context. The authors provide commentary on the issues that may arise from the guidelines, but they take a different approach from other sentencing texts in that their commentary only includes case law that expands upon the sentencing guidelines and shows the reader how the guidelines should be interpreted or applied. In doing so, the authors present refreshing insights with practical outcomes.

Sentencing Principles, Procedure and Practice is a rich and considered tome that provides a valuable insight into the continuously evolving sentencing landscape of England and Wales. Through their comprehensive descriptive account of sentencing practice and procedure, Harris and Walker have created a high calibre yet accessible textbook that offers scholars, practitioners and judicial authorities a welcome field guide on navigating the labyrinthian formalities of modern sentencing practice as it is has been re-ordered under the Sentencing Code. However, it would be to do a disservice to the textbook to frame its value entirely in the context of its interrogation of the Sentencing Code of England and Wales. Both the wide applicability of the general sentencing principles excavated in the book – and the scholarly deeper critique of their operation – offers rich, transferrable insights that might usefully inform other common law jurisdictions in their approach to sentencing. Indeed, from an Irish context, the text may be particularly valuable to those on the Sentencing Guidelines and

[12] ibid paras A8-008 – A8-011.
[13] ibid para A8-014.
[14] ibid para A9-001.

Information Committee ('SGIC') in preparing draft sentencing guidelines following their empirical analysis of data pertaining to sentencing practices in Ireland.[15]

[15] See section 23(2) of the Judicial Council Act 2019; Jay Gormley and others, *Assessing Approaches to Sentencing Data Collection and Analysis: Final Report* (Judicial Council of Ireland 5 May 2022).

BOOK REVIEW

Oonagh B. Breen, and Noel McGrath (eds), *Palles, The Legal Legacy of the Last Lord Chief Baron* (Dublin and Chicago: Four Courts Press 2022)

Author: Mr Justice Max Barrett

Christopher Palles (1831-1920) was born in Dublin, the son of a resolutely Catholic family. He later studied at Trinity College Dublin, taking a degree in mathematics. But – like Lords Denning and Mackay of Clashfern after him – he forsook a career in mathematics and opted for a legal career instead. He eventually served as attorney general for Ireland in Gladstone's first administration and was appointed chief baron in one of Gladstone's last acts as prime minister after losing the 1874 election. This book comprises a series of essays that between them consider, in a highly readable manner, the making of that appointment and the remarkable 42-year judicial career that followed.

Professor Breen and Dr McGrath provide the opening chapter, offering an overview of Palles' career, identifying some issues that can present in assessing a judge's career, and seeking to gauge Palles' international significance, a point to which they return in their concluding chapter. I was struck by the difficulties they describe, and enlightened by the guidance they offer, as regards undertaking the writing of judicial biography, a much-neglected field of scholarship in Ireland (with Delany's long-ago biography of Palles being a notable exception).[1]

Dr Cope provides a fascinating insight into the mechanics of Palles' appointment, the manoeuvrings which preceded it, and the (difficult-to-understand) hesitation Gladstone showed in making the appointment. It is striking when one reads Cope's chapter how little in some ways the judicial appointments process has evolved since the 19th century and how the pre-Independence Irish bench might so greatly have been diminished had Gladstone not overcome his initial hesitation.

Dr Hamill examines Palles' reaction to the Judicature Act of 1877 and its fusion of legal and equitable jurisdiction. What is interesting to me as a judge is how much 'at sea' Palles and his colleagues appear to have been in wrestling with the opportunities the Act presented, preferring (even after the Act) to view common law and equity as two separate fish swimming in a common stream of justice. Hamill's chapter puts in mind the challenges that contemporary judges face in wrestling with the different but not dissimilar opportunities and challenges that present in terms of evolving the justice system in a highly technological age.

Dr McGrath considers Palles' judgments in the area of company law, pointing to the unvarying pragmatism that Palles brought to the various company cases he decided. I noted with interest McGrath's suggestion that Palles might well be unimpressed by the ongoing 'doctrinaire refusal' of our contemporary courts to allow directors to represent impecunious companies before the courts.[2] The needs of the poor, I submit, require constant attentiveness from judges; for the rich can afford to look after themselves.

Professor Dooley's chapter on Palles and the Irish land question is a gripping read. As a lawyer I was struck by Dooley's intimations as to the importance of legal history to a person seeking a rounded view of yesterday's world and by his observation that Palles does not

[1] See Vincent Thomas Hyginus Delany, *Christopher Palles, His Life and Times* (Dublin: Allen Figgis & Co. 1960).
[2] Oonagh B. Breen, and Noel McGrath (eds), Palles, The Legal Legacy of the Last Lord Chief Baron (Dublin and Chicago: Four Courts Press 2022) 69.

feature in any of the major survey histories of the 19th century. Even a great judge may not (it seems) cut so great a figure on the wider historical stage.

Professor Breen addresses Palles' significant impact on charity law here in Ireland and also in the wider Commonwealth. One cannot but be impressed by Palles' willingness to evolve his thinking in this area (to the point of reversing his own judgment in *AG v Delaney* (1875) IR 10 CL 104 in the case of *O'Hanlon v Logue* [1906] 1 IR 247). Implicit in this reversal, it seems to me, was an understanding that there is rarely an unerringly right answer to the issues that judges decide.

Dr Coen brings the reader on a memorable journey through Palles' application of the laws of contempt and the striking eloquence of Palles' observations in the late-19th century case of *Ex parte Tanner*[3] on the substance and rationale of the law of contempt. I was struck also by the simple humanity of how Palles dealt patiently with a barrister who (sadly) appears to have become mentally unsettled and was prone to making wild applications to the courts – and by how great a model of forbearance Palles still provides for modern judges in this regard.

Professor Costello (well known to judges for his book on the law of *habeas corpus*) deals with Palles' extension of the writ (and relief) of *certiorari*. The longer I am a judge, the more I wonder whether judicial review is not an area in need of significant reform, and whether, even in the High Court, a three-judge court as standard would be preferable to the despatch of cases by a solitary judge. Palles, Costello observes, sought ever 'to expand the reach of judicial review'.[4] But there is no reason such reach cannot be coupled with refinement and reform.

Professor Howlin considers Palles' contribution to the law on compensation for criminal injuries, focusing initially on the misfortunes of a Mrs Barrett (who naturally has my sympathies). She got up one morning to find that the windows of her shop in Tralee had been vandalized and later sought to receive compensation for this injury. She failed but – doubtless of little comfort to her – Palles' judgment in her case prompted later reform of applicable law. Striking to me was the tightrope Palles so often had to walk in this area, juggling law, justice, and social concerns: *plus ça change, plus c'est la même chose.*

Professor Ryan considers Palles' role in evolving the law on vicarious liability and the non-delegable duty of care. I was intrigued by how Palles' decision in *Hegarty v Shine* (1878) 4 LR Ir. 288 was recently revisited by the Court of Appeal (in *McDonald v Conroy* [2020] IECA 239) for its potential relevance to a tort of grooming – a wrongdoing most 19th century people likely did not understand to exist. Truly when one puts a judgment 'out there', one has no idea what use may be made of it in the future.

Professor Hedley highlights the pioneering and significant role of Palles as an architect of Ireland's modern law of torts. In particular, Palles played a critical role in evolving the law on nervous shock. I laughed aloud at Hedley's re-telling of the 1820s anecdote about the Irish lord chancellor, Lord Manners (1756-1842), asking a barrister how certain he was of a particular proposition and being told that it was the law a half-hour previously but that the packet-boat (and hence news of the latest judgments from the English courts) had yet to arrive.

Last but far from least comes Professor O'Dell's sparkling account of Palles' role in the modern law of defamation. O'Dell's chapter tells almost as much about defamation as it does

[3] Ex parte Tanner, MP, Judgments of the Superior Courts (Ireland), p343 (Exch Div, 1889).
[4] ibid 139.

about Palles and is a useful read for any judge who wants an informative account of the origins and direction of Ireland's law of defamation. O'Dell's concluding remarks involve perhaps the highest praise that can be given to any judge. Thus, he writes:

> Palles CB's judgments are astonishingly modern. It is not just that his judgments are often the first statement of principle of the current law; it is more than that. At a time when legal procedures and writing styles were convoluted Palles judged and wrote with meticulous precision and accessible clarity. His longevity on the bench has bequeathed to us a rich legacy of case law, as important for its legal wisdom as it is notable for its crystalline prose.[5]

This is a stimulating read by skilled authors about a singular judge. I commend it highly to anyone with an interest in law and/or history. It deserves the widest readership.

[5] ibid 209.