

**The Hon. Mr. Justice Frank Clarke, Chief Justice**

**Statement on the occasion of the Opening of the New Legal Year**

**September 2018**

**Introduction**

This is the second time that I have had the opportunity, as Chief Justice, to outline my thoughts at the beginning of a new Legal Year. I will in part report on developments over the last year not least in the context of the questions which I identified in my address in September 2017. I also hope to identify continuing priorities for the year to come.

One central theme of my address last year was to identify access to justice as a key challenge facing the Irish legal system. As I said on that occasion not all of the problems which we face in that regard have solutions within the courts but there are some things which we can do. The key aim, from our perspective, must be to make access to justice as straightforward and uncomplicated as it can be while at the same time ensuring that the court process is fair and comprehensive. That balance is not always easily struck.

A key component of the contribution which we in the courts can make is to ensure that our procedures are modern and accessible so that they do not place any unnecessary difficulty in the way of those accessing the courts whether with the benefit of legal representation or not. There are three aspects of the process of modernisation of our procedures on which I would like to touch. The first is the civil justice review currently underway by a committee under the chairmanship of the President of the High Court, Mr. Justice Kelly. There has been considerable progress with the review with many detailed submissions made and both public and private meetings held. I understand that President Kelly hopes to be able to report by late next year or early 2020. I also hope and expect that, when the recommendations of that committee have been considered and implemented, we will have an up to date modern and fit for purpose procedural framework within which civil litigation in Ireland can be conducted.

Second it should touch on the review on the procedures of the Supreme Court which have been in place since the Court of Appeal was established. I am happy that the review has now been completed with a finalised set of proposals adopted after consultation with the practising professions. Those proposals are currently with the Draftsman and it is to be hoped that all necessary changes to the rules of court and practice directions will be in place in time to come into operation at the beginning of next calendar year.

Third the project which I announced last year to enable all applications for leave to appeal to the Supreme Court to be conducted on-line has progressed substantially. I am advised that, like the procedural changes, it should also be possible to implement the proposed on-line system from the beginning of next year. It is to be hoped, therefore, that, by January 2019, we will have in place further refinements of the Supreme Court procedures and, at the same time, a new means of delivery being the ability to apply for leave to appeal to the Supreme Court on-line.

Those measures are relatively easily implemented at the level of a single Supreme Court with a limited volume of business. Attempting to replicate those measures in busier trial courts is highly desirable but altogether more complex. It is likely that the recommendations of the civil review committee will require rule change and possibly even, in some respects, legislation. At the same time it will be necessary to consider new and innovative ways of allowing the courts to be more efficient by the deployment of extra resources in fields such as judicial back-up and courts staff together with a greatly increased use of IT.

My thinking on the best route ahead for the use of IT in our civil courts has evolved significantly over the last year. In conjunction with the senior management team of the Courts Service we have taken significant advice from those experienced in the roll out of on-line based courts administration in common law countries. While I indicated last year that we might expect a piece by piece adoption of on-line methods in particular areas of practice, it has now become clear that by far the best way to achieve the considerable efficiencies which IT can provide, both for courts’ administration and for parties and their advisors, is to develop a comprehensive on-line system which will have, at its root, a radical change whereby the virtual documents held in the database of that system will represent the official court record with hard copies only being used to whatever extent individual judges, parties or their representatives feel it necessary or appropriate. This is the method which has, for example, been adopted with some success by the Australian Federal Courts.

I, and others, have often commented that one of the problems with our current IT system is that it was starved of resources during the years of the Great Recession. That system is now a long way short of where we would like it to be. But the best advice is that continuing to patch up an outdated system does not involve the best use of available resources and will ultimately lead to a significantly less than optimal solution. Perhaps the best analogy is with a road system. We currently have the equivalent of a poor quality single lane carriageway with many potholes. We want to have a modern motorway. The best way to do this is to build a new motorway while keeping, as best we can, the existing sub-standard roadway operational while the new motorway is under construction. I hope, in conjunction with the senior management team, to be in a position to bring proposals to adopt such an approach as a matter of policy to an early meeting of the Board of the Courts Service after which I would hope to engage in discussions with the Minister for Justice and Equality and through him the Minister for Public Expenditure and Reform to secure the funding necessary to complete such a project. Again our best advice is that a full commitment to such a project requires, in essence, two separate budgetary provisions. One should be a ring fenced amount designed to allow for the building and commissioning of the new on-line system. The second would be a continuation of the current budget to ensure that our existing systems, some of which qualify for the technical description of “flaming platform”, can continue to work as best they can while the new system is being commissioned. Again our best advice is that such a project would take 3 to 4 years and I fully understand that neither Minister could commit to it without seeing a detailed business case. However, I would hope to be in a position to commence such discussions in reasonably early course.

I should also say that, despite depleted resources, there have been a number of successful innovations in the IT field in recent years including a number of significant projects which are already well underway. The use of IT in the criminal field in a manner which would allow the efficient transfer of documents between each of the parts of the justice system is a desirable goal and work on significant developments in that regard are ongoing.

I know that the Minister for Justice intends, in the context of the civil procedure review, and doubtless taking into account whatever efficiencies might be envisaged as deriving from an on-line court system, to comprehensively review the needs of our courts not just at the moment but for the near or medium term. I think it is fair to say that we have, for too long, approached the question of the resources required for the courts system on a piece meal basis. A proper evidence based review of what is really needed today and what is likely to be needed in the future, seems to me to make sense all round. The courts cannot simply go on asking for more without making a business case. But it is also difficult for courts to plan without some reasonable medium term commitment as to what is likely to be made available. I also am aware of, and very much welcome, the fact that the Minister intends to have early discussions with the President of the District Court for the purposes of setting up an independent review into the structure and needs of that court.

It seems to me that all of these matters really represent different strands of the same question. Where do we need to be in 5 or 10 years’ time? How can we make best use of what we have and make the best case for what we need? Modern streamlined procedures form part of that picture. A significantly increased use of IT and on-line services forms another strand. The availability of back-up staff to Judges and additional court officials to do routine court related work which does not require judicial input may well be another. But I am happy that all of these strands are now coming together although, being realistic, it is likely to be 3 – 4 years before they can begin to come into place. It would, I think, be a fitting contribution from the courts to the celebration of 100 years of independence if we could, by that time, have implemented the sort of proposals which are currently under consideration so as to allow our courts system to enter into the second century of its independent existence with a modern up-to-date and fit for purpose structure.

Finally, before leaving this topic, I should mention one further matter on which discussions have been taking place between senior court service staff, at my request, and senior officials of Government. I have been concerned that it has not always been the case, when new legislation is under consideration, that the impact which that legislation may have on the courts has been fully assessed. In fairness it should be acknowledged that in some cases there has been a fairly detailed assessment carried out. But in other cases the consequences for the volume and complexity of litigation have not received what I would consider to be adequate assessment. I have been seeking through the discussions to which I have referred that we might put in place some type of at least informal process which would attempt to ensure that there was an adequate litigation impact assessment carried out in conjunction with the legislative process involving any proposed new statute which might affect the work of the courts. Such a litigation impact assessment would, in my view, be an important tool which would form part of the process of assessing in advance the needs of the courts rather than, as heretofore, often placing the courts in the position of having to play catch-up after the consequences of new legislation have become apparent.

Obviously, one meaning of the term “access to justice” relates to the ease, or otherwise, with which it is possible for people to gain access to the courts system for the purposes of vindicating their rights or establishing their entitlements. But there is another sense in which that term can be used. It relates to the ease with which the public can come to know of what is going on in the courts and the extent to which the courts may be accessible to those who have an interest in what goes on.

No human institution is perfect and I would not pretend that everything that happens in every court on every day stands up to the high standards which we would wish to set for ourselves. I do believe strongly that most of the business transacted most of the time in most courts does bear the highest level of scrutiny. But it is important that we, in the courts, are as open as we can be so that the public generally can understand what goes on and, perhaps more importantly, why business is conducted in the way in which it is.

The only countervailing factor is that the overriding obligation on any court must be to ensure that its business is conducted fairly and in accordance with law. Any real risk that the fair and orderly conduct of business might be compromised needs to be guarded against. But subject to that caveat I believe we in the courts should be as open as possible.

In that context I would like to note some developments in the last year and announce some projects for the future.

For the first time cameras were allowed into the Supreme Court for the purposes of filming the delivery of judgments. I believe that this project has been successful and it has now been made clear that, subject to the very limited number of cases where issues of privacy may arise, broadcasters are free to transmit any judgment of the Supreme Court which they consider might be of interest. However, it was made clear that this was but a first step. In that context I am happy to confirm that discussions have commenced between the Supreme Court, represented by Mr Justice John MacMenamin and the Courts Service Media Advisor, Gerry Curran, with broadcasters for the purposes of seeking to agree a mechanism to allow for the recording and transmission of legal argument in the Supreme Court. There are practical issues which require to be ironed out. It is also necessary to ensure that any model agreed cannot be said to materially interfere with the ordinary conduct of appeals. But I am confident that any such issues can be resolved and I am hopeful that we may be able to announce early progress on this project with a view to it being rolled out in the new year.

Next, the Supreme Court was particularly happy to have been able to continue the pilot project put in place by Chief Justice Denham involving sittings of the Court outside of Dublin. I consider this to be an important symbol of the fact that the Supreme Court is for all of Ireland and not just Dublin. This year the Court sat for three days in Limerick and, as had been successfully the case in the initial pilot in Cork, not only heard cases but arranged for members of the Court to engage with students and faculty of the Law Department of the University of Limerick and with the local practising professions in what I think can fairly be described as an outreach to the Limerick legal community as a whole.

This is a project which I wish to continue and, while it may not be possible in practice to guarantee that the court will sit outside Dublin during each legal year, an annual sitting outside of the capital is my aspiration. In that context I am happy to announce that discussions are at an advanced stage for a sitting of the Supreme Court to take place between Christmas and Easter of next year in Galway. As with previous sittings outside Dublin, I would very much hope that this would give the Supreme Court an opportunity to engage with the practising professions in the west and with the excellent Law Department in NUIG.

There are a number of other developments which may contribute to a greater understanding of the work of our courts. A major project to revamp the Courts Service website and the website of the Supreme Court is currently underway and it is hoped that this will come to fruition during 2019. I hope that this will enable us to be more pro-active in giving out information about the courts. I am also happy to say that the Supreme Court intends itself to publish an annual report for each calendar year with the first such report due in the early months of 2019. In a similar context I very much welcome the decision of leading Irish academic lawyers to promote a conference in each year at which there will be a discussion of what are considered to be the most important legal cases decided by the Supreme Court in the previous twelve months. The first such conference is due to be held in TCD on the 6th October and I also welcome the intention to publish the papers delivered. A considered but robust debate about the important issues which the Supreme Court has to decide can only contribute to the evolution of our case law.

I would next like to move to the International sphere. Last year I briefly mentioned the potential challenges which lie ahead in the context of Brexit. Unfortunately there seems to be little greater clarity at this stage as to the precise terms on which the United Kingdom will leave the European Union. But significant challenges lie ahead for the Irish courts not least in the context of the fact that Ireland will become, after Brexit, the leading common law jurisdiction within the European Union. The Irish Supreme Court has been involved for many years in the organisations which represent Supreme Courts throughout Europe. Because systems differ there are, in effect, three such organisations representing respectively Constitutional Courts, Supreme Administrative Courts and general Supreme Courts. While we have always played our role in all of these bodies, and indeed my predecessor, Chief Justice Denham, was President of the Network of Presidents which is the body representing ordinary Supreme Courts, it is highly likely that we will be called on to play a much greater role in the future. Those bodies frequently seek a common law voice on their committees and working groups. That openness to accommodating different legal systems is very much to be welcomed. Furthermore, those bodies are regularly consulted by the European Commission and other institutions and thus can influence the laws and required practices which emanate from Brussels. There is unfortunately a significant risk of unintended consequences if European Union laws are made without a real input from the common law countries. The United Kingdom has, to date, played a significant role in that regard but a particular burden will now fall on Ireland.

In a similar context it will be all the more important that we maintain and foster our close relations with judicial colleagues in Northern Ireland specifically and the United Kingdom more generally. We have already had a very valuable meeting with our United Kingdom colleagues (including senior Judges from both Scotland and Northern Ireland) in London earlier this year and we hope to welcome our northern colleagues to Dublin in the near future. It will hardly be a surprise to learn that Brexit will form an important part of our discussions. It is also worth recording that the Supreme Court has, in recent years, held bilateral meetings with the German Constitutional Court and with the Court of Justice in Luxembourg and that senior Irish Judiciary will be travelling to the Court of Human Rights for a similar meeting later this year.

Providing personnel from a small Judiciary to attend such meetings and, perhaps equally importantly, engage in the additional work which membership of such bodies generates, is a particular burden for us. I have already noted the willingness of our colleagues from the continental tradition to seek to accommodate any difficulties which might be encountered in implementing proposed European measures in a common law system. But those difficulties cannot be identified and solutions provided if there is not a common law voice at the table. Much of the burden of providing that voice will now fall on us. While attendance at such meetings and conferences may sometimes be portrayed as unnecessary I am convinced that a failure on our part to take up the slack which will be left by the departure of the United Kingdom has the potential, by leaving the common law voice largely unheard, to lead to significant complications, and indeed cost, within the Irish legal system. The senior Irish Judiciary are committed to ensuring that the common law voice will continue to be heard.

One final matter is worth comment at this stage. Some areas of the law are precise. Others provide a broad discretion on Judges. Some matters are capable of relatively precise analysis and calculation. Others involve, to a greater or lesser extent, a broad judgment.

Two of the latter have been the subject of some publicity not least in recent times. Although they come from different areas of the law they have at least one thing in common. I speak of the amount of damages awarded in injury cases, on the one hand, and sentencing, on the other.

Such issues involve a judgment not just as to where the case lies on the spectrum from the less serious to the most grave but also, in practice, requires putting a number (be it a monetary amount or a term of imprisonment), to reflect that position.

In such cases there is often a tension between consistency and flexibility. Both are important. Where the public feel that like cases are dealt with in significantly different ways then questions arise as to the fairness of the system. On the other hand, overly rigorous rules can always apply unfairly in certain circumstances. Any fair system needs to pay appropriate attention both to ensuring a reasonable level of consistency but also allowing for the flexibility to take into account all relevant factors some of which may differ significantly as and between cases which may outwardly appear to be similar.

On sentencing I am personally of the view that, provided a proper mechanism can be devised, flexible guidelines have the potential to give greater assurance to the public that there is consistency and that any variations in sentences can be explained by differing factors properly taken into account. The experience of countries which introduced overly rigid guidelines on sentencing has not been particularly positive but that is not to say that an appropriate and well worked out system might not contribute significantly to achieving the difficult balance between consistency and the flexibility necessary to take into account all relevant factors.

Similar considerations apply in the field of injury awards. An overall set of judge made guidelines would contribute not only to consistency but also to the proper calibration of the overall level of awards. But here again it is important that any system retains the flexibility to enable all relevant factors to be taken into account. We all know that the same clinical injury may impact very differently on different persons because of factors such as their lifestyle or the type of work they do. Overly rigid guidelines are as likely to lead to injustice as to improve things.

I note that there have been suggestions in the recent past that the proposed Judicial Council might be given a role in preparing guidelines in these, and perhaps other, areas. In principle I would see this as a positive development. However, the devil is very much in the detail in any such proposals. In that context I am more than happy that there should be discussions about precisely how guidelines proposals of the types suggested might be progressed.