

Editorial

Fáilte go dtí an dara eagrán 2024.

As the legal landscape continues to evolve, so too does the breadth and depth of scholarship that seeks to explore, analyse, and shape it. This edition of the Irish Judicial Studies Journal brings together an abundant and diverse collection of articles that reflect the dynamic nature of contemporary law, covering topics that span from foundational principles to cutting-edge issues at the forefront of legal practice. Within these pages, you will find insights from a variety of legal fields, offering perspectives on both longstanding debates and emerging challenges. As always, we hope that the ideas presented here spark further dialogue and inspire new avenues of inquiry within the legal community.

In the first article Jamie McLoughlin examines Article 40.5 of Bunreacht na hÉireann and compares it to Section 26(3) of the South African Constitution, making the argument that both represent instances of a ‘defensive social right’ at work. He also proposes that the addition of an express right to housing in the Constitution would complement and fortify the interpretation of Article 40.5’s guarantee of the inviolability of the ‘dwelling’ as a ‘defensive social right’.

Then Róisín Á Costello analyses the test for recovery of non-material damages in Irish law. She argues that the existing tortious test for the recovery of such damages, established in *Kelly v Hennessey*, is applicable to such claims but also that there are problems with the test arising out of non-engagement with it and that further clarity is needed.

Next Stephen Kelly considers the concept of desuetude, where a law ceases to apply due to disuse or non-enforcement over a period of time. He examines the approach taken in Ireland and in the United Kingdom and offers some thoughts on developing a coherent doctrine.

In the following article, Mary Donnelly and Caoimhe Gleeson examine the Assisted Decision-Making (Capacity) Act 2015 and in particular, the role of the relevant person’s voice. It identifies efforts being made by judges to ensure that the relevant person’s voice is heard but also recognises some of the challenges that can arise in delivering on this. It identifies the need for further resourcing to support the voice requirements in the Act, including better access to independent advocacy, and for enhanced guidance for courts and legal practitioners.

The principle of *res ipsa loquitur* and its interpretation across jurisdictions is the subject of the next article by Michael McGrath with Leah Powell. The piece addresses the myriad of descriptions that have been attached to the principle and the inconsistent views of its procedural effect. Calls for the doctrine’s abolition are rejected and it is argued that the principle is distinct from wider doctrines such as those of peculiar knowledge or capacity for proof and ought not to be conflated with them.

John Quinn examines the case of *McCool v Honeywell*, in the next piece and he argues that the case is notable for its focus on the public policy rationales underpinning the rule as well as for Charleton J’s dissenting judgment. The article analyses the decision and welcomes the engagement with the public policy dimensions of company law.

The next article examines the relationship between Mincéirí/Travellers and judges as shaped by racism on the part of the settled population against the Mincéirí/Travellers in Ireland. Mary Rose Gearty, Jennifer Scheppe, Amanda Haynes and Sindy Joyce describe unconscious bias and institutional racism, and present empirical evidence of Travellers' experiences of institutional and individual racism within the Irish criminal justice system. They also describe a range of measures to address Travellers' access to justice, using the lens of judicial training informed by international human rights law.

Ian O'Donnell then offers some reflections on the role of the short prison sentence and what might be done to reduce its popularity. Relying on experience gained as a lay magistrate, he argues that such sentences are disruptive without being reformatory, expensive, and contribute to prison overcrowding and that the interests of justice would be better served by an increased reliance on community service and restorative justice.

The issue of the judge's charge is under examination in the next piece by Mark Coen, Niamh Howlin, and Colette Barry. They consider the recent case of the *People (DPP) v Lane*, where the Supreme Court indicated that it wished to see the adoption of written directions, particularly in complicated trials. The article considers the likely impact of that decision, drawing on the findings of a qualitative study on judge-jury interactions in Ireland previously carried out by the authors.

Finally, we have a mini-symposium on judicial appointments systems. The articles here arose out of a seminar held as part of an IRC-funded project on judicial selection procedures in Ireland. Richard Devlin and Antonia Chircop, Patrick O'Brien, and Michael Robinson discuss aspects of judicial appointments processes in Canada, England and Wales, and Northern Ireland.

Many thanks to our copy-editorial team: Victoria O'Connor, Bríd Kenny, Deirbhile Clenaghan, Emma Bowie, Alessandra Grosariu, Muireann Carton, and Anna Miskelly. Particular thanks also to Deputy-Editor Dr Laura Donnellan and to articles editor Dr Michelle Stevenson for all their work in preparing this edition. Thanks, as always, to all members of the editorial team and to our judicial board. Final thanks to all the authors who contributed to this edition, and to the reviewers, who gave so generously of their time.

Signing-off

This will be my 13th and last edition as Editor in Chief. As I close this edition of *The Irish Judicial Studies Journal*, it is with a sense of accomplishment and gratitude that I reflect on the contributions of our esteemed authors, reviewers, and board members over the last seven years.

In late 2015, I approached my head of School – Professor Shane Kilcommins – with the idea of pitching a re-launch of the Journal to the Office of the Chief Justice. The Journal had not been published since 2010 and I felt this was a huge loss given the significant opportunities to be gained from a platform where judges, academics and practitioners can engage on legal scholarship and the practicalities of Irish law. Luckily, the then Chief Justice Susan Denham agreed, and a plan was hatched to re-launch the Journal. Professor Raymond Friel and Mr Justice Peter Charleton shouldered the burden of the set-up and liaised with the Courts Service on renaming and redesigning the Journal. Since that time, the Journal has gone from strength to strength; in 2021 we became the first Irish law journal to be listed on SCOPUS

(an international, multidisciplinary citation database for high-quality journals) and we are still the highest-ranked Irish law journal on the database. We are also the most cited journal in the Courts in the last few years – many articles have been cited and relied on in judgments – some on multiple occasions. The Journal has also proved to be a successful space for judicial-academic dialogue. The Journal aligns with the responsibilities and duties of judges to engage in education and training and indeed many articles that appear in the Journal have this as their aim. We are lucky in this jurisdiction to have a judiciary that is so engaged with scholarship and indeed so willing to be involved, as well as to consider new scholarship on issues relating to Irish law and the judicial role.

I am proud that the Journal has showcased a diversity of scholarship from the most senior judges and academics to early-career scholars and practitioners and I think it is important that a variety of voices should always be heard. A big part of the Journal's success is that it is open-access and available to everyone. This also means that the journal is non-profit and all involvement in the Journal is voluntary. As a consequence, I have a huge number of people to thank for all their hard work over the years and I am truly grateful to the following:

To Professors Shane Kilcommins and Raymond Friel, for all their work in the early years; to the Chief Justices Susan Denham, Frank Clarke and Donal O'Donnell for all their support; to Lucy Davis, Bláithín O'Shea and everyone involved in copy-editing over the years; to members of the Court Service who have helped in different ways, particularly Declan Calpin; to the members of the editorial board at the School of Law in UL, who have been a great support, especially Laura Donnellan; to the members of the judicial board, particularly Mr Justice Brian Murray and Mr Justice Max Barrett, who have always been helpful and enthusiastic in their roles; and to all the authors who have trusted us to publish their work – mo mhíle buíochas do gach aon duine.

I also want to say a special thanks for the goodwill, patience, and generosity of all those who have acted as reviewers for the journal over the years – it is not possible to name anyone of course but they know who they are, and without them, it simply would not be possible to run a voluntary journal such as this.

A sincere thank you to Mr Justice Peter Charleton, who has been at the heart of the Journal since its relaunch. His unerring enthusiasm is admirable, from producing an impressive number of thought-provoking articles to encouraging his colleagues to get involved, the part he has played in the success of the Journal cannot be underestimated and I am very grateful to him.

Finally, I extend my thanks to all those who have contributed in any way to the success of this journal. We are grateful to our readers and supporters who ensure that *The Irish Judicial Studies Journal* continues to be a valuable resource in the pursuit of legal excellence. With more developments and challenges in the legal ecosystem, our role as writers and analysts of the law is more crucial than ever. Law journals serve as forums for critical reflection, fostering dialogue on pressing legal and ethical dilemmas. The articles published here do not merely reflect the state of the law – they shape it, helping to ensure that legal principles remain responsive to the challenges of our time. Looking ahead, *The Irish Judicial Studies Journal* remains committed to fostering high-quality, rigorous research that not only addresses the technicalities of the law but also engages with its moral, social, and political implications and it will continue to promote dialogue between all those who interact with the law in Ireland.

I leave the post of Editor now but not the Journal itself and so I look forward to seeing the continued success of the Journal in a different role. I wish the incoming Editor – Professor Jennifer Schweppe – all the very best, and I am sure she will continue to strive for excellence and aim to achieve ever greater heights with energy and enthusiasm.

I am privileged to have acted as Editor for this esteemed journal and I have enjoyed every minute.

Go dté sibh slán.

Professor Laura Cahillane
Editor in Chief