Legal Ease

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Note from your Editors

Welcome to the winter edition of *Legal Ease.* We try to ensure that there is a variety of material and information to keep you the reader fully updated. We could not complete this task without the assistance of our contributors and those who inform us of new judgments or developments. It is heartening to have in this issue contributions from our colleagues, right across the Board, in mediation, law centres, management and administration. We are at the forefront of law and mediation in Ireland. We note in particular the judgment in *A O'D v Judge Constantine G O'Leary [2016] 10 JIC 1403 [2016] IEHC 555* where judicial review instituted by one of our law centres resulted in (some) clarification in relation to the role of *guardian ad litem* in child care proceedings. These are exciting times with the collocation programmes for mediation and law centres well underway in a number of locations. The Board has also been actively involved in the development and launch of the national "Abhaile" mortgage arrears scheme. We promise to bring you more on these initiatives in our spring edition. We welcome your ongoing support, feedback and contributions. Finally I want to thank my co-editor Zoë Melling who is deserting us, for a while at least, to take up an exciting post in Sydney. I cannot thank her enough for her hard work and expertise and her good humoured and warm support. I and this publication will miss her skill and company. I am sure you will join with me in wishing her every success and happiness and we look forward to many future articles from down under.

Phil O'Laoide, Regional Manager
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With "Dignity at Work Week" upon us I would like to echo Fiona McAuslan's words that as a staff member of the Legal Aid Board it is important to me to be valued by others, rather than tolerated. I am very fortunate to have worked with some wonderful colleagues during my 9 ½ years in the Board, and I am very grateful to the many people who have given positive feedback on the library service and made my job so enjoyable. I wish you all the best for the future and hope that we will meet again one day.

Zoë Melling, Librarian
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Dignity in the Workplace - Why Each of Us Counts

Fiona McAuslan, Regional Manager, Family Mediation Service

As many reading this article will know, the definition for bullying is the following: "Repeated inappropriate behaviour, direct or indirect whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work".[1]

An organisation's anti-bullying procedures are often under the wider policy of 'Dignity in the Workplace'. I have always been struck by the nobility of this phrase. The evocation of an employee's value and well being in the word "dignity" gives us a complete sense of the human condition being aspired to in the policy.

As a Shop Steward many years ago, I was involved in a number of bullying cases which went through formal proceedings. These were always difficult cases and it wasn't until I started training as a mediator that I learned why each of these cases ended so unsatisfactorily for all parties. The above description talks of repeated behaviours, however bullying is a highly complex relationship where one party has power and control over the other.

By its very nature it is difficult to investigate in a formal process because while there may be types of behaviours obvious to a third party, all too often, a lot goes on between the parties that is unseen. A strong glance or a quick comment can be enough to perpetuate the fear. The person being bullied slowly withers under the attention of the other.

There is much to say about how we evidence what is going on, under the terms of the policy. However, it is internationally accepted that the best course is to foster the type of organisation that focuses on the word 'Dignity' for its staff, as a real and tangible value in the workplace. Through this, bullying stops having the oxygen to grow.

So, what does the everyday staff member do to help achieve this? What should our response be? Well, maybe first of all we need to understand that there are other words at the heart of the workplace relationships as evocative as

[1]Dignity at Work: An Anti-Bullying, Harassment and Sexual Harassment Policy for the Irish Civil Service: http://hr.per.gov.ie/wp-content/uploads/2015/02/here.pdf

'Dignity', but which are diminishing of others. One of those words is 'shame'. If a human being is continually shamed, their spirit dies within them. It is one of the most pernicious of human actions to shame another and yet, when it comes to shaming, we are a very permissive society. We belittle when we make a joke at another's expense, or exclude from a conversation. We win arguments which carelessly leave others as losers, not worrying too much about the after effect of our work relationship.

We also can find ourselves on the brunt of some else's "do as I say, not as I do" attitude to giving us instructions, often the result of a rather hierarchical organisation.

I believe that our permissive ways have inured us towards those little acts of shaming we are all guilty of. I am sure each of us can think of times when, involved in "heated discussions" or "matters of principle", upholding the dignity of our fellow colleague has not been uppermost in our mind! The cutting look, or knowing glance between others, the half smile. We all know the signs. We human beings are marvelously intuitive. It is rare that we do not pick up the sharp edge under the carefully worded sentence.....and we shrink a little.

As a staff member of the Legal Aid Board, I do not want to be tolerated by others, I want to be valued. Within that difference lays our understanding of Dignity. Our organisational posts might give us authority over others, but we are all equals as people.

Is it shocking to think that we can be responsible for someone else feeling belittled? Yes, of course it is. However, if we treated shame as the toxic substance it is, being careful how we dole it out to others and mindful of the effects of that toxicity, we could well reduce the belittling and bullying of others around us. Dignity in the workplace is down to the culture we each influence on an hour by hour basis at our place of work.

As a staff member of the Legal Aid Board, I do not want to be tolerated by others, I want to be valued. Within that difference lies our understanding of Dignity. Our organisational posts might give us authority over others, but we are all equals as people. Each time we treat our fellow staff member with care and attention, even when arguing our point, we enhance the working environment for all staff members. Each time we treat our fellow staff member with an off hand sense of unimportance, or deliberate undermining, we tip our workplace towards the opposite.

So, as we work our way through Dignity At Work Week, it is worth taking time to think. What would our colleagues say about how I treat them?

The Legal Aid Board's Dignity at Work Week takes place from 7-11 November 2016.

The aim of the week is to take a fresh look at the whole issue of dignity and respect at work in the Legal Aid Board and to raise awareness about bullying, harassment and sexual harassment and how to deal with them.

Over the week there will be a different Dignity at Work theme each day.

Guardian Ad Litem—Have All Our Questions Been Answered?

Phil O'Laoide,
Regional Manager

The role of a guardian ad litem (GAL) and the guardian's power to instruct legal representatives are, I would suggest, the most frequently discussed topics by practitioners in the area of child care law. The debate whether the guardian should be regarded as a party to the proceedings or a "mere" witness without the right to cross-examine or seek discovery has run since GALs were first appointed. Many of us who acted on behalf of parents in defending child care proceedings brought under the Child Care Act 1991 (1991 Act) saw the Guardian, particularly where the guardian supported the view of the Child and Family Agency, as providing the parents with two opposing legal teams. We frequently argued that Guardians should be like any other witness providing to the court, an expert view on the best interest of the child and a report of the child's wishes. On the other hand we too were the very practitioners who would seek the appointment of the guardian so that we could ensure the child would have a voice in court and we could concentrate on getting the best results for our client's interests.

These questions and competing arguments came before the High Court in a Judicial Review case *A O'D v O'Leary and Others [2016] IEHC 555.*

The Applicant was represented by the Legal Aid Board and judgment was given on 14th October by Ms Justice Baker.

The Background

The Applicant was the mother of E O'D who was almost seven years on the date of the judgement and had been placed firstly in voluntary foster care and was then later the subject of care proceedings under the 1991 Act Child Care Act. A succession of care orders were made by the District Court. A guardian was appointed by the District Court Judge on the application of the mother. The order appointing the guardian was in accordance with the District Court Rules and provided for her:

"to act in the proceedings on behalf of the minor, the Court having determined that she was a fit and proper person to act in such role, that she had no interest in the matter in question in the proceedings adverse to that of the minor, and that she consented to so act".

The Guardian sought to have legal representation as she regarded the case to be complex and that the best interests of the child required she engage a solicitor. This was opposed by the mother and the child's father and an application was brought to the District Court to determine whether there was an

entitlement by this guardian to legal representation. The court ordered that

"… the Guardian ad litem is entitled to instruct a solicitor, or solicitor and counsel, who may with the leave of the Court act as an advocate for the Guardian in the same way as an advocate of any party in the proceedings."

It was the correctness of this order that was challenged in the JR proceedings. The mother sought:

- An order of Certiorari quashing the order of the District Judge and
- Declaratory Relief that it is not within the power of a GAL, who has been appointed under the 1991 Act as amended to become involved in the determination of facts which are disputed between the CFA and the parent of a child the subject of care proceedings.

The (District) Court ordered that "… the Guardian ad litem is entitled to instruct a solicitor, or solicitor and counsel, who may with the leave of the Court act as an advocate for the Guardian in the same way as an advocate of any party in the proceedings."

Section 25 and Section 26 of the 1991 Act

The court examined the legislative framework and in particular Sections 25 and 26 of the 1991 Act. Section 26 gives the court the power to appoint a guardian. Section 25 allows for the child to become a party to the proceedings and provides for legal representations for that child. There is no such provision expressly made for the guardian in section 26. Ms Justice Baker was of the view that some difference was envisaged by the legislature between the role of a child who is a party to the proceedings and the child on whose behalf a guardian is appointed. *"These are intended to be, and are expressed to be, mutually exclusive processes by which the child engages with the proceedings."*

The judge in examining section 25 said it contained a procedural exception to the general rule that a child had "litigation disability". A child, the subject matter of care proceedings, can be joined to those proceedings without an application by a "next friend" as happens in other litigation. Where a child is of tender years or too immature to be joined as a party the court can make the appointment of the GAL under section 26. She considered the appointment of a guardian to be an alternative means of ensuring the child's participation in the proceedings and that *"it does not impute a lesser status or a lower degree of participation."*

The Role: Not a Witness and Not a Party

In examining the Guardians' role the Judge found no assistance in the legislation but did find relevance in the elements of the role as identified by MacMenamin J in *HSE v DK [2007] IEHC 488* (which was not a child care case). However Ms Justice Baker considered that the GAL's role was not solely that of an expert providing reports as Section 27 of the 1991 act expressly provides for the obtaining of expert reports. The Judge adopted a schematic interpretation of the legislations and held that a GAL appointed under section 26 *"is envisaged as performing a role different from the*

reporting and assessment role carried out by the person preparing a report under s.27. I consider that the function of the guardian ad litem appointed under s.26 is to represent the child in the litigation, and to promote the interests of the child and the interests of justice. The furtherance of the interests of justice by the appointment of the guardian ad litem would suggest that the Oireachtas had in mind that the guardian ad litem would take a role consistent with the furtherance of the interests of justice, and therefore will take a role in the proceedings not merely as a witness".

However the judge pointed out that the role of an appointed GAL may not always fit readily with the breadth of the role of a party. She differentiated with guardians ad litem appointed in other proceedings (e.g. administration of estates or in the cases of person of unsound mind not so found) where the guardian acting *ad litem* is a party to the proceedings whether as plaintiff or defendant. In childcare proceedings however the child whom the guardian "represents" is not a party and does not have the role of defending the proceedings.

The court noted that the District Court Judge had reserved the power to restrict the solicitor for the Guardian to engage in factual or legal questioning of matters of which the judge had *seisin* and the guardian could act as an advocate only with the leave of the court.

Fairness and Fair Process

Ms Justice Baker was of the view that because of the extent to which a care order can impact on the rights of a child the child has a right to fair procedures. The judge said Article 42A gives the child constitutional rights beyond merely common law or statutory rights. The GAL had argued that it would impinge on the fairness of the proceedings if she was not to have legal representation and be able to adduce evidence, cross examine and make submissions.

Looking at fairness to the parents the judge pointed out that no argument can be made that the joining of a child with legal representation to the proceeding would be "unfairly burdensome" to the parents and that she could see no difference in the increases burden that might arise from the order of the District Judge in the case at hand.

The judge concluded that the Oireachtas intended the appointments of Guardians to be a means whereby a child could engage in the proceedings and that the appointment was an alternative to the joining of the child as a party to the proceedings.

The judge concluded that the Oireachtas intended the appointments of Guardians to be a means whereby a child could engage in the proceedings and that the appointment was an alternative to the joining of the child as a party to the proceedings. A child joined as a party is entitled to legal representation.

The court held the guardian must have the capacity to engage a solicitor or solicitor and counsel though this is not mandatory and is in the judge's view *"a necessary implication from the scheme of the Act if one is to interpret it in the context of constitutional and natural fair*

procedures, and if a child who is represented by a guardian ad litem is to be treated as having full procedural rights to engage in the proceedings".

The court refused the reliefs sought.

Questions Answered or More Questions?

In the case discussed the District Judge had carefully reserved for himself the power to restrict the capacity of the solicitor for the guardian to engage in factual and legal questioning of matters of which he had *seisin*. I would submit that such management and exercise of judicial discretion is not universally applied.

The Answers We Have:

- Section 26 is of no assistance in deciding the role or scope of a GAL
- There are no requirements in the present legislation for the GAL to have specific qualifications as a social worker or child expert
- The GAL is a not a party to the proceedings
- The GAL is more than a witness

It is a matter for the court to determine the remit and role of the GAL and his/her legal team.

The GAL is entitled to seek and to choose its own legal representation.

The appointment of legal representation for a guardian should only apply in appropriate cases and to ensure fairness of the process for the child.

The Last Word

We will give the last word to Colm Roberts, Solicitor, who had instituted the Judicial Review proceedings. Colm is of the view that this judgement helpfully clarifies the position of the guardian ad litem and in particular his/her entitlement to legal representation. He believes that it is now clear that legal representation should only be available in suitable cases and further that the lawyer's role in such cases will be determined by the interests of justice and always subject to the active supervision of the Court.

Human Trafficking Second National Action Plan

Phil O'Laoide, Regional Manager

The second action plan to prevent and combat human trafficking in Ireland was launched by the Tánaiste on 17th October 2016. This action plan seeks to build on the work carried out to date and set out Ireland's strategy for the coming years. We in Ireland have had the benefit of international evaluations of our practices and policies in the area of human trafficking prevention and this second national plan seeks to build on the strengths identified and make improvements where necessary. The Tanaiste emphasised once again the crucial role that civil society must play and that the partnership between state and civil society will be central to tackling this crime and in supporting victims.

There are 8 goals and 65 actions in this plan:

- Prevent trafficking in human beings
- Identify, assist, protect and support victims of trafficking in human beings
- Ensure an effective criminal justice response
- Ensure that Ireland's response to human trafficking complies with the requirements of a human rights-based approach and is gender sensitive
- Ensure effective co-ordination and co-operation between key players both nationally and internationally
- Increase the level of knowledge of emerging trends in the trafficking of human beings
- And continue to ensure an effective response to child trafficking

The prevention strategy continues to focus on training and raising awareness. There will now be more emphasis on training of frontline personnel in social and emergency services beyond the traditional sectors such as Gardai and labour inspectors. It is recognised in this plan that efforts to reduce the demand for the services of human trafficking are vitally important. As the reports states "if the demand for the services of victims can be reduced, and hopefully eliminated, the business model of trafficker's can be dismantled".

A Day in the Life of a Citizens Information Service Office

Mary Fogarty,
Blanchardstown Law Centre

As Blanchardstown is such a highly populated area and there are many resources that we were not aware of, our manager Joan Crawford arranged a day with the Department of Social Protection to familiarise ourselves with how they worked. We also had two representatives from Citizens Advice who came to our offices to tell us about their services.

It was suggested that a member of staff spend a day with Citizens Advice to sit in with a member of their staff to get a more in-depth idea of the type of queries they deal with, as often we may need to refer people to other services in the Blanchardstown area and it is important that we know exactly what type of services are available.

I spent a day with the Citizens Advice Information Centre which is situated in the Westend Office Park, Snugborough Road Extension, Blanchardstown, Dublin 15. I set up two half day visits. There are four full time staff (1 Manager, 1 Administrator, 1.5 Information Officers, 7 Community Employment Officers and 15

volunteers). On the first day I sat in with one of the full time staff members and the second day with a very experienced voluntary worker. There was a waiting room with leaflets for all ranges of services to assist the community and a number was assigned to each client when they came in so that they were called in turn. N.B. This service is a free service and you do not have to make an appointment - it is a walk in facility. All queries are confidential.

The way the system works is that the client is called into a private office and each client's query is taken on its own merit. The queries range from social welfare payment issues, landlord and tenant issues, employment rights, immigration queries and any issues where the client has a difficulty in filling out forms, to explaining a letter the client may not understand. They will also calculate entitlements for the client but the purpose of Citizens Information is more to facilitate as they do not type up letters or continuously fax or photocopy for the client. They will also help clients by navigating the internet to find out information for them and then supply the e-mail address/phone number for the client to contact themselves. They will also discuss a client's case over the phone if need be with the client's consent. It is very important therefore that the client supplies the relevant letters/documents which they need help with. Each case is then closed off and/or assigned a case number depending on the issue if it needs to be revisited again.

I learned a lot from my day's experience in that the staff were very knowledgeable on a wide range of issues to do with a huge variety of queries. They have a good relationship with many organisations e.g. Threshold who liaise between the client and the RTB, as they deal with housing problems regularly. They have a great knowledge of social welfare entitlements and they are constantly being given on the job training and have a wealth of knowledge from their day to day experiences with clients of all ages and cultures and contacts which they have built up over time. They are also very good listeners and treat each client with great respect and courtesy.

Other Services Provided

Other services they can resource are interpreters who speak Russian, Polish, Romanian, Hungarian, French etc. They also hold a Free Legal Advice Centre (FLAC) service on a Monday night (by appointment only) in which solicitors and barristers volunteer their services on an advice only basis. This can be of great benefit to clients when looking for advice for the first time. They also have an Immigration Officer who sits every Wednesday and can talk clients through their rights etc. (by appointment).

Contact Details

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Email: blanchardstown@citinfo.ie

Opening Hours

Monday, Thursday & Friday 9.00am to 1.00pm & 2.00pm to 5.00pm

Tuesday & Wednesday 9.00am to 1.00pm – closed in the afternoon.

Every Monday evening (FLAC) 7.30pm to 9.00pm - by appointment only.

The Current Legal Situation Surrounding Surrogacy in Ireland

Tom O'Mahony,
Regional Manager

Over the past 30 years Irish society has moved considerable distance from its traditionally held views on certain aspects of social policy. Another vexed question that has been troubling our society is what legal provisions we should have in place in relation to surrogacy. Like abortion, divorce and marriage equality, surrogacy too has serious legal, political and ethical issues.

Surrogacy

Surrogacy involves using one woman's uterus for the purpose of implanting an embyro with the purpose of delivering a baby for another person, or couple. There are two types of surrogacy – "traditional surrogacy" and "gestational surrogacy".

Traditional Surrogacy: This is where the surrogate is also the genetic mother as her eggs will be used in the fertilisation. There is a clear genetic/biological connection between surrogate mother and child.

Gestational Surrogacy: In this situation, the surrogate's eggs are not used. The embryo is created using the genetic mother's egg and the genetic father's sperm and that embryo is then transferred to the uterus of the surrogate. There is no genetic/biological connection between surrogate mother and child.

In this area, a further distinction can be made and that is between "altruistic surrogacy" and "commercial surrogacy". "Altruistic surrogacy" is where the arrangement does not involve any financial payment to the gestational mother apart from what might be considered to be realistic out of pocket expenses. "Commercial surrogacy" is where there is a payment passing from the genetic parent(s) to the gestational mother not only for those expenses but also for, as one agency's website described, "a sum for her time and unselfish efforts".

Ireland

As most are aware, the last Government initially, through Minister for Justice Alan Shatter, had intended to include provisions relating to the regulation of surrogacy in the Children and Family Relationships Bill when the draft Bill was first published in 2014. However the Bill in its final form and as enacted did not include such provisions. The 2015 Act, as it is now constituted, contains no provisions with regard to surrogacy.

Therefore, there continues to be a legal and policy vacuum in relation to surrogacy.

There is by no means a consensus internationally as to how surrogacy should be regulated. Some countries ban it outright. It might be surprising to hear that a governmental enquiry in Sweden, a country most would feel to be quite liberal in its social policies, recently recommended that surrogacy should be banned. In the UK, commercial surrogacy is banned. Whereas, perhaps not surprisingly to some, the state of California is quite accepting of surrogacy agreements.

In March of this year (12th March 2016), NUIG hosted a conference on this very topic entitled "Surrogacy – Forging a Legal and Policy Framework for Ireland". As that title would suggest, the conference considered the current vacuum that exists and what might be introduced in this country by way of regulation.

The provisions of the 2015 Act now allow for the genetic mother to be appointed guardian of the child as well, once the provisions of that Act are satisfied. The Act does not, however, allow for her to be registered as mother on the birth register.

It should be stressed that surrogacy is not banned in Ireland, but the present situation is that if a couple choose to have a child through surrogacy then that child is left in a legal limbo. It is also the situation that the numbers affected by this are extremely small. Nevertheless, the impact for anyone stuck in this limbo is significant.

For couples entering into surrogacy arrangements abroad then there will be significant problems returning to the State with the child. Even, for a child born in Ireland, there can be problems as illustrated in *MR & Anor v An tArd-Chláraitheoir [2014] IEHC 60*. In that case the gestational mother was a sister of the genetic mother. The genetic mother's husband was the genetic father. The gestational mother gave birth to twins. There was no dispute between any of them and the problem arose in relation to the registration of the births of the twins. Initially, the gestational mother was registered as mother, together with the genetic father. The genetic parents then sought to alter the register providing the DNA evidence but the Registrar refused stating, as a matter of law, that only the gestational mother can be treated as mother of the twins. The parents were successful in the High Court but, on appeal by the State, the Supreme Court reversed this decision. The upshot of this is that only the gestational mother may be registered as mother on the register and that is what will appear on the birth certificate. The Supreme Court upheld the principle "Mater Semper Certa Est" - the mother is always certain.

The provisions of the 2015 Act now allow for the genetic mother to be appointed guardian of the child as well, once the provisions of that Act are satisfied. The Act does not, however, allow for her to be registered as mother on the birth register.

The original proposals in the 2014 Bill would have legislated only for "gestational surrogacy". It proposed that

there would be a transfer of parentage to the genetic parents but only with the consent of the surrogate. That consent was only to be dispensed with if the surrogate was dead or could not be traced.

It has to be remembered that the surrogate in this situation has no genetic connection to the child yet she could prevent the genetic parents being recognized as the legal parents. This might very well have run into difficulties when considering the rights of children under Article 42A of the Constitution.

In certain circumstances, the conditions are being circumvented by the Courts. This is particularly so if the Court feels the restriction is disproportionate to the rights of the child. The Courts will always have regard to what is in the best interests of the child.

The conference considered what had been proposed in the Bill and what might be a more appropriate model for dealing with the issue. Dr Brian Tobin, NUIG, posited that a model providing for pre-birth judicial approval would be more likely to be constitutionally sound. He said that this is the approach in Greece and the Court approves the arrangement before the implantation of the embryo. Once this approval is in place, there is a statutory presumption of maternity/ paternity in favour of the genetic parents.

United Kingdom

Deirdre Fottrell QC explained that the position in the UK is that commercial surrogacy is prohibited and the genetic parents cannot enter into a legally enforceable agreement with the surrogate. The gestational mother (surrogate) is the legal parent but, under the legislation (Surrogacy Arrangements Act 1985 as amended by the Human Fertilisation and Embryology Act 2008), legal parenthood can be transferred. The legal effect of this is the same as adoption. The child is then, for all intents and purposes, as if born of the genetic parents. Conditions attaching are:

(i) One of the commissioning parents must be genetically connected to the child;

(ii) Only a couple can apply;

(iii) The transfer must be within 6 months of the birth but no earlier than 6 weeks;

(iv) The child's home must be with the parents;

(v) The consent of the surrogate must be freely given;

(vi) No money, other than reasonable expenses, can be given to the surrogate.

In certain circumstances, the conditions are being circumvented by the Courts. This is particularly so if the Court feels the restriction is disproportionate to the rights of the child. The Courts will always have regard to what is in the best interests of the child. The 6 month requirement can be ignored where the courts consider that the identity rights of the child require a parental order.

The consent must be a freely given consent but the courts can dispense with the consent. Problems have arisen in relation to overseas arrangements. In *Re WT [2014] EWHC 1303* the forms to be

signed by the surrogate were all in English and there was no evidence they were translated and understood by the surrogate. There can also be issues relating to the capacity, due to cognitive or intellectual impairment, of the surrogate to give the necessary consent.

Fottrell felt that there were other particular difficulties with the UK regime and these were:

(i) there is no screening of either the commissioning parents or the surrogates;

(ii) the agreements are not binding, leaving either side to withdraw from the arrangement;

(iii) there is no legal requirement for the commissioning parents to make provision for any children born to the surrogate.

Surrogacy can get very bad press. Fottrell also commented that the press in the UK seem to be obsessed with "the weird and wonderful" cases. As a result, there is a danger it can be stigmatised yet the vast majority of people who avail of it are ordinary normal people who simply have difficulty conceiving.

Dr Kirsti Horsey, University of Kent, felt that we could learn from the mistakes of the UK. While the legislation there permits surrogacy, essentially it is discouraged. Since the Surrogacy Arrangements Act 1985, surrogacy has changed completely and it is now more widespread in many countries. There is no doubt that the internet has changed things and international surrogacy arrangements are more commonplace. She felt the legislation is in need of reform. She felt the following areas should be addressed:

(i) reverse the presumption of maternity from the gestational mother to the genetic mother;

(ii) have a model of pre-birth parental orders;

(iii) promote surrogacy as a relationship and not a transaction;

(iv) the welfare of child must be central to any regulation;

(v) state agencies should provide clear and joined up guidance for all those involved, including the professionals.

The European Court of Human Rights has found that the right of a couple to conceive and make use of medically assisted procreation is protected by Article 8 but that does not mean States will be held to be in breach of the Convention if they adopt an outright ban on surrogacy.

Perhaps we in Ireland can learn from the mistakes of the UK in this area and we might consider Dr Hersey's proposals as part of any regulatory framework we introduce.

European Convention on Human Rights

Andrea Mulligan, TCD, noted that Article 8 of the European Convention on Human Rights recognises the right to respect for private and family life. The European Court of Human Rights has found that the right of a couple to conceive and make use of medically assisted procreation is protected by Article 8 but that does not mean States will be held to be in breach of the Convention if they adopt an outright ban on surrogacy. The Court recognises that there is no great

consensus from State to State on surrogacy arrangements. A State does have a margin of appreciation due to the fact that there are sensitive moral and ethical issues at play against a background of fast moving medical and scientific developments. As a result, a wide discretion is given to States. However, what can narrow that margin is the right of a child to an identity.

Problems can arise for States when the child in question is born through a surrogacy arrangement abroad and the arrangement is legal in the country of birth. The Court may find a breach of Article 8 if it feels the personal rights of the child – to nationality and identity – are being violated.

It is fairly safe to say that, at the end of the day, there will be little discretion to refuse to recognise the legal status of the child and the best interest of the child is always likely to trump the broader public policy in relation to surrogacy in general. A state must take into consideration the best interests of the child, irrespective of the parental relationship, genetic or otherwise.

Elsewhere

Outside of Europe, despite attempts at legislative restriction, there has been a huge increase in surrogacy tourism. A lot of this is driven by people from the developed world seeking surrogacy arrangements in developing countries. Prof Deirdre Madden, UCC, said that this is so because couples will always find ways of circumventing laws to find alternative ways to bring about their intended parenthood. There is a responsibility on states to have some form of recognition and regulation of commercial surrogacy because there are human rights issues arising from it. There is a wide diversity of attitudes and legal approaches from one State to the next.

One thing that stood out from the Conference in NUIG was that none of the contributors considered going down the road of an outright ban. No one seemed to be troubled enough by any of the ethical concerns surrounding surrogacy to consider such a ban.

For example, commercial surrogacy has been legal in India for some time. On average it requires a payment of $30,000 and it seems the surrogate will get less than 30% of this. Nevertheless, lots of surrogates do not see themselves as exploited. India is moving to restricting the treatment to nationals only. In the USA, the treatment is very open and very commercial. It is up to each state to regulate as it sees fit. California has been referred to as the surrogacy capital of the US. The treatment there can cost $75,000 to $125,000.

Summary

Many see surrogacy, whether altruistic or commercial, as basically involving the buying and selling of human life. There seems little doubt that Sweden will proceed with an outright ban and outright bans are already in place in Italy and France.

One thing that stood out from the Conference in NUIG was that none of the contributors considered going down the road of an outright ban. No one seemed to be troubled enough by any of the

ethical concerns surrounding surrogacy to consider such a ban. Having said that, Prof Deirdre Madden of UCC does point out that cross-border surrogacy is already widespread and this raises many jurisdictional challenges in relation to legal parentage and conflicts of laws amongst states. It is not going to go away whether Ireland bans it or not and prohibition will only drive it underground.

Surrogacy cannot be legislated out of existence. Prof Madden's view is that this would best be dealt with by an international convention on surrogacy if consensus could be achieved between states.

As I said earlier the numbers affected by this in Ireland are small. It would also have to be said that there is a strong and vocal opposition to surrogacy, many with sincerely held views that surrogacy commodifies babies and exploits women. Their concerns cannot be dismissed out of hand. Many in that latter grouping would take the view that the State should not be tripping over itself to legislate in order to regularise the irregular arrangements this minority entered into. These people made their decisions in the full knowledge that the arrangements they were entering into were, at best, questionable and embroiled with legal uncertainty.

Nevertheless, at the centre of this legal uncertainty is a child. Regardless of how that child came into being that child has the same rights as any other child in the country. We now have a constitutional obligation to protect and vindicate the rights of every child in the State. Article 42A (1) states: *"The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights".*

At the centre of this legal uncertainty is a child. Regardless of how that child came into being that child has the same rights as any other child in the country. We now have a constitutional obligation to protect and vindicate the rights of every child in the State.

As Dr Brian Tobin points out, those natural and imprescriptible rights extend to the child's "natural and constitutional right to family life with its genetic parents", the right to be "nurtured by its natural family". Therefore, whatever we as a society decide to do, doing nothing would appear to no longer be an option.

Contributors to the conference at NUIG were:

- Prof Susan Golomblok, Director of the Centre for Family Research, University of Cambridge
- Dr Kirsty Horsey, Senior Lecturer in Law, University of Kent
- Dr Brian Tobin, Lecturer in Law, NUI Galway
- Deirdre Fottrell, QC
- Dr Andrea Mulligan, Adjunct Lecturer in Law, TCD
- Prof Deirdre Madden, School of Law, UCC
- Dr John Danaher, Lecturer in Law, NUI Galway

Highlights From the 2016 International Association of Law Libraries Conference

Zoë Melling, Librarian

I was fortunate to be awarded a bursary by the British and Irish Association of Law Librarians (BIALL) to attend the 2016 International Association of Law Libraries conference on Law and Legal Information, which was held in Oxford from July 31st-August 3th. The theme was "Common Law Perspectives in an International Context". Oxford is the centre of academic excellence and legal scholarship in the UK, with one of the top law schools in the world, and the city voted overwhelmingly in favour to stay in the EU. The Brexit theme permeated all the conference activities, with many of the UK attendees expressing outrage at the outcome of the referendum. A wide range of topics were covered in the three days of plenary sessions, and some of the highlights are included below.

The Common Law System

In the opening session of the conference, Emeritus Professor of Law Frances Reynolds gave an overview of the diversities among common law countries, and made some observations on the future of the common law system. Some common law jurisdictions have partial codification and there are more differences between civil law jurisdictions than is realised. The official scheme of law reporting shows signs of breaking down under the weight of the huge volume of information available online. Common law systems are primarily in English speaking countries including England, Wales, Ireland, the United States, New Zealand, Australia, Hong Kong, the West Indies, Malaysia and India. Common law operates over a huge area of the world, and it is difficult to train lawyers to operate different systems. There is no need to retain older common law procedures, such as asking witnesses to repeat at length from statements. After 40 years of EU law the common law system will only survive in its true form in other areas. Brexit won't impact on the European Court of Human Rights as it has wider jurisdiction than the EU, and contract, tort and restitution law is unaffected by the EU "flow up the river" as quoted by Lord Alfred Denning. Some elements of English common law have been exported, including equity in the United Arab Emirates, and the system is capable of development and expansion.

Law Reporting

Emeritus Professor Sir John Baker gave an informative presentation on the history of law reporting in the UK from 1550-1650. Case law is at the root of the common law system, and law reports

from this period are more accessible than the year books of medieval times, which ceased publication in 1935. Nominate reports such as "Les Commentaries" produced by Plowden in 1571 were the beginning of modern law reporting and set a high standard. They were translated into French as there was doubt as to whether English law could be discussed in English. James Dyer wrote law reports in the 1930s for his law student nephews but these were not intended for publication and didn't appear in print until after his death in 1582.

In 1600 the first part of Edmund Coke's reports appeared in print, which incorporated commentary within the report, unlike Plowden's reports which presented comments in a separate typeface. Coke was dismissed as Chief Justice in 1616 due to alleged subjectivity in his reporting style, and was ordered to spend the summer amending his reports. Lord Chancellor and Attorney General Francis Bacon introduced a scheme in 1617 to engage professional law reporters which failed after a few years, and no new reports were published until the 16th century. The system depended on reports but these became a matter of private enterprise until the end of the 18th century.

Judicial authorities come from the idea of argument by dialectic, and the argument of authority can be traced back to the time of Cicero.

Continental Perspective

David Ibbetson, Professor of Civil Law at Cambridge University, discussed the development of precedent in Continental Europe prior to 1800 and how it compares to the English common law system. English law is a system of case law and it is hard to think of common law without printed decisions. Medieval law had a notion of authority and in the early 17th century judicial precedents had a special status. In the 16th century it was said that decisions were an authority while in the 18th century they were said to have authority. Judicial authorities come from the idea of argument by dialectic, and the argument of authority can be traced back to the time of Cicero, in which there were necessary authorities and probable authorities. Fables, popular sayings and customary ways of doing things had legal authority.

Continental law was not substantially different in theory, but operated according to *lex* rather than *exempla*. The printing of law reports in England allowed the idea of precedents to be set and this was also the case in Continental Europe, for example the large folio volumes produced in Italy in 1700. English reports contained arguments and had greater weight than textbooks, and the English system allowed for the development of laws. Continental judges lacked flexibility but had more authority. The French reports of the first half of the 17th century are very similar to English reports. In the 16th century it appeared that civil law was playing too big a part in England, and law reporters didn't attend trials as they took place elsewhere and weren't considered legally interesting.

Family Law

The second day of the conference opened with a presentation from Baroness Ruth Deech, Crossbench Peer in the House of

Lords. In her talk, titled "An Unhappy Marriage - Common Law and Statutes in Family Law", Ruth outlined her views on divorce law in the UK, where she feels there is one system for the rich and one for the poor. There are 119,000 divorces in England each year, and proceedings are often long and drawn out which is detrimental to children. Legal fees are often equal to or higher than the cost of the settlement and legal aid is no longer available for this area of law. In an ideal world mediation would be a viable option if there was more certainty in the legal principles, but it often falters as couples go in with no starting point.

Decisions used to be based on what people needed, but a series of high profile cases in London has set the law and many judges have an outdated view of gender roles, believing women should be kept indefinitely. Some judges are opposed to reform and there is an assumption of lifelong liability when determining maintenance. In the *Vince v Wyatt* case a former wife received a £300k award from her ex-husband 30 years after the relationship ended, after he became wealthy, and the ex-husband had to pay costs of £360k. A quarter of marriages are second marriages by older people, and many people are afraid to marry their partner in case it threatens assets and inheritance from their first marriage. South American countries are more advanced in family law matters, with sophisticated agreements in place and more female judges.

The Divorce (Financial Provision) Bill proposes to make pre-nuptial and post-nuptial agreements binding and to set a five year limit for maintenance.

Ruth has introduced a Private Members Bill, the Divorce (Financial Provision) Bill, which proposes to make pre-nuptial and post-nuptial agreements binding if both parties have received independent legal advice at least 21 days before the wedding, and to set a five year limit for maintenance. The Bill is based on Scottish law and would apply to all marriages and civil partnerships. It provides for equal division of postmarital assets excluding inheritance and gifts. The law relating to children is untouched other than raising the age of child maintenance to 21 to cover full time tertiary education. The Bill has passed through the House of Lords but has not yet been considered by the House of Commons. It is available on the UK Parliament site.

Employment Law

Jeremias Prassl, Associate Professor and Tutorial Fellow at Magdalen College, gave an entertaining and thought-provoking presentation on the idea of humans as a service in the sharing economy, which highlighted how crowdsourcing is replacing formal employment contracts in modern society. The idea of crowd work originated as slang in Silicon Valley and the term "crowdsourcing" was coined by Wired Magazine in 2006. The language of work has been replaced by phrases such as "sharing economy", "collaborative economy" and "gig economy" with online platforms or apps connecting a large group of workers with individual customers without any long term commitment. Examples include Airbnb, Amazon Mechanical Turk, and Uber. The boundaries between employer, consumer

and business are becoming blurred. Benefits for the consumer include more products, better service and lower costs, and for providers greater flexibility, independence and additional income. Problems include low pay, insecurity, legal uncertainties, and lack of employer accountability and appeals processes. To combat precarity, Jeremias argued that "gigs", "tasks" and "rides" should be viewed as work and regulated within the scope of employment law, which would benefit consumers, workers and employers.

Big Data

Karen Yeung, Professor of Law at King's College London, spoke on the legal implications of big data and algorithmic regulation. She referred to a new industrial revolution powered by the engine of big data, which transforms personal digital data into economic value. The term "algorithmic regulation" was popularised by Tim O'Reilly in 2015 but was already in use in academic literature. Examples of algorithmic regulation, or "algocracy", include motor vehicle fuel emissions systems, automative pilot systems and credit card fraud detection systems. Algorithmic decision making systems can be automatic or digital decision guidance systems, and map to two forms of algorithm regulation:

- Intelligent enforcement, where no human intervention is needed. Examples include smart soap dispensers, towel tagging in hotels for usage analysis, and remote vehicle monitoring.
- Pre-emptive enforcement to identify high risk candidates warranting further investigation, such as predictive policing, tax fraud detection, and border control.

Legal implications of algorithmic regulation include concerns about privacy and data protection laws. The "privacy self management" model is inadequate as people generally don't pay attention to terms and conditions.

Legal implications of algorithmic regulation include concerns about privacy and data protection laws. The "privacy self management" model is inadequate as people generally don't pay attention to terms and conditions. An experiment was carried out in London in 2014 in which, in return for free wifi, users of an internet hotspot were asked to give up their first born child for eternity; all accepted the terms and conditions. There are legal and constitutional principles at risk including transparency and accountability, due process, rights of appeal/redress, and equality of treatment. To protect these fundamental values legal institutions and scholars need to be innovative and think outside the box.

Refugee Law

Professor Guy Goodwin-Gill gave an interesting overview of international refugee law, from its origins in Europe after the First World War and the Russian Revolution, to the current crisis and projections for the future. The history of refugee law is aligned with the history of international organisations, and Professor Goodwin-Gill highlighted some of the key landmarks beginning with the establishment of the High Commission for Refugees by the League of Nations in 1921. Fridtjof Nansen was the first High Commissioner and within a year he had introduced the "Nansen passport" for

refugees from the Russian Civil War who were unable to obtain ID documents. He also promoted the principle of "non-refoulement", identified vulnerable groups such as orphans, and encouraged states to accept refugees with disabilities. Some states were unwilling to adopt a general approach in case they were expected to write a blank cheque, and sovereignty was still a major concern.

Nansen died in 1930 but his work continued, and in 1933 an office was opened for refugees from Germany when Nazism took hold. James Grover McDonald was appointed as High Commissioner for Refugees (Jewish and Other), but resigned in 1935 after encountering resistance from states to house displaced Jewish refugees. He believed his task was to negotiate collaboration but stay out of the realm of politics, as it was the role of governments to lead the way.

There was a fresh wave of refugees in the 1940s and asylum issues were a key topic on the agenda at the first session of the UN General Assembly in 1946. The Universal Declaration of Human Rights was adopted in 1948. UNHCR was established in 1951, in the same year the Institute of Migration (IOM) was established as the Intergovernmental Committee for European Migration (ICEM). The 1951 Convention Relating to the Status of Refugees defines who qualifies for refugee status and treatment of refugees once accepted. Criminals and terrorists are outside the range of protection, with States reserving the right to send them back even if accepted as persecuted.

The 1967 Protocol Relating to the Status of Refugees removed the time frames specified in the Convention, which only covered people who had become refugees as a result of events occurring prior to 1 January 1951. Prince Sadruddin Aga Khan served as High Commissioner for Refugees from 1966 to 1977, taking a humanitarian approach and following McDonald's focus on mediating conflict. He also recognised the need for assistance with repatriation, and the fact that underdevelopment can be a stronger driver than conflict. His UN refugee work continued after he ceased to be High Commissioner and in 1986 he produced a report on international co-operation to avert flows of refugees.

How Europe works through the next 2-3 years will have an impact on international refugee law.

The 1980s was notable for an explosion in literature and jurisprudence. The first edition of The Refugee in International Law was published in 1983, and in 1989 Oxford University Press established the International Journal of Refugee Law. There was no case law until the 1970s when states got interested in procedures for refugee status determination, and there was a reluctance to step away from a case by case basis. Refugee law is a dynamic area and is more integrated with human rights now.

How Europe works through the next 2-3 years will have an impact on international refugee law. States ought to know better today how to handle the crisis that occurred in 2016, as they have 60 years experience in identifying who are refugees and who are not; for example in the 1930s France received

large numbers of refugees during the Spanish civil war. There is no coherent standard throughout the EU, and the legislative system is not balanced. EU states are reluctant to rally round and are unwilling to approach migration issues on the basis of equality.

There are difficulties in dealing with migrants who are not refugees, who come with different degrees of desperation, and the EU has often promised migration opportunities but has failed to deliver. There is a big increase in asylum seekers of working age, and a consequent need to create jobs. The big youth unemployment crisis in West Africa will drive people further abroad in search of survival.

The French data protection authority ruled that the right to be forgotten should apply worldwide for all Google domains.

Data Protection

Dr Judith Townend, Director of the Information Law and Policy Centre in the Institute of Advanced Legal Studies, gave a UK perspective on data protection law with reference to two recent landmark cases involving the "right to be forgotten" and transatlantic transmission of data under the "Safe Harbor" agreement.

Although data protection has been in force for nearly three decades, most journalists know little about it and the threat of action is rare. Lawyers acting for media organisations are primarily concerned with defamation and breach of privacy. However it is becoming a more pressing issue and the General Data Protection Regulation (GDPR) will apply from 2018.

The right to be forgotten ruling is based on Article 12 of the 1995 Data Protection Directive and concerns erasure rights resulting from the 2014 European Court of Justice case *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*. The judgement doesn't give an absolute position and each case must be considered on its merits and balanced against other fundamental rights. Google now has an online form for people to request that information be removed from the search engine, and decisions can be appealed to the Data Protection Commissioner. There is a lack of transparency regarding Google's internal processes and notification procedures, and media organisations are deliberately undermining the effects of de-listing by republishing stories. The French data protection authority ruled that the right to be forgotten should apply worldwide for all Google domains and the company has appealed the decision to the highest court in France.

A recent Belgian case, *Olivier G v Le Soir*, in which a court ordered a newspaper to anonymise an online article, could signal the possibility of extending the right to be forgotten to anonymisation of material at source. This could have huge implications for archives of civil and criminal law, and raises conundrums for media organisations, online archivists and librarians. Further cases are expected concerning source material and the right to be forgotten.

In the *Europe v Facebook* legal campaign, Austrian privacy campaigner Maximilian Schrems challenged the Irish

Data Protection Commissioner's decision not to investigate claims that Facebook passed on EU users' data to the United States National Security Agency, and the case was referred to the European Court of Justice in 2015 which ruled that the Safe Harbor agreement governing data transfers between the EU and the US was invalid. The decision led to a new privacy shield agreement which was adopted on 12 July 2016, and the UK government is seeking to join as a party. The expansion of media litigation to data protection is significant and provides a more flexible option for claimants than defamation.

Codrington Library, All Souls College

Oxford Libraries

Delegates were offered a choice of two library tours during the conference, including the famous Bodleian research library, which along with the Bodleian Law Library is part of a network of 40 libraries with a shared library management system, and one of the college libraries with significant law and legal history collections. I opted to visit the Codrington Library at All Soul's College, where William Blackstone, a key figure in the development of the common law system, was a fellow. In addition to being a barrister, professor and author of the famous "Commentaries on the Laws of England", Blackstone had a keen interest in architecture and is credited with completing the main reading room in 1756. He also developed a bespoke classification system for the library's books.

In addition to the library tours the conference provided numerous social activities, including the Annual IALL Dinner, a lavish affair held in the opulent 11th century Balliol College, and an indoor barbecue in the longest dining hall in Oxford at Keble College.

I am grateful to BIALL for the opportunity to attend the conference, which allowed me to meet law librarians and legal practitioners from a wide range of jurisdictions, and to explore the rich historical and cultural heritage of the City of Dreaming Spires.

Conference dinner at Balliol Dining Hall

Current Awareness: Legislation Update

District Court (Housing) Rules 2016 - SI 506/2016

This SI amends Order 99A of the District Court Rules and includes forms for applications relating to termination of local authority tenancies under the Housing (Miscellaneous Provisions) Act 2014. The new rules came into operation on 21st October 2016.

Health (Amendment) Act 2013 (Certain Provisions) (Commencement) Order 2016

This SI commences, on 1 January 2017, sections of the Health (Amendment) Act 2013 relating to charges for inpatient services, introduction of a framework for maintenance and accommodation contributions payable by recipients of long-stay non-acute residential support services, and waivers from those contributions in certain circumstances.

Health (Amendment) (Professional Home Care) Bill 2016

Introduced on 27th October 2016, this Bill follows on from recommendations in the Law Reform Commission report "The Legal Aspects of Professional Home Care" published in December 2011. It amends the Health Act 2007 and provides for a regulatory framework and legal standards for professional home carers.

Health and Social Care Professionals (Amendment) Bill 2016

The purpose of this Bill, introduced on 19th October 2016, is to amend the Health and Social Care Professionals Act 2005 by adding crisis pregnancy counsellor to the list of professions regulated under the Act.

Judicial Appointments Commission Bill 2016

This Bill was introduced on 18th October 2016 to provide for the establishment of an independent Judicial Appointments Commission to recommend appointments to judicial office based solely on merit, to enhance the principle of judicial independence.

Paternity Leave and Benefit Act 2016

This Act provides for two weeks of paid paternity leave and two weeks of paternity benefit payable by the Department of Social Protection for "relevant parents" of children born after 1 September 2016, including the father, the spouse/civil partner/cohabitant of the child's mother, the child's sole male adopter, or either parent of a donor-conceived child.

Rent Certainty (No. 2) Bill 2016

This Private Member's Bill was introduced in the Seanad on 12th October 2016 to amend the Residential Tenancies Act 2004 to link changes in rent in the private rental market to the Consumer Price Index.

Rules of the Superior Courts (Order 122) 2016 - SI 471/2016

These rules which came into operation on 10th October 2016 amend the Rules of the Superior Courts to pleadings to be delivered or amended during the long vacation.