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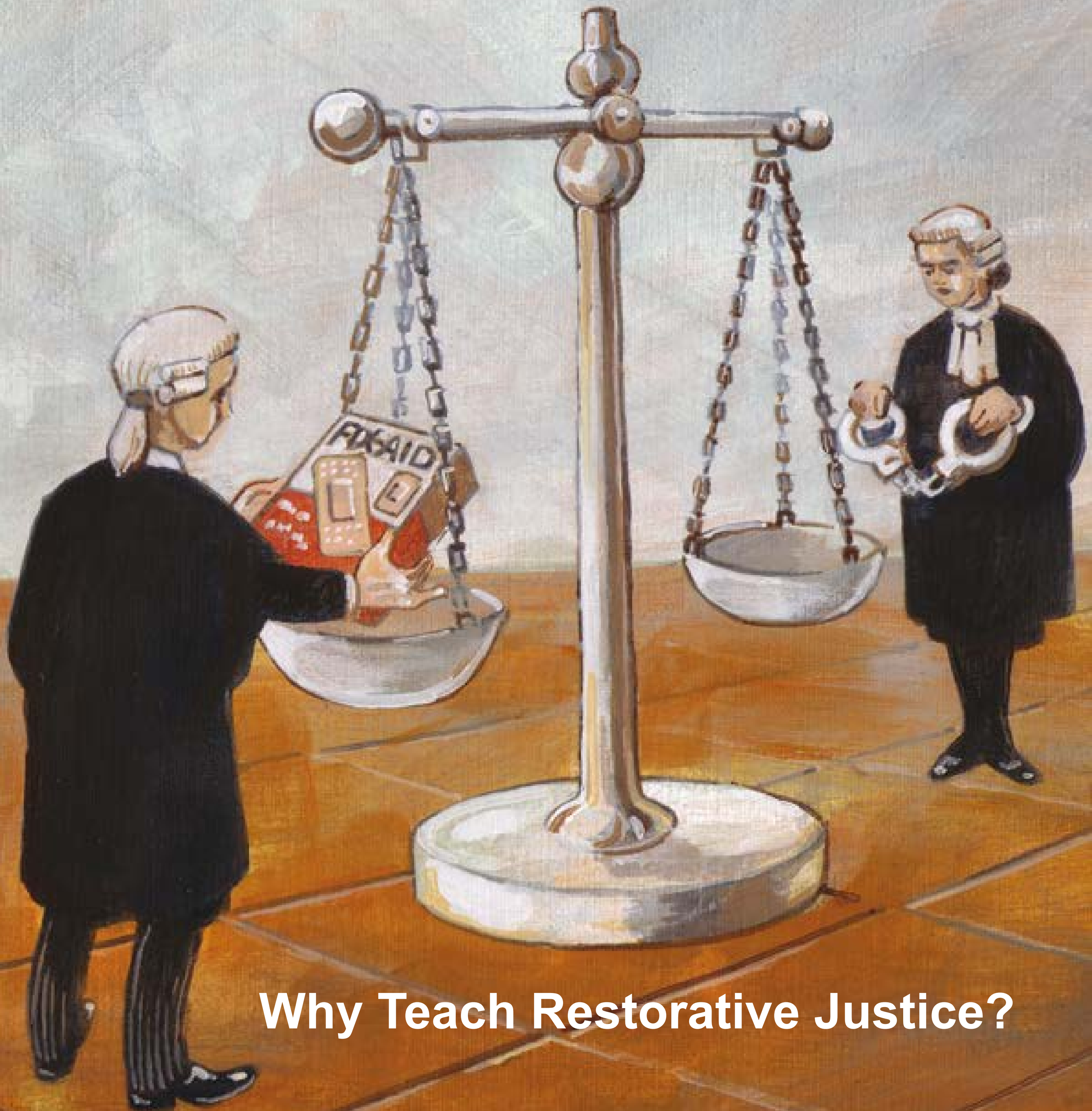

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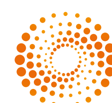
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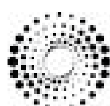

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Embryos in Limbo

Jessica Bartak-Healy BL

Introduction

This article will examine the potential benefits and disadvantages of introducing *in vitro* fertilisation (IVF) legislation in Ireland. It addresses the question as to what extent legislation would impact on Irish IVF clinics, and gamete providers in the wake of the *Roche*[1] case. The consent forms in both Ireland and England and Wales are also examined and compared in detail. Lastly the disadvantages of the Human Fertilisation and Embryology Authority (HFEA) governing IVF in England and Wales are explored.

Is regulation needed in Ireland to govern the area of assisted reproduction?

Research conducted suggests that legally binding guidelines are required in this area to avoid confusion and cases like *MR v TR*.[2] This issue has been live since IVF was established in Ireland in 1985[3] and to date there has been no proposals brought before the Dáil. The Department of Health in Ireland is in the process of preparing an options paper for the government on how to legislate for assisted reproduction in Ireland due to the debates surrounding the *Roche* case and the Report of the Commission on Assisted Human Reproduction in 2005. However, it is uncertain when they will produce a report and what direction it will take.

MR v TR centred around the fate of three frozen embryos produced by *in vitro* fertilisation. The Plaintiff, Mrs Roche and the first named Defendant, Mr Roche were separated at the date of the trial but remained husband and wife. The Plaintiff wanted to become pregnant with a second child after she had surgery to remove two thirds of her right ovary due to an ovarian cyst. The couple decided to undergo their treatment at the Sims Clinic in Rathgar, Dublin (the fourth named Defendant).

Before the treatment, the Plaintiff signed a form headed "Consent to Treatment Involving Egg Retrieval" and "Consent to Embryo Freezing".[4] Also on that day, the husband signed the form entitled "Husband's Consent",[5] where he agreed that he was the husband of the Plaintiff and was the legal father of any child resulting from the fertilisation of the Plaintiff's eggs. The Defendant signed the form entitled "Semen Collection Form" and "Consent to Embryo Transfer".[6] The IVF procedure created six viable embryos, three were implanted in the Plaintiff's uterus and three were frozen. The Plaintiff gave birth to a daughter on the 26th October, 2002.

Marriage difficulties began to appear in the couple's relationship towards the end of the pregnancy and the first named Defendant had begun another relationship. The couple commenced living apart and were judicially separated. There was an issue as to what would happen to the remaining frozen embryos as each party had different views. The Plaintiff wished for the remaining embryos implanted in her uterus in the hope of becoming pregnant again. The Defendant wanted them destroyed and did not want to become a father to any child that would be born as a result of the procedure. The Defendant argued that he never agreed to the implantation of the frozen embryos, however, the Plaintiff argued that he had expressly or impliedly consented for the frozen embryos to be implanted into her uterus. Mrs Roche also claimed that there was a violation of her right under Article 41° of the Constitution, namely the respect for privacy and family life. She also claimed that there was a violation of the embryo's right to life under Article 40.3.3°. This case brought huge challenges for the High Court as there was 'no judicial or legislative framework in place to address the medical, scientific, or ethical uncertainties.'[7]

The preliminary ruling in this case focussed on the consent the Defendant had given for any future use of the frozen embryos and if this was implicit in the contract document that acknowledged that he would take full responsibility for any outcome of the IVF procedure.[8] The Defendant expressed that he did not want any more children with the Plaintiff and that there was no agreement as to what would happen to the frozen embryos. The Court ruled in favour of the Defendant and held that there was no express or implied consent for the embryos to be implanted into the Plaintiff's uterus. The Irish Fertility Society said in relation to this case that 'Each episode of treatment requires the consent of all parties involved and this consent may be revoked by any party should their circumstances change. We cannot accept that either partner should be coerced into any fertility treatment, even if he or she has already had treatment which has led to the creation of the embryos'.[9]

Nevertheless, there is a counter argument. If one agrees to undergo a procedure such as IVF which is completely elective, then the intended outcome is to produce a baby

1 [2009] IESC 82.
2 *ibid.*
3 IVF has been carried out in Ireland since 1985 when Professor Harrison was the first person to perform IVF in Ireland. J Shannon, 'The Birth of Fertility Treatment' The Medical Independent, July 22, 2010. Available at: http://www.medicalindependent.iepage.aspx?title=the_birth_of_irish_fertility_treatment Cited in A McMahon, 'The Legal Status of Embryos *in vitro* in Ireland – a "precarious" position' (2011) Medico-Legal Journal of Ireland 17(1) 33, 33.
4 *ibid.*
5 *MR v TR & Ors [2006] IEHC* 359, paragraph 'The Facts'.
6 *ibid.*
7 ES Sills & SE Murphy, 'Determining the Status of Non-Transferred Embryos in Ireland: A Conspectus of Case Law and Implications for Clinical INF Practice' (2009) Philosophy, Ethics, and Humanities in Medicine, 4:8 at 1.
8 *ibid* at 12.
9 A Healy, 'Sense of a Case Just Beginning, Not Ending' *The Irish Times* (Dublin, 19 July 2006) 4. Cited in Sills & Murphy *ibid.*

and become parents. If one party then wishes to avoid the agreed result of becoming a parent after contracts have been signed and eggs have been fertilised, the party seeking to implant the embryos in order to procreate would perhaps be entitled to invoke the doctrine of promissory estoppel.[10] There is an assumption that both parties have committed to the making of a family. In the *Roche* case, the Plaintiff relied to her detriment on representations that the Defendant would carry on with this procedure and that they would reproduce together; 'The partner who opposes implantation of the embryos should be estopped from asserting his or her right not to reproduce'.[11] Mrs Roche unsuccessfully claimed the equitable doctrine of promissory estoppel, failing to show an act of detrimental reliance. Chan and Quigley are of the opinion that once the egg is fertilised with the sperm, a partner must not be able to revoke his consent.[12] They have committed and cannot just change their mind:

> "The implication of this is plain and simple: once you have given up your genetic informational rights in this manner you cannot take them back. The creation of IVF embryos involves both parents giving up some rights over their genetic information in pursuit of the creation of embryos. Once this has occurred, any right of the parents not to have those embryos created (as new genetic entities from their genetic information) is lost, and only the physical rights to the embryos persist."[13]

The Court looked at the document executed relating to informed consent and concluded that it only applied to the 'fresh' embryos and not to the three frozen embryos. Mr Justice McGovern stated that:

> "In light of the evidence in this case and the documents which have been produced it cannot be said that it was the presumed intention of the parties that the three frozen embryos would be implanted in the Plaintiff's uterus in the circumstance which have arisen, namely following the success of the first implantation procedure and the legal separation of the Plaintiff and the first Defendant."[14]

This would appear to be well reasoned as the circumstances had changed dramatically and the ex-husband had a new partner. They were not to know that they would be successful first time around, and that the procedure would result in surplus embryos.[15]

The author made a series of telephone calls to all of the clinics in Ireland that offer assisted reproductive treatment.[16] Their opinions seem quite uniform in that they want standard consent forms for all procedures for all clinics. One particular clinic responded that they have new consent forms on average every 9 – 12 months due to new research and newly published guidelines. Along with this, each drafting process requires legal assistance and therefore, makes the process very tedious and frustrating. For this reason, clinics were reluctant to allow any of their consent forms to be used or commented on, with the exception of one. This can be contrasted with the English consent forms which are available to the public on the HFEA website.[17]

Consent Forms for the Use and Storage of Embryos in Ireland and England and Wales

Of the many consent forms available on the HFEA website for different procedures and individuals, only three in particular are relevant for discussion.[18] There are some major differences in the content of the forms used in Ireland and those used in England and Wales.

The first difference is that both gamete providers sign the same consent forms in Ireland, whereas in England and Wales, each male and female have their own separate and different forms to sign. Therefore, it specifies the eggs and the sperm, whichever is applicable in the case.

Another obvious difference is the number of pages in each consent form. The two Irish consent forms are three and a half pages long in total, which covers both gamete providers compared to the HFEA forms for male and female gamete providers which are five and four pages long respectively. This indicates that a lot more detail goes into the English consent forms. However it should be noted, the UK consent forms do ask for consent for the use of unused embryos on training and research which is not relevant in Ireland due to the prohibition on research.

England and Wales have a separate consent form for withdrawing consent or stating lack of consent which is five and a half pages long.[19] It covers discontinuing storage, use or for research purposes but also caters for withdrawal of consent to become a parent and also withdrawal of consent of the other gamete provider. This can only occur in donor cases. The Irish consent forms contain two small paragraphs which refer to revoking consent.[20] The notice of withdrawal must be in writing and then after 28 days, the embryos are thawed. This is in contrast to England and Wales which has a full form dedicated to withdrawal and has a one year

10 *ibid.*

11 *ibid.* Citing T Feliciano, '*Davis v Davis*: What About Future Disputes?' Conn Law Review 1993, 26, 305 – 319.

12 S Chan & M Quigley, 'Frozen Embryos, Genetic Information and Reproductive Rights' (2007) Biothetics Vol 21(8) at 445. Cited in D Madden, *Medicine, Ethics and the Law* (2nd edn Bloomsbury Professional, Dublin 2011) 230.

13 Chan & Quigley *ibid.*

14 *R v R & Ors* [2006] IEHC 221, paragraph 'Express Agreement'.

15 In 2010, the success rate for IVF was 38.5% between a couple who had used their own specimen. There is also a miscarriage rate of 50% in older couples aged 42-43. Info available at http://www.merrionfertility.ie/Success-rates/ Accessed 3/08/12.

16 Clinics contacted were Beacon Care Fertility, Dublin 18, Clane Fertility Clinic, Co. Kildare, Cork Fertility Centre, Cork, Human Assisted Reproduction Ireland, Dublin 1, Merrion Fertility Clinic, Dublin 2, Sims IVF, Dublin 14.

17 www.hfea.gov.uk. Accessed 28/01/14. These consent forms are models for clinics, however they can be used as is as they meet all the conditions set by the HFEA.

18 HFEA WT Form – Your consent to the use of your eggs and embryos for your treatment and the storage of your embryos.
HFEA MT Form – Your consent to the use of your sperm and embryos for your partner's treatment and the storage of your embryos.
HFEA WC Form – Withdrawing your consent or stating your lack of consent.

19 WC Form.

20 Para 12 of the Irish consent form that the author was given.

'cooling off' period. It does not specify in the Irish forms when consent can be revoked, whereas it stipulates in the English forms that at any point up until implantation, consent can be retracted.

Upon relationship status change, death or incapacitation, the Irish consent form states that implantation will not occur and the embryos will be allowed to perish.[21] There is no room for negotiation on this point, while the English model consent form allows for the patients seeking the treatment to specify what they would like to happen to the embryos in these circumstances.[22] This allows for a couple to consider and discuss these issues instead of arbitrarily deciding these issues on their behalf.

On the English forms it states that the patients should have been 'offered counselling'[23] not that they should be given counselling or that it is strongly advised. This is actually stated on the top of every consent form, yet it is not even mentioned in the Irish consent forms. The Irish consent forms have yet to fully comply with the Medical Council Guidelines as it has stated counselling is 'essential'.

In the Irish clinic, the maximum period for storage of cryopreserved embryos is five years.[24] In England and Wales, storage periods range from ten years to 55 years with the option to choose how many years in between.[25]

After comparing both sets of consent forms, it is clear Ireland would greatly benefit from legal guidance on the content of consent forms for the use and storage of embryos.

Disadvantages of the HFEA(England and Wales)

It is tempting to conclude that the HFEA is the answer to all reproductive problems as it regulates the area in great detail and at first glance it seems to leave nothing out. However, the Human Fertilisation and Embryology 1990 Act has many flaws and omissions. Assisted reproductive technologies (ART) in England and Wales are regulated by the Human Fertilisation and Embryology Authority (HFEA) which was created by the Human Fertilisation and Embryology Act 1990 (1990 Act).[26]

First, it is clear from the case law that only one of the gamete providers needs to withdraw consent for the embryos to be destroyed. This is not expressly stated on the consent forms and therefore may not cause either party in the treatment process to realise that if one party withdraws consent – the result is the destruction of the embryo.[27] Moreover, this is not clearly stated in the Act either. It is unfair to assume that patients receiving treatment will infer that this will be the case if either party revokes their consent. This is quite an anomaly as there is a need for joint consent for the use or storage of embryos but the embryos can 'be destroyed on a unilateral basis'.[28] This point has been criticised: 'surely if rights were equal the law would be prevented from doing anything with the embryos unless the parties were in agreement'.[29] Lorraine Hadley, another women who started proceedings at the same time as Natalie Evans in the controversial case of *Evans v United Kingdom*[30] said:

> "An embryo is not a possession to be divided up in the divorce proceedings. It is a baby in the making. I fully accept that men have rights too. But I find it abhorrent that we should be able to create these little human beings – and then flush them down the toilet on a whim. Why should one of us have the right to say the embryos should be destroyed simply because it doesn't suit them any more?"[31]

In *Evans v United Kingdom,* the facts are similar to *MR v* TR. After preliminary tests, Ms Evans was told on the 10th of October 2000 that she needed both of her ovaries removed due to the presence of pre-cancerous cells.[32] Ms Evans enquired about freezing her eggs unfertilised as she was concerned with the possibility of the breakdown of the relationship.[33] The couple were told that they both had to sign consent forms with regard to fertilised eggs which enabled either party to withdraw their consent at any time before implantation occurred.[34] The clinic pointed out that unfertilised eggs had a much lower success rate than that of fertilised eggs[35] and also that that clinic did not operate such a facility.[36] However, Mr Johnston said that there was no need to consider that, as he wanted to be the father of her child, and that they would not split up.[37] However, in May 2002 the relationship broke down and the future of the embryos was discussed by the parties.[38] Mr Johnston wrote to the clinic stating that he wanted the embryos destroyed and that he was revoking his consent.[39] The clinic informed Ms Evans of Mr Johnston's withdrawal of consent and told her that they were obliged under section 8(2) of Schedule 3 to the 1990 Act to destroy the embryos.[40] The relevant section provides that "An embryo the creation of which was brought about in vitro must not be kept in storage unless there is an effective consent by each person whose gametes were used to bring

21 Para 8.

22 Section 6 in WT and MT Form.

23 'About this form' in WT and MT Form.

24 Paras 6, 7 and 9.

25 Section 4 in WT and MT Form.

26 J Herring, *Medical Law and Ethics* (2nd edn Oxford University Press, Oxford 2008) 326.

27 A Smajdor, 'Deciding the Fate of Disputed Embryos: Ethical Issues in the case of Natalie Evans' (2007) Journal of Experimental & Clinical Assisted Reproduction 4;2.

28 *ibid.*

29 K Webster, 'Whose Embryo is it Anyway? A Critique of Evans v Amicus Healthcare [2003] EWHC 2161 (Fam)' (2006) Journal of International Women's Studies 7(3) 71-86. Cited in Smajdor *ibid.*

30 *Evans v United Kingdom,* 6339/05 Eur. Ct. H.R. 1 (2007) (Grand Chamber).

31 2nd October 2003, *The Daily Mail.* Cited in P Saunders, 'Frozen Embryos – The Tip of a Huge Iceberg' (2004) Triple Helix, Winter, 13 available at http://www.cmf.org.uk/publications/content.asp?context=article&id=1186. Accessed 27/01/14. *Evans v United Kingdom,* 6339/05 Eur. Ct. H.R. 1 (2007) (Grand Chamber).

32 *Evans* GC (n 30) at para 1.

33 *ibid.*

34 *ibid.*

35 Success rates vary from 10-15% with eggs that are stored unfertilised. Info available at http://www.hfea.gov.uk/en/1426.html Accessed 3/08/12.

36 *Evans* GC (n 30) at para 1.

37 *ibid.*

38 *ibid* at para 12.

39 *ibid.*

40 *ibid* at para 13.

about the creation of the embryo."[41] Ms Evans complained that section 12 of Schedule 3 in the 1990 Act was inconsistent with the Human Rights Act 1998, Articles 8, 12 and 14, and furthermore, that the embryos were entitled to protection under Articles 2 and 8 of the 1998 Act.[42] Ms Evans was unsuccessful in all her arguments.

Another problem with the Human Fertilisation and Embryology 1990 Act in the UK which is pointed out by Morris and Nott is that the Act seems to treat both men and women the same.[43] When looked at briefly, 'a symmetric right of veto seems the epitome of equality'.[44] This would imply that both sexes endure the same procedures.[45] This is incorrect as the woman undergoes considerably more invasive treatment than men. Essentially, this creates a conflict between the right to procreate and the right not to be a parent. The 1990 Act would seem to choose the right not to become a parent over the right to procreate as it would be too much of a burden on their life.[46] Nonetheless, it is not just the Act which takes this stance, Ireland and the US have taken this viewpoint also through their case law. Indeed Morris and Nott question 'whether developments in assisted reproductive techniques are empowering women, or merely reinforcing their stereotypical role'.[47]

Quality control and supervision is another concern for the HFEA. There is a huge variance in the success rates between clinics and the HFEA fails to advise patients as to these differences.[48] The average success rate for IVF in women under 35 is 28.2%[49] with some clinics managing to double this but with others preforming significantly below this average.[50] This dissimilarity may be due to a number of reasons such as clinics not taking on 'difficult cases' to increase their success rates.[51] After a number of adverse events had been reported, an independent review was carried out in 2004.[52] The report concluded that the licensing committees found it hard to censure clinics that were not complying with guidelines.[53] The report recommended that external specialist inspectors should be used in order to ensure high quality throughout the clinics.[54] This is a similar problem to that experienced by the Irish Medical Council Guidelines, which had no procedure in place to assess that the medical professional were complying with the Guidelines, other than a full disciplinary hearing against an individual doctor.

The HFEA has also been criticised on its research policy for two completely different reasons. First that it does not give the embryo enough protection, and secondly, that it is too restricting. On the first point, pro-life groups believe that the HFEA too easily permits research and ART entails destroying embryos.[55] On the other hand, many have said the HFEA limits research by being bureaucratic.[56] Winston complains that his clinic must employ two full time staff just to deal with the paper work associated with 1,000 patients, that is required by the Authority.[57]

The question is whether Ireland should replicate the HFEA? Is there even a need for Ireland to enact legislation due to the fact that it has gone so long already without legislation and surprisingly there has only been one case to date highlighting this apparent gap in law? Yet, the Irish courts left open a number of questions such as the status of the embryo, which may encourage future cases. As the positives and negatives of the 1990 Act have been highlighted, it should be possible to draft better legislation in Ireland. Is it not appropriate and straightforward to copy the positives and rectify the negatives? The Act has been in place for so long and has stood the test of time, surely it would be an advantageous decision to mirror most of the Act? Research on unused embryos will most likely not be allowed in Ireland in the near future due to the Constitutional protection of the unborn and the preponderance of Catholic views regarding the embryo, accordingly Irish legislators could only select the relative portions of the 1990 Act for now.

Conclusion

On the issue of consent forms, the English model is yet again another good example of what Ireland might consider. It is surprising that with its availability on the internet, the approach in these documents has not been followed in Ireland. Nonetheless, *Evans* did challenge the consent forms but it was the forms' clarity and preciseness that brought the courts to their conclusion. The consent forms in Ireland are constantly under review but it seems peculiar that they do not try to mirror the practice in England and Wales. If an authority was set up and it created model consent forms similar to those of the HFEA, it could provide the Irish clinics with some measure of certainty. Their reluctance to allow discussion of their consent forms further demonstrates the lack of direction and the muddied legal landscape provided by the state. ■

41 Human Fertilisation and Embryology Act 1990 Schedule 3, Section 8(2).
42 *Evans* GC (n 30) at para 13.
43 A Morris & S Nott, 'Rights and Responsibilities: Contested Parenthood' (2009) Journal of Social Welfare & Family Law 31(1) 3, 6.
44 Morris & Nott *ibid* citing D Barak-Erez, 'The Delusion of Symmetric Rights' (1999) Oxford Journal of Legal Studies 19, 297 - 312.
45 Morris & Nott *ibid.*
46 *ibid.*
47 *ibid* at 7.
48 Herring (n 26) at 332.
49 http://www.prideangel.com/p140/IVF-Calculator.aspx Accessed 27/01/14.
50 Herring (n 26) at 332.
51 *ibid.*
52 B Toft, Independent review of the circumstances surrounding four adverse events that occurred in the Reproductive Medicine Units at The Leeds Teaching Hospitals NHS Trust, West Yorkshire (DoH) (2004). Cited in Herring *ibid.*
53 *ibid.*
54 *ibid.*
55 *ibid* at 333.
56 R Winston, Memorandum to Select Committee on Science and Technology (TSO) (2005). Cited in Herring *ibid.*
57 *ibid.* Cited in Herring *ibid.*

The Extradition and Expulsion of the Mentally Ill: a Schizophrenic Approach?

Joanne Williams BL

Introduction

In an article published in the Bar Review in December 2012, the author discussed the judgment of the European Court of Human Rights in *Babar Ahmed & others*, delivered in April 2012.[1] The background, in brief, was that the United States (US) sought the extradition of the six applicants from the United Kingdom (UK) for the purpose of prosecution on terrorism-type charges. The applicants argued that if extradited and convicted they would be at real risk of treatment contrary to Article 3 of the European Convention on Human Rights (ECHR) on account of the conditions at the infamous US 'supermax' detention facilities where they would likely serve lengthy sentences. The Strasbourg Court held that the extradition of five of the six applicants would not contravene the ECHR, and those five were extradited in October 2012.[2] However, the Court required further submissions before it could decide on the case of the sixth applicant *Haroon Aswat* who has a mental illness.

In April 2013, the *Aswat* case reached its conclusion, with the Strasbourg Court distinguishing his case from his fellow applicants' on account of the current severity of his medical condition. The Court held that on the facts before it, his extradition would breach Article 3. A line was drawn under the case when in September 2013, the UK Government's request for the case to be referred to the Grand Chamber was refused.[3] This article reviews the *Aswat* judgment and queries whether it marks a departure from the Court's earlier jurisprudence regarding the expulsion of the mentally ill.

The *Aswat* Case

Mr Aswat has been indicted before the US federal courts in respect of an alleged conspiracy to establish a *jihad* training camp in Oregon. His attempts to resist his extradition to the US were unsuccessful before the English courts[4] and he lodged a complaint in Strasbourg in 2007. While his case was pending, he was transferred from a UK general prison to a high security psychiatric hospital and he was diagnosed with *paranoid schizophrenia*. It was deemed appropriate to continue his detention in a medical hospital rather than return him to prison, for his own health and safety. The medical evidence before the Strasbourg Court was that his condition was well-controlled on medication in the UK psychiatric hospital and that his participation in occupational and vocational activities helped to prevent any significant deterioration of his mood.[5] However, he had only limited insight into his illness and if he was returned to prison, his compliance with medication would be uncertain, particularly in the medium to long term, and would likely lead to a relapse.[6]

Mr Aswat argued in Strasbourg that mentally ill patients convicted of terrorism-related offences in the US are detained at the notorious ADX Florence 'supermax' facility and that if convicted, he would likely be housed there in a single cell and would, at best, spend a significant part of each day alone, which would be likely to exacerbate his mental illness. He had a history of not eating or drinking when under stress and there was a real risk that such behaviour would resume if extradited.[7] The UK Government submitted that with his consent, Mr Aswat's medical records would be communicated to the US in advance of his surrender. If surrendered, his mental health would be relevant to every decision regarding his placement within the US prison system and could be raised as an issue regarding his fitness to plead. He would have a full right of access to the US' courts and to the protections of the criminal justice system. The US Department of Justice had furnished information to the UK authorities on the assessment of his fitness to stand trial, his detention pending trial and upon conviction (if relevant), and the system and standard of mental health care available in US institutions. The evidence before the Strasbourg Court was that he could present evidence and make oral statements as to why he should not be detained in ADX Florence in light of his mental health, and the Court had before it information regarding review procedures there. The UK Government submitted that while a diagnosis of schizophrenia would not preclude designation to a maximum security facility such as ADX Florence, in practice, most inmates with this diagnosis were managed and treated in other facilities.[8]

Judgment

The Strasbourg Court reiterated its well established principle that Article 3 applies irrespective of the reprehensible nature of the conduct of the person in question,[9] that the detention of a person who is ill may raise issues under Article 3, that the lack of appropriate medical care may amount

1 *Ahmad & Others v. UK* [2013] 56 E.H.R.R. 1.

2 A final domestic challenge in that case was rejected: see *Hamza & Others v. Secretary of State for the Home Department* [2012] EWHC 2736 (Admin).

3 Press Release issued by the Registrar of the Court, ECHR 257 (2013), 10th September 2013.

4 See *Ahmad & Aswat v. Secretary of State for the Home Department* [2006] EWHC 2927 (Admin); [2007] H.R.L.R. 8.

5 *Aswat v. UK* (Application No. 17299/12, judgment of 16th April 2003) (hereafter "*Aswat*"), §§ 22 and 51.

6 *Aswat,* § 51.

7 *Aswat,* §§ 39-44.

8 *Aswat,* §§ 45-47.

9 *Aswat,* § 49.

to treatment contrary to Article 3 and that in the case of mentally ill patients, increased vigilance is required in light of their vulnerability and their potential inability to complain coherently or at all about their treatment. The Court recalled that three elements are relevant to the compatibility of an applicant's health with his detention: (a) his or her medical condition, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of the person's health.[10] The Court seemed satisfied with the medical evidence[11] but it found that its assessment of the conditions in which he would be detained in the US was hindered by uncertainty about where he would be housed before or after trial, which was a matter to be determined by the prison services. The Court was decidedly critical of the lack of information provided on US pre-trial detention.[12] It accepted that Mr Aswat would, if convicted, have access to medical facilities and mental health services regardless of where he was detained. However, it noted that he has no ties with the U.S. and would face an uncertain future in an as-yet undetermined institution. Moreover, there was no guarantee that, if convicted, he would not be detained in ADX Florence where he would face a highly restrictive regime with long periods of social isolation. His case was, therefore, distinguishable from that his fellow applicant, *Abu Hamza* who had various physical disabilities. In the latter's case there was evidence that, because of his medical condition, he would spend only a short period of time at ADX Florence.[13]

Ultimately, the Court distinguished Mr Aswat's case on account of the severity of his mental condition. It emphasised that he faced expulsion to a country where he had no ties, would be detained and would not have the support of family and friends. It concluded that, in light of the current medical evidence, there was a real risk that his extradition to a different country and to a different – and potentially more hostile – prison environment would result in a significant deterioration in his mental and physical health. That deterioration would be capable of reaching the Article 3 threshold.[14]

A New Departure regarding the Mentally Ill?

The *Aswat* judgment represents a high water mark for the protection of the mentally ill under Article 3 ECHR. Perhaps the most interesting feature of the judgment is the manner in which the Court distinguished the *Aswat* case from *Bensaid*,[15] which also concerned the expulsion from the UK of a man suffering from schizophrenia. Aside from that shared characteristic, the circumstances of the *Bensaid* case differed significantly from the *Aswat* case. *Bensaid* did not relate to extradition; it was an immigration case. Mr Bensaid entered the UK in 1989 and in 1995 he was granted indefinite leave to remain as the spouse of a UK citizen. Around that time, he came to the attention of the mental health services and was involuntarily admitted to a psychiatric hospital but his condition stabilised with the help of medication and he was then released and treated as an outpatient. When he returned to Algeria for a holiday in 1996, his permission to remain in the UK lapsed and he was refused leave to re-enter the UK because of suspicions that his was a marriage of convenience.

He argued that his removal from the UK would cause a full relapse in his mental health problems, in breach of Article 3 ECHR. The evidence before the Strasbourg Court was that his home village in Algeria was 75-80km from the nearest hospital which treated mentally ill patients. He would no longer have available to him as an outpatient a particular medication which he received for free in the UK and he had no way of paying for the drug in Algeria. He could only obtain the drug for free in Algeria if admitted as an inpatient. He argued that his risk of relapse, if returned to Algeria, was accentuated by the fact that he would have to regularly undertake an arduous journey through a troubled region to obtain medication. The Strasbourg Court found that the suffering associated with a relapse could, in principle, fall within the scope of Article 3 but it noted that he was also at risk of relapse in the UK as his was a long term illness. Ultimately, the fact that his circumstances would be less favourable than those enjoyed by him in the UK was not decisive. It found the risk of relapse to be "*to a large extent speculative*"[16] and held that having regard to the high threshold set by Article 3, there was not a sufficiently real risk.

The Court in *Aswat* distinguished that case from *Bensaid* on the basis that Mr Aswat was facing "*not expulsion but extradition to a country where he has no ties, where he will be detained and where he will not have the support of family and friends.*"[17] The Court does not seem to have attributed any weight to the fact that while Mr Bensaid was not facing a sentence in Algeria, he was nonetheless facing essentially involuntary admittance to a psychiatric hospital some distance from his home and family unless he could find a way to pay for his required medication. The most interesting aspect of the distinction drawn between the two cases, however, is the manner in which the Court approached the sufficiency of the evidence before it.

In *Aswat,* the judgment of the Court gives no indication that the applicant provided information about his personal circumstances – his family life, means, origins, religion, citizenship, native language etc. – and yet the Court placed a great emphasis on the perceived lack of familial or social support in the US. It is not clear from the judgment if the Court knew the circumstances of his private and family life in the UK. One is also left to speculate as to the extent of his ties to the US, if any. In *Bensaid*, in contrast, the Court had before it detailed information about the applicant's family circumstances, religion and financial situation; the considerable distance between his village and the nearest relevant hospital; the fact that his family did not have a means of transport; the drugs available at the hospital and the price of those drugs; and the security situation in the area. Nonetheless in *Bensaid,* the Court found the risk of relapse to be speculative while in *Aswat* the Court placed considerable emphasis on the lack of family support in the US, which may have been the product of the Court's own speculation.

The distinction drawn between the two cases also relied on the fact that while Mr Aswat would have been detained in the US if extradited and convicted, Mr Bensaid would not be at risk

10 *Aswat,* § 50.
11 *Aswat,* § 51.
12 *Aswat,* § 52.
13 *Aswat,* § 56.
14 *Aswat,* § 57.
15 *Bensaid v. United Kingdom* [2001] 33 E.H.R.R. 205 (hereafter "*Bensaid*").
16 *Bensaid*, § 39.
17 *Aswat,* § 58.

of detention in Algeria. A more cynical court could have viewed the potential incarceration of Mr Aswat as a factor which created a more favourable outlook for his mental health than could be expected for Mr Bensaid. The evidence was that Mr Aswat could be expected to receive free, regular medical treatment and review in sanitary conditions, in contrast to Mr Bensaid who faced an inability to pay for his medication as a destitute outpatient in a conflict-prone area. The *Aswat* judgment may therefore mark a progression in Strasbourg's approach to the protection of the mentally ill from expulsion and, in particular, from extradition. The Court certainly seems to have signalled a more robust approach than it did in *Bensaid* more than a decade ago. ■

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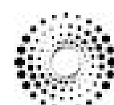

THOMSON REUTERS

The Right of a Social Welfare Claimant to seek a Revision of a Decision

Derek Shortall BL*

Introduction

Since 1952,[1] a social welfare claimant whose claim has been refused by a deciding officer and/or disallowed on appeal has enjoyed a statutory right to seek to have either or both decisions revised in the following circumstances. The decision can be reviewed in the light of new evidence or of new facts; where there has been any relevant change of circumstances or; a mistake having been made with respect to the law or the facts. There have been three consolidations[2] of the Social Welfare Acts since 1952, the most recent of which is the Social Welfare Consolidation Act 2005. Since 2005, the statutory provisions governing revisions have been subject to a number of amendments, the most recent of which, contained within the Social Welfare and Pensions (No. 2) Act 2013,[3] circumscribe both the circumstances in which a claimant may invoke these provisions and the discretion to back-date payments in revised decisions. These amendments were introduced as a consequence[4] of the recent decision of Hogan J. in *C.P. v Chief Appeals Officer & ors.*[5]

Purpose of a revision

A revision serves a number of purposes which are of benefit to claimants, the Department of Social Protection (DSP) and the Social Welfare Appeals Office (SWAO): it permits unsuccessful claimants to have their claims and/or appeals reconsidered without having recourse to making a fresh application and/or appeal; it facilitates more effective administration; it grants a deciding officer,[6] designated person,[7] appeals officer[8] and the Chief Appeals Officer[9] discretion as to the date upon which payment should commence in the event of a successful revision; it empowers the DSP and the SWAO to amend an earlier decision for the purpose of suspending, disallowing or reducing a claimant's existing payment and; provides a legal basis for the DSP to seek repayment of any erroneous or fraudulently obtained overpayment.[10]

The parameters of a revision

The Social Welfare Consolidation Act 2005 provides for revisions in s. 301, s. 317, s. 318 and s. 324. Section 301 grants a deciding officer of the DSP discretion to revise his or her own decision or that of another deciding officer or a designated person,[11] 'at any time' in the following circumstances: in the light of new evidence or of new facts;[12] a mistake in relation to the law or facts or;[13] where there has been a relevant change of circumstances since the decision was given.[14] The change of circumstance provision may only be engaged now, post-amendment, where there is a payment in being.[15] However, those claimants, not being in payment, who invoked s. 301 prior to 25 December 2013, remain unaffected by the amendment.[16] A deciding officer may also revise his or her own decision or that of another deciding officer where an appeal is pending, provided the decision is in favour of the claimant,[17] or revise an appeal officer's decision where there has been a relevant change of circumstances.[18] This latter provision may only be engaged now where there is a payment in being,[19] unless invoked before 25 December 2013. Where an application for a revision is unsuccessful, the claimant may, in turn, appeal that decision to the SWAO.[20]

Section 317 – the subject of the *C.P.* judgment – empowers an appeals officer of the SWAO to revise their own decision or that of another appeals officer[21] 'at any time' in the following circumstances: in the light of new evidence or of new facts or; where there has been any relevant change of circumstances since the decision was given. As with s. 301, the change of circumstances provision may only be engaged

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1 Social Welfare Act 1952.
2 Social Welfare (Consolidation) Act 1981, Social Welfare (Consolidation) Act 1993 and the Social Welfare Consolidation Act 2005.
3 Which came into force on 25 December 2013.
4 Social Welfare and Pensions (No. 2) Bill 2013: Committee Stage (Continued), 28 November 2013, where Ms Joan Burton, Minister for Social Protection stated that:

> 'Amendments Nos. 2 to 4, inclusive, address issues that have been raised in a very recent High Court judgment concerning the legal powers of deciding officers and appeal officers to revise decision in certain cases.'

5 [2013] IEHC 512. The author acted for the applicant.
6 Social Welfare Consolidation Act 2005, s 302(c).
7 Social Welfare Consolidation Act 2005, s 325(c).
8 Social Welfare Consolidation Act 2005, s 319(c).
9 *ibid.*
10 Social Welfare Consolidation Act 2005, s 302(a)-(b) and Part 11.
11 Social Welfare Consolidation Act 2005, s 301(2A)(as amended).
12 Social Welfare Consolidation Act 2005, s 301(1)(a)(as amended).
13 *ibid.*
14 Social Welfare Consolidation Act, s 301(1)(a)-(2)(a)(as amended).
15 Social Welfare Consolidation Act 2005, s 304(1)(b) (as amended by Social Welfare and Pensions (No. 2) Act 2013, s 3).
16 Social Welfare and Pensions (No. 2) Act 2013, s 4(2).
17 Social Welfare Consolidation Act 2005, s 301(4).
18 Social Welfare Consolidation Act 2005, s 301(3).
19 Social Welfare Consolidation Act 2005, s 300(1)(b).
20 Social Welfare Consolidation Act 2005, s 301(1)(a)(ii) (as amended by Social Welfare and Pensions (No. 2) Act 2013, s 3).
21 The appeals officer may revise their own decision of that of another appeals officer.

now where there is a payment in being,[22] unless invoked prior to 25 December 2013. An appeals officer does not have jurisdiction to revise a decision where there has been an error of law.[23] Section 318 permits the Chief Appeals Officer to revise, 'at any time', any decision of an appeals officer deemed erroneous by reason of some mistake having been made in relation to the law or the facts. The Chief Appeals Officer does not have power to revise a decision where there has been a change of circumstances.

Prior to September 2011 – when the legal functions of the HSE, in respect of its operation of the Community Welfare Services, were transferred to the Minister for Social Protection[24] – s. 324 granted jurisdiction to an 'employee of the executive'[25] to revise determinations. Section 324 now grants 'designated persons'[26] discretion to revise a determination of *another*[27] designated person 'at any time', in respect of Supplementary Welfare Allowance payments,[28] in the following circumstances: in the light of new evidence or of new facts;[29] a mistake in relation to the law or facts[30] or; where it appears to the designated person that there has been a relevant change of circumstances.[31] The change of circumstance provision may only be engaged now, post-amendment, where there is a payment in being,[32] unless the provision was invoked prior to 25 December 2013. A designated person may also revise the decision of another designated person, where an appeal is in being, provided the revision is in favour of the claimant,[33] or revise an appeal officer's decision where there has been a relevant change of circumstances.[34] This latter provision may only now be engaged where there is a payment in being,[35] unless invoked before 25 December 2013. Where an application for a revision is unsuccessful, the claimant may appeal that decision to the SWAO.[36]

An important feature of the power to revise is the concomitant discretion granted to deciding officers, appeals officers, the Chief Appeals Officer and designated persons, as to the date from which a revised decision shall take effect. This allows the relevant officer or designated person to back-date or disallow a payment to any period between the date of the original application and the date of the revision. As a consequence of the 2013 amendment, the discretion to back-date a claim originally disallowed can no longer be exercised on foot of a change in circumstances – the claimant must now make a fresh application to the Department and, if necessary, a fresh appeal to the SWAO.

Case law

In *Corcoran v Minister for Social Welfare,*[37] Murphy J. considered s. 300 of the Social Welfare Consolidation Act 1981, which contained earlier versions of s. 301, s. 317 and s. 318, observing that an aggrieved party had 'an unlimited right to reopen the issue "in the light of new evidence or of new facts."'[38] Although *obiter*, the observation was wholly consistent with the section and, for that matter, with s. 301, s. 317, s. 318 and s. 324, insofar as these sections may be invoked at 'any time'. In *Sheehan v Minister for Family Affairs & Anor,*[39] McMenamin J. noted the revisionary functions of a deciding officer under s. 301 and observed that a negative decision could 'either be considered by the appeals officer, or alternatively… be referred back to the deciding officer for review or revision…'.[40] A claimant may certainly elect to appeal *or* seek a revision, but equally may seek both. O'Neill J. alluded to this in *Ayavoro v HSE & Minister for Social and Family Affairs,*[41] noting that 'the statutory regime… not only provides for an appeal but, in fact, makes provision for revision of decision…'.[42]

Section 263 of the Social Welfare Consolidation Act of 1993 – the forerunner of s. 318 – has been referred to and considered in a number of Superior Court cases. In *Galvin v Chief Appeals Officer*,[43] Costello P. restated the provisions of the section.[44] In *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs*,[45] the Supreme Court addressed the temporal scope of s. 263, stating that: 'Under the provisions of s. 263 of that Act "the Chief Appeals Officer" may, at any time, revise any decision of an appeals officer…'.[46] Further, that although it did not confer a 'double appeal', the Chief Appeals Officer could, where facts were insufficient or ambiguous, 'require additional evidence.'[47] In *Maher v Minister for Social Welfare*[48] the Supreme Court again addressed the temporal effect of s. 263, holding that 'it is clear… that the Chief Appeals Officer may "at any time" review any

22 Social Welfare Consolidation Act 2005, s 317(1)(as amended by Social Welfare and Pensions (No. 2) Act 2013, s 4).
23 The absence of a reference to an error of law in s. 317 and the inclusion of such a reference in s. 301, s. 318 and s. 324 affirm the more limited parameters of s. 317.
24 Social Welfare and Pensions Act 2010, Part 4 (commenced by S.I. 471 of 2011).
25 Social Welfare Consolidation Act 2004, s 324(1).
26 Social Welfare Consolidation Act 2005, s 324(1)(as amended by the social Welfare and Pensions Act 2008, s 18 and Schedule 1).
27 *ibid.*
28 The following payments are deemed to be SWA: basic Supplementary Welfare Allowance (Social Welfare Consolidation Act 2005, s 189); Rent Supplement (Social Welfare Consolidation 2005, s 198; Exceptional Needs or Urgent case payment (Social Welfare Consolidation Act 2005, s 200, s 201, respectively).
29 Social Welfare Consolidation Act 2005, s 324(1)(i)(I) (as amended by the Social Welfare and Pensions Act 2008, s 18 and Schedule 1).
30 Social Welfare Consolidation Act 2005, s 324(1)(i)(II) (as amended by the Social Welfare and Pensions Act 2008, s 18 and Schedule 1).
31 Social Welfare Consolidation Act 2005, s 324(1)(ii) (as amended by the Social Welfare and Pensions Act 2008, s 18 and Schedule 1).
32 Social Welfare Consolidation Act 2005, s 324(1)(a) (as amended by Social Welfare and Pensions (No. 2) Act 2013, s 5).
33 Social Welfare Consolidation Act 2005, s 324(2) (as amended by the Social Welfare and Pensions Act 2008, s 18 and Schedule 1).
34 Social Welfare Consolidation Act 2005, s 324(1)(b) (as amended by the Social Welfare and Pensions Act 2008, s 18 and Schedule 1).
35 Social Welfare Consolidation Act 2005, s 324(1)(b) (as amended by Social Welfare and Pensions (No. 2) Act 2013, s 5).
36 *ibid.*

37 [1991] 2 IR 175.
38 *ibid.* at 183.
39 [2010] IEHC 4.
40 *ibid.* at para 10.
41 [2009] IEHC 66.
42 *ibid.*
43 [1997] 3 IR 240.
44 At 249.
45 [2004] IESC 40.
46 *ibid.*
47 [2004] IESC 40.
48 [2008] IESC 15.

decision'.[49] The applicant/appellant's appeal to the SWAO had been disallowed in 2000 and his case heard in the Supreme Court in 2008. In spite of a gap of eight years, the appellant's case was remitted to the Chief Appeals Officer for revision. The effect of which was that the Chief Appeals Officer had discretion as to whether or not to revise the earlier decision and discretion to determine the date from which any revision would take effect.

In the High Court, in *Minister for Social, Community and Family Affairs v Scanlon,*[50] a case primarily concerned with the retrospective recovery of payments erroneously allowed, Laffoy J. observed that 'in broad terms, a deciding officer or an appeals officer had a discretion as to the date on which a revised decision should take effect…'.[51]

C.P. v Chief Appeals Officer

In *C.P. v Chief Appeals Officer & ors*,[52] Hogan J. addressed the question of whether or not there was an implied temporal limitation, in s. 317, to the exercise of a claimant's right to a revision and whether or not there was a distinction to be drawn between claimants with a payment in being and those whose claims had been disallowed and deemed closed. Section 317, as noted above, empowers an appeals officer to revise, at any time, his or her own decision or that of another appeals officer, where the earlier decision was erroneous in the light of new evidence or new facts or where there has been a change of circumstances. In *C.P.* and four other similar judicial review applications the applicants had sought to invoke the provisions of s. 317 on the basis of new evidence and/or on the basis that there had been a change of circumstances. The SWAO acknowledged that there was new evidence but refused to remit the matter back to an appeals officer for consideration on the basis that the appropriate remedy was a fresh application to the DSP. In the four other cases, the primary reason given by the SWAO for refusing to permit the applicants to invoke s. 317 was the passage of time from the determination of the appeal to the date upon which the revision had been sought. In *C.P.* there was a gap of 11 months. The applicants in all five cases were the parents of special needs children, who had applied for Domiciliary Care Allowance.

The respondents sought to limit the application of s. 317 to cases in which payment was in being or 'live',[53] on the basis that those powers could not be exercised where a case was deemed to be closed. Further, that there was an implied limitation which permitted the respondent to impose a cut-off date or temporal limitation and refuse to revise earlier adverse decisions,[54] in the premises that the absence of a limit on the backdating of claims would have serious administrative and financial implications for the DSP.[55] Hogan J. first observed that in the absence of a provision such as s. 317, the appeals officer would be *functus officio* and administratively final, irrespective of the circumstances, but that the Oireachtas clearly recognised that, given the special nature of social security claims and the ever-changing circumstances of claimants, it would be desirable that the appeals officer should have the power to re-open appeals in certain circumstances.[56] Hogan J. then considered whether or not an appeals officer had a jurisdiction to exercise the revising powers under s. 317 to re-open an appeal adverse to a claimant after an interval of several months and held that:

> 'At first blush it is difficult to see why the Appeals Officer should not have such a jurisdiction in view of the express language of s. 317 which provides that this revision may be done "at any time". This is very straightforward language which clearly provides that the power to re-open otherwise concluded appeals decision is not directly limited by temporal constraints.[57]

Hogan J. went on to consider the Supreme Court decision in *Maher* and held that the dicta of Denham J. in *Maher* governed the interpretation which must be ascribed to the words 'at any time' in s. 317, and that:

> 'In these circumstances I am accordingly coerced to conclude that the Department has failed to operate the section in the manner which was plainly intended by the Oireachtas. The criteria which were in fact applied in refusing to consider this revision application under s. 317 have no proper legal basis. It follows, therefore, that I must hold that the Appeals Office erred in law in declining to entertain this application for a review based on new evidence of the earlier decision of the Appeals Officer dated 28th August, 2012. Section 317 of the 2005 Act clearly confers such a jurisdiction to entertain revision applications of this nature in cases where new evidence has been presented.'[58]

Hogan J. also rejected the respondents' argument that there was a distinction between claimants in payment and those whose claims were disallowed, such as the applicant:

> '…the distinction sought to be drawn by the Department between cases which are in payment and those which are not has simply no basis in law. Section 317 does not make distinctions of this nature and nor does it distinguish between cases which are "live" and those which are not.'[59]

Conclusion

On foot of the decision in *C.P.,* s. 301, s. 317 and s. 324 have been amended in a somewhat hurried fashion, which attracted the criticism of some public interest organisations.[60]

49 *ibid.*
50 [2001] 1 I.R. at 64.
51 *ibid.* at 76.
52 [2013] IEHC 512.
53 At para 9.
54 At para 10.
55 At para 11.
56 At para 13.
57 At para 15.
58 At para 24.
59 At para 23.
60 See Michael Farrell (Senior Solicitor, FLAC) *Comment on Social Welfare Case,* 8 January 2014:
> 'With remarkable speed the Department drafted amendments to the main Social Welfare Act to support their position, tacked them onto a Pensions Bill that was

The effect of which is that, where a claim is disallowed, deciding officers, designated persons and appeals officers no longer have the power to revise that decision on the basis of a change of circumstances. The claimant must now make a fresh application to the DSP. Although this is broadly in line with legislative provisions in the UK,[61] a more effective and fairer way of amending the legislation would have been to insert a provision into the Act of 2005 to the effect that where a payment was disallowed and there is a subsequent change of circumstances the payment may only be back-dated to the date on which the change of circumstance occurred. This would have avoided the need for fresh applications to the DSP and fresh appeals to the SWAO – and with it the inconvenience and delay to claimants and administrative burden on the DSP and SWAO – while, at the same time, protected the DSP from the unquantifiable financial liability which the DSP asserted might arise on foot of an unlimited discretion to back-date previously disallowed claims.

The amendments are limited to revisions where there has been a change in circumstances.[62] Thus it remains open to a claimant, whose application was, or is, disallowed, to seek a revision on the basis of new evidence or new facts or by reason of some mistake having been made in relation to the law or the facts, at *any time*. It is submitted that any further proposed amendments[63] to these important provisions – which been extant for more than half a century and have survived unscathed in more straitened times than these – deserve a greater degree of consultation and debate than that which preceded the Social Welfare and Pensions (No. 2) Act 2013. ■

already going through the Oireachtas, and got them passed and signed into law by Christmas with minimal debate. The amendments were highly technical and there was no time for, or even attempt to have a public consultation or debate on the issue.'

Available at <http://www.pila.ie/bulletin/january-2014/8-january/guest-article-by-flac-senior-solicitor-michael-farrell-comment-on-social-welfare-case-update/>.

61 Social Security Act 1998, s 8(2).

62 In the context of Domiciliary Care Allowance by example, a change in circumstance implies an increased level in the care needs of a claimant's child since the date of the disallowed claim. Applications for revisions are routinely supported by further or better medical reports, the contents of which might be deemed to constitute either a change of circumstances *or* new evidence or new facts.

63 Social Welfare and Pensions (No. 2) Bill 2013: Committee Stage (Continued), 28 November 2013, where Ms Joan Burton, Minister for Social Protection stated that:

> '…in the aftermath of the High Court decision I have asked officials of the Department to carry out a more wide-ranging review of the legislation on social welfare decisions. I will bring forward any necessary legislation at a later date.'

At the launch of Family Law by Louise Crowley, left to right: Dr Louise Crowley, Professor Ursula Kilkelly, Head, College of Business and Law and His Honour Judge David Riordan, Judge of the Circuit Court. The launch took place on 6 February 2014 in UCC. Family Law in published by Thomson Reuters Round Hall.

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National Asset Management Ltd v McNulty

Interpretation

Intention of parties – Sale of lands – Whether vendors required to compel local authority to consent to mortgage of lands – Whether vendors required to execute limited recourse mortgage – Whether vendors agreed to terms that could not be fulfilled – Whether vendors in fundamental breach of contract – Whether purchasers entitled to rescission – Whether trial judge erred in construction of contract – Whether trial judge substituted own views of bargain for those actually contracted for – *Marlan Homes Ltd v Walsh* [2009] IEHC 135, (Unrep, Clarke J, 20/3/2009); *Marlan Homes Ltd v Walsh* [2009] IEHC 576, (Unrep, Clarke J, 21/12/2009); *Northern Bank Finance Corp v Charlton* [1979] IR 149; *Aga Khan v Firestone* [1992] ILRM 31 and *Lac Minerals Ltd v Chevron Mineral Corp of Ireland* [1995] 1 ILRM 161 considered – *Kramer v Arnold* [1997] 3 IR 43; *Ryanair Ltd v An Bord Pleanála* [2008] IEHC 1, (Unrep, Clarke J, 11/1/2008); *Analog Devices BV v Zurich Insurance Co* [2002] 1 IR 272; *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 and *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 1 WLR 1465 approved – *Charter Reinsurance v Fagan* [1997] AC 313 applied – Appeal allowed; High Court order set aside (95/2010 – SC – 30/3/2012) [2012] IESC 23
Marlan Homes Ltd v Walsh

Interpretation

Licence – Electricity generation – Code of practice – Carbon revenue levy – Cost – Ordinary and natural meaning – Whether carbon levy constituted cost attributable to electricity generation – Whether electricity generators entitled to include levy in costs of bidding system – Whether levy constituted opportunity cost or short term marginal costs – Whether terms defined in licence and code of practice – Whether generators contractually committed to definitions in licence and code of practice – Whether levy constituted integral part of generation of electricity – *Analog Devices BV v Zurich Insurance Co* [2005] IESC 12, [2005] 1 IR 274; *People (AG) v Kennedy* [1946] IR 517 and *ICS Ltd v West Bromwich BS* [1998] 1 WLR 896 applied – *McGuire v Western Morning News* [1903] 2 KB 101 and *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205 considered – Electricity Regulation Act 1999 (No 23), s 14 & part VIB – Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010 (No 13), s 3 – Electricity Regulation (Amendment) Single Electricity Market) Act 2007 (No 5) – Council Directive 2003/87/EC – Council Directive 96/61/EC – European Communities (Greenhouse Gas Emissions Trading) Regulations 2004 (SI 437/2004) – Council Directive 96/92/EC – Appeal dismissed (285/2011 – SC – 23/2/2012) [2012] IESC 13
Viridian Power v Commissioner for Energy Regulation

Mistake

Unilateral mistake – Equity – Rectification – Deed of pledge – Personal guarantee – Whether common intention to mitigate personal guarantee – Whether deed of pledge representing agreement of parties – Whether unilateral mistake – Whether rectification appropriate – Duty of confidentiality – Defendant disclosing information regarding plaintiff to third party – Whether duty of confidentiality existing between parties – Whether necessary to establish special damages – A Roberts & Co Ltd v Leicestershire County Council [1961] Ch 555; Agip SpA v Navigazione Alta Italia SpA (The Nai Genova) [1984] 1 Lloyd's Rep 353; AG v Guardian Newspapers (No 2) [1990] 1 AC 109; Bank of Tokyo Ltd v Karoon [1987] 1 AC 45;
Barclays Bank plc v Taylor [1989] 1 WLR 1066; Caldwell v Mahon [2006] IEHC 86, [2007] 3 IR 542; Campbell v MGN Ltd [2004] 2 AC 457; Coles v William Hill Organisation Ltd [1998] L & TR 14; Comm for the New Towns v Cooper (GB) Ltd [1995] Ch. 259; Conway v Irish National Teachers Organisation [1991] 2 IR 305; Crane v Hegeman-Harris Co Inc [1939] 1 All ER 662; euNetworks Fiber UK Ltd v Abovenet Communications UK Ltd [2007] EWHC 3099 (Ch), (Unrep, High Court of England and Wales, Briggs J, 21/12/2007); FW v British Broadcasting Corporation (Unrep, Barr J, 25/3/1999); George Wimpey UK Ltd v VIC Construction Ltd [2005] EWCA Civ. 77, 103 Con LR 67; Haughey v Moriarty [1999] 3 IR 1; Herrity v Associated Newspapers (Ireland) Ltd [2008] IEHC 249, [2009] 1 IR 316; Huber (JJ) Investments Ltd v Private DIY Co Ltd [1995] NPC 102; Hurst Stores & Interiors Ltd v ML Property Ltd [2004] EWCA Civ 490, 94 Con LR 66; In re Norway's Application (Nos 1 and 2) [1990] 1 AC 723; Irish Life Assurance Co Ltd v Dublin Land Securities Ltd [1986] IR 332 (HC); [1989] IR 253 (SC); Leopardstown Club Ltd v Templeville Developments Ltd [2010] IEHC 152, (Unrep, Edwards J, 29/1/2010); Lipkin Gorman v Karpnale Ltd [1989] 1 WLR 1340; Littman v Aspen Oil (Broking) Ltd [2005] EWCA Civ 1579, [2006] 2 P & CR 35;
Lucey v Laurel Construction Co Ltd (Unrep, Kenny J, 18/12/1970); McIntyre v Lewis [1991] 1 IR 121; Monaghan County Council v Vaughan [1948] IR 306; Mosley v News Group Newspapers Ltd [2008] EWHC 1777, [2008] EMLR 679; National Irish Bank Ltd v Radio Telefís Éireann [1998] 2 IR 465; O'Neill v Ryan (No 3) [1992] 1 IR 166; QR Sciences Ltd v BTG International Ltd [2005] EWCA 670 (Ch), (Unrep, High Court of England and Wales, Park J, 15/4/2005); Riverlate Properties v Paul [1975] 1 Ch 133; Shortt v Commissioner of An Garda Síochána [2007] IESC 9, [2007] 4 IR 587; Templiss Properties Ltd v Hyams [1999] EGCS 60; Thomas Bates Ltd v Wyndham's Ltd [1981] 1 WLR 505; Tournier v National Provincial & Union Bank of England [1924] 1 KB 461; Walford v Miles [1992] 2 AC 128; Walsh v National Irish Bank Ltd [2007] IEHC 325, [2008] 2 ILRM 56 and Weeds v Blaney [1978] 2 EGLR 84 considered – Rectification of deed of pledge; declaration that defendant entitled to rely on guarantee and damages awarded to plaintiff for breach of confidence (2012/2092P & 2012/51COM – McGovern J – 15/3/2013) [2013] IEHC 136
Slattery v Friends First Life Assurance Company Limited

Undue influence

Appeal against order setting aside alleged gifts – Supreme Court as court of appeal – Whether findings of fact based on evidence – Whether inferences correctly and factually drawn – Facts as found by High Court – Evidence and findings on capacity of ward – Undue influence – Relationship giving rise to presumption of undue influence – Onus on donee – Findings on financial transactions – Transfers from bank accounts – Absence of credible evidence that legal or financial advice received – Attempt to revisit findings of fact of trial judge – Failure to raise substantial grounds of appeal – Hay v O'Grady [1992] IR 210; Pernod Ricard and Comrie plc v Fyffes plc (Unrep, SC, 11/11/1988); O'Connor v Dublin Bus [2003] 4 IR 459; Quinn (A Minor) v Mid Western Health Board [2005] IESC 19, [2005] 4 IR 1; Reg (Proctor) v Hutton [1978] NI 139; Inche Noriah v Shaik Allie Bin Omar [1929] AC 127; Allcard v Skinner [1887] 36 Ch D 145 and Carroll v Carroll [1999] 4 IR 241 considered – Constitution of Ireland 1937, Article 34 – Appeal dismissed (215/2013 – SC – 30/7/13) [2013] IESC 36
C(M) (a ward) v C(F)

Terms

Sale of land – Building contract – Lease – Call and put option – Arrears of rent – Cost of extra works – Construction of contract

terms – Whether interest rate of arrears reasonable – Whether rent calculation based on building cost should include value added tax – Whether claim contested on pleadings – Whether evidence of pyrite admissible – Whether defendant should be permitted to amend defence – Judgment granted (2012/4910S – Ryan J – 2/2/2012) [2012] IEHC 187
Helsingor Ltd v Walsh

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Statutory Instruments

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SI 566/2013

District Court districts and areas (amendment) and variation of days and hours (Ballina, Ballyhaunis, Baltinglass, Bandon, Birr, Bray, Cahirciveen, Carlow, Castlebar, Clones, Edenderry, Kells, Killarney, Killorglin, Kinsale, Listowel, Monaghan, Navan, Nenagh, Swinford, Tralee, Trim, Tullamore and Virginia) order 2013
SI 468/2013

CRIMINAL LAW

Appeal

Application for disclosure of additional documents – Pending appeal against conviction – Whether disclosure sought relevant – Whether disclosure could materially assist defence case over and above evidence available at trial – People (DPP) v O'Regan [2007] IESC 38, [2007] 3 IR 805 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 86, r 16(2) – Relief refused (308/2009 – CCA – 10/2/2012) [2012] IECCA 49
People (DPP) v Farrelly

Appeal

Application for certificate for appeal to Supreme Court – Whether decision involved point of law of exceptional public importance – Offence of handling stolen property – Offence of false imprisonment – Sentence – Suspended sentence imposed – Application for review of sentence by DPP – Sentence quashed and new sentence imposed with portion suspended – Further offences – Offences committed prior to order of Court of Criminal Appeal – Offences committed subsequent to order of Court of Criminal Appeal – Whether jurisdiction to consider revocation of suspension of sentence – Statutory basis for suspended sentences – Clear and unambiguous wording of statute – Absence of uncertainty – People (Attorney General) v Carolan [1943] IJR 49; People (Attorney General) v Grimes [1955] IR 315; People (DPP) v McCarthy [2010] IECCA 51, (Unrep, CCA, 16/6/2010); Howard v Commissioners of Public Works [1994] 1 IR 101; DPP v Flanagan [1979] IR 265; Grey v Pearson (1857) 6 HL Cas 61; McGrath v McDermott (Inspector of Taxes) [1988] IR 258 and Nestor v Murphy [1979] IR 326 considered – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 15 and 17 – Non-Fatal Offences Against the Person Act 1997 (No 26), s 17 – Criminal Justice Act 1993 (No 6), ss 2 and 3 – Criminal Justice Act 2006 (No 26), ss 22 and 99 – Criminal Justice Act 2007 (No 29), s 60 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28), s 51 – Courts of Justice Act 1924 (No 10), ss 29 and 34 – Constitution of Ireland 1937, Art 34.3 – Certificate refused (202/2006 – CCA – 21/12/2011) [2011] IECCA 100
People (DPP) v Foley

Appeal

Application for leave to appeal against sentence – Dangerous driving causing death – Previous convictions for road traffic offences – Mitigating circumstances – Evidence of ramming of applicant's vehicle by third party – Explanation for speed of applicant's vehicle – Whether term of imprisonment excessive in circumstances – Road Traffic Act 1961 (No 24), s 53(1) – Application for leave treated as appeal and sentence reduced such that release directed (228/2011 – CCA – 18/1/2012) [2012] IECCA 19
People (DPP) v Haughey

Appeal

Application for certificate for appeal to Supreme Court – Whether decision involved point of law of exceptional public importance – Whether precise question within ambit of decision of court – Necessity for probation report – People (DPP) v Ulrich [2011] IECCA 30, (Unrep, CCA, 11/5/2011) considered – Courts of Justice Act 1924 (No 10), s 29 – Certificate refused (287/2010 – CCA – 22/2/2012) [2012] IECCA 44
People (DPP) v Izundu

Appeal

Application for certificate for appeal to Supreme Court – Whether decision involved point of law of exceptional public importance – Murder – Admissibility of evidence of diary of victim –Whether diary of limited probative value – Function of trial judge – Balancing of probative value against prejudice resulting from admission – Whether question to be certified raised issue of law of general application – People (DPP) v McCarthy [2010] IECCA 51, (Unrep, CCA, 16/6/2010) and People (DPP) v Meleady (Unrep, CCA, 20/3/2001) considered – Courts of Justice Act 1924 (No 10), s 29 – Certificate refused (76/2008 – CCA – 19/1/2012) [2012] IECCA 1
People (DPP) v Kearney

Appeal

Application for leave to appeal against sentence – Robbery – Delay between plea and sentencing – Rehabilitative efforts – Admissions – Impact on victim – Previous convictions – Failure to take adequate account of efforts to deal with drug addiction – Whether effects on victim separate aggravating factor – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 – Appeal allowed and sentence reduced (75/2011 – CCA – 15/2//2012) [2012] IECCA 54
People (DPP) v Keogh

Appeal

Application for leave to appeal against conviction and sentence – Assault causing harm – Possession of explosive substance – Previous criminal convictions disclosed – Disclosure suggesting single prior conviction for minor offence – Cross-examination of prosecution witnesses as to previous offending – Introduction of evidence of prior convictions including multiple convictions in United Kingdom – Reliance on disclosure by legal advisors – Damage to credibility of applicant – Whether unfairness affecting safety of verdict – People (DPP) v AC [2005] IECCA 69, [2005] 2 IR 217 considered – Explosive Substances Act 1883, s 4 – Non-Fatal Offences Against the Person Act 1997 (No 26), s 15 – Application for leave treated as appeal and conviction set aside (191/2009 – CCA – 3/2//2012) [2012] IECCA 30
People (DPP) v O'Neill

Appeal

Application for leave to appeal against sentence – Possession of drugs – Mitigation

– Prior good character – Prompt admissions – Guilty plea – Previous convictions – Whether drugs for personal consumption or for distribution and sale – Inadmissible hearsay evidence – Whether trial judge erred in soliciting opinion evidence of garda – Whether error materially prejudiced applicant – Distinction between questions seeking to clarify evidence tendered and questions relating to extraneous matters – People (DPP) v Gethins (Unrep, CCA, 23/11/2001); DPP v Delaney (Unrep, CCA, 28/2/2000); People (DPP) v Gilligan (No 2) [2004] 3 IR 87; People (DPP) v McDonnell [2009] IECCA, [2009] 2 IR 105 and People (DPP) v O'Donoghue [2006] IECCA, [2007] 2 IR 336 considered – Misuse of Drugs Act 1977 (No 12), s 15 – Appeal dismissed (315/2010 – CCA – 15/2/2012) [2012] IECCA 37
People (DPP) v O'Neill

Appeal

Application for leave to appeal against sentence – Offensive comments levelled at respondents as members of travelling community – Violent disorder – Assault causing harm – Assault causing serious harm – Three defendants each pleading guilty to assault – Two defendants convicted of violent disorder – One defendant convicted of assault causing serious harm – Interval of approximately 30 minutes between two violent incidents – Alcohol – Cocaine – Remorse – Involvement in community – Sporting achievements – Whether trial judge erred in principle – Whether possible to safely conclude that one defendant used knife to slash victim – Failure to give sufficient weight to distinguishing feature of absence of kicking of victim – Failure to sufficiently distinguish between criminal records of defendants – Whether consecutive sentences ought to have been imposed for second set of incidents – Intervening period of time between incidents – Deliberation – Criminal Justice (Public Order) Act 1994 (No 2), s 15 – Non-Fatal Offences Against the Person Act 1997 (No 26), ss 3 and 4 – Two sentences reduced; one sentence affirmed (226/2010, 265/2010 and 254/2010 – CCA – 27/2/2012) [2012] IECCA 62
People (DPP) v Sweeney

Appeal

Application for certificate for appeal to Supreme Court – Whether decision involved point of law of exceptional public importance – Whether right of reasonable access to solicitor breached where sample requested and taken before arrival of solicitor who had indicated intention to come to station immediately – Whether warrant required to show on its face compliance with statutory conditions in Criminal Justice Act 1999, s 42 – Whether fingerprint expert witness entitled to state that of "no doubt" that fingerprint evidence matched that of accused – Salduz v Turkey (2008) 49 EHRR 421 and Cadder v HM Advocate (HM Advocate General for Scotland intervening) [2010] UKSC 43, [2010] 1 WLR 2601 considered – Courts of Justice Act 1924 (No 10), s 29 – Criminal Justice (Forensic Evidence) Act 1990 (No 34) – Criminal Justice Act 1999 (No 10), s 42 – Criminal Justice Act 2011 (No 22), ss 9 and 12 – Certificate granted (218/2009 – CCA – 16/2/2012) [2012] IECCA 38
People (DPP) v White

Bail

Application for estreatment of bail monies – Independent surety – Extradition – Accused granted bail pending hearing of application for surrender – Disappearance of accused in breach of bail conditions – Mother of accused independent surety – Provenance of funds –Failure of independent surety to verify provenance of funds – Adverse inferences drawn – Inference drawn that funds provided by accused – Whether consideration of culpability of mother in absconding of accused necessary – Whether forfeiture of bail monies should be ordered – Whether bail monies truly provided by independent surety – Whether provenance of bail monies verified – Whether adverse inferences could be drawn – Whether necessary to consider culpability of independent surety in absconding of accused – Order made (2009/62Ext – Peart J – 20/7/2012) [2012] IEHC 302
Attorney General v Doyle orse West

Bail

Extradition – Application for bail – Whether applicant could proceed with proposed bail application – Charges in United States relating to child pornography – Arrest on foot of provisional extradition warrant – Refusal of previous application for bail on grounds that flight risk – Request for extradition presented within required 18 day period – Fresh application for bail – Preliminary objection to fresh bail application – Contention that substantive change in circumstances absent – Whether material change of circumstances – Potential length of detention – Absence of express statement in prior ruling that length of detention taken into account – Absence of basis for inferring that maximum detention period for purpose of prior decision on bail other than 18 days – The People (Attorney General) v Gilliland [1985] IR 643 and The People (Attorney General) v O'Callaghan [1966] IR 501 considered – Extradition Act 1965 (No 17), s 27(1) – Fresh bail application permitted to proceed (2013/198EXT – Edwards J – 12/9/2013) [2013] IEHC 415
Attorney General v Marques

Delay

Fair procedures – Delay in prosecuting accused – Whether delay such to cause presumptive prejudice – Whether specific prejudice suffered by accused – Where reversal of onus of proof amounted to prejudice – Whether on balance prohibition order ought to be made – Failure to caution witness prior to taking statements –Appropriate venue to dispose of issue – Whether ground to make prohibition order – *Devoy v DPP* [2008] IESC 13, [2008] 4 IR 235; *PM v Malone* [2002] 2 IR 560; *Barker v Wingo* (1972) 407 US 514; *PP v DPP* [2000] 1 IR 403; *PM v DPP* [2006] IESC 22, [2006] 3 IR 172 and *DC v DPP* [2005] IESC 77, [2005] 4 IR 281 approved – *Z v DPP* [1994] 2 IR 476; *Ryan v DPP* [1988] IR 232; *DPP v Byrne* [1994] 2 IR 236; *Noonan (orse Hoban) v DPP* [2007] IESC 34, [2008] 1 IR 445; *O'Flynn v District Justice Clifford* [1988] IR 740; *Hogan v President of the Circuit Court* [1994] 2 IR 513; *Cahalane v Murphy* [1994] 2 IR 262; *McFarlane v DPP* [2006] IESC 11, [2007] 1 IR 134; *Hardy v Ireland* [1994] 2 IR 550 and *M O'H v DPP* [2007] IESC 12, [2007] 3 IR 299 considered – Safety, Health and Welfare at Work Act 1989 (No 7), ss 6, 10, 48 and 50 – European Convention on Human Rights 1950, art 6 – Appeal dismissed (406/2009 – SC – 1/2/2012) [2012] IESC 6
J Harris (Assemblers) v DPP

Delay

Sexual offences – Application to strike out for delay – Inherent jurisdiction of court – Inordinate and inexcusable delay – Balance of justice – Inherent risks of unfairness in delay – Offences occurring 26 years previously – Delay in advancing proceedings by plaintiff – Death of defendant witnesses – Whether delay inordinate – Whether delay inexcusable – Whether balance of justice required proceedings to be struck out – Southern Mineral Oil Ltd v Cooney [1997] 3 IR 549; Manning v Benson and Hedges Ltd [2004] IEHC 316, [2004] 3 IR 556; Doyle v Gibney [2011] IEHC 10, (Unrep, Hogan J, 18/1/2011); Gilroy v Flynn [2004] IESC 98, [2005] 1 ILRM 290; Primor plc v Stokes Kennedy Crowley [1996] 2 IR 459; Sheehan v Amond [1982] IR 235; MW v SW [2011] IEHC 201, (Unrep, Kearns J, 6/5/2011); Ó Domhnaill v Merrick [1984] IR 151; J O'C v Director of Public Prosecutions [2000] 3 IR 478; Kelly v O'Leary [2001] 2 IR 526 and SH v DPP [2006] IEHC 65, [2006] 3 IR 575 applied – JR v Minister for Justice [2007] IESC 7, [2007] 2 IR 748 and Donnellan v Westport Textiles Ltd [2011] IEHC 11, (Unrep, Hogan J, 18/1/2011) distinguished – Constitution of Ireland 1937, Arts 34 and 40 – Statute of Limitations (Amendment) Act 2000 (No 13) – Application granted (2006/977P – Hogan J – 5/7/2012) [2012] IEHC 327
II v JJ

Detention

Lawfulness of detention – Application for release of applicant – Dwelling of applicant searched under Offences Against the State Act 1939, s 29 (1) – Evidence obtained – Applicant tried, convicted

and sentenced – Section subsequently found to be unconstitutional – Claim by applicant that conviction and detention unlawful – Deprivation of due process – Absence of objection to arrest during trial of applicant – Fundamental legality of conviction – Evidence – Exclusionary rule of evidence –Assertion by applicant that evidence obtained unconstitutionally central and integral to conviction – Requisite consent of DPP to trial of applicant in Circuit Court not given – No endorsement contained in return for trial – Consent established through oral statement of counsel for DPP – Whether applicant detained in accordance with law – Whether conviction lawful – Whether detention lawful – Whether alleged unconstitutional evidence central and integral to conviction – Whether applicant deprived of due process – Whether consent of DPP must be in writing – Whether consent of DPP may be given orally –Damache v DPP [2012] IESC 12, [2012] 2 IR 266; DPP v Cunningham [2012] IECCA 64, (Unrep, CCA, 11/5/2012), DPP v Kavanagh [2012] IECCA 65, (Unrep, CCA, 24/5/2012); DPP v Hughes [2012] IECCA 69, (Unrep, CCA, 2/7/2012); DPP v O'Brien [2012] IECCA 68, (Unrep, CCA, 2/7/2012) and DPP v Kenny [1990] 2 IR 110 considered – The State(McDonagh) v Frawley [1978] IR 131 and State (Royle) v Kelly [1974] IR 259 distinguished –People (DPP) v Gilligan (Unrep, McCracken J, 8/8/2003) applied – Constitution of Ireland 1937, Arts 38 and 40.4.2° – Offences Against the State Act 1939 (No 13), ss 29, 30 and 45 – Prosecution of Offences Act 1974 (No 22), s 4 -Application rejected (2012/1071SS – Hogan J – 20/8/2012) [2012] IEHC 325
O'Callaghan v Governor of Cork Prison

Evidence

Statements – Role of statements in court hearings – Whether statements constituted evidence – Right to hearing – Pre-determining policy of judge – Driving related charges against three separate accused – Finding by trial judge that templates used to compile garda statements – Cases dismissed –No evidence given in third case – Whether judge erred in basing decision on written statements of gardaí – Whether hearing in each case – Whether judge fettered discretion – Whether judge took into consideration irrelevant factor – *Phonographic Performance Ltd v Cody* [1998] 4 IR 504; *DPP v Doyle* [1994] 2 IR 286; *People (Attorney General) v Cummins* [1972] IR 312; *State (Murphy) v Kielt* [1984] IR 458 and *P & F Sharpe Ltd v Dublin City and County Manager* [1989] IR 701 applied – *DPP (Lee) v Colwell* (Unrep, Barr J, 17/11/1994); *State (Howard) v District Justice Donnelly* [1966] IR 51; *People (DPP) v WC* [1994] 1 ILRM 321 and *Whelan v Fitzpatrick* [2007] IEHC 213, [2008] 2 IR 678 approved – District Court Rules 1997 (SI 93/97), O 8, r 1 – Road Traffic Act 1961 (No 24), s 49 – Criminal Justice (Legal Aid) Act 1962 (No 12), s 2 – Misuse of Drugs Acts 1977 (No 12), ss 23 and 25 – Road Traffic Act 1994 (No 7), s 13 – Questions answered in the negative (2011/1542SS – Kearns P – 10/2/2011) [2012] IEHC 55
DPP v Sweeney

Judicial review

Injunction restraining prosecution of applicant refused – Application for damages for alleged breach of right to trial with due expedition – Application for costs – Whether applicant entitled to damages – Whether delay – Whether appropriate to award applicant costs – *Dunne v Minister for Environment* [2007] IESC 60, [2008] 2 IR 775 and *Nash v DPP* [2012] IEHC 359 (Unrep, Moriarty J, 10/8/2012) considered – Damages refused; partial costs awarded (2010/35JR – Moriarty J – 17/10/2012) [2012] IEHC 598
Nash v DPP

Judicial review

Prohibition of trial – Application to prohibit second trial for alleged failure to make disclosure – Allegation of lack of fair investigation – Claim that criminally negligent manslaughter 'vague offence' – Exceptional circumstances – Real risk of unfair trial – Accused charged with criminally negligent manslaughter and reckless endangerment – Whether trial should be prohibited – Whether failure to make disclosure – Whether exceptional circumstances existed – Whether real risk of unfair trial –Whether offence vague and unconstitutional – DC v DPP [2005] IESC 77, [2005] 4 IR 281 applied – PG v DPP [2006] IESC 19, [2007] 3 IR 39 applied – Kennedy v DPP [2007] IEHC 3, (Unrep, MacMenamin J, 11/1/2007) applied – The People (Attorney General) v Dunleavy [1948] IR 95 applied – DPP v Cullagh (Unrep, CCA, 15/3/1999) applied – G v DPP [1994] 1 IR 374 considered – Constitution of Ireland 1937, Art 40 – European Convention on Human Rights, arts 2, 6, 8 and 14 – Relief refused (2012/595JR – Charleton J – 9/7/2012) [2012] IEHC 295
Joel v DPP

Judicial review

Prohibition of trial – Alleged prosecutorial delay – Delay caused by accused – Entitlement to trial with reasonable expedition – Right to fair trial – Risk of unfair trial – Exceptional circumstances – Specific prejudice owing to delay – Accused minor at time of offence – Special duty on prosecution to expedite criminal matters concerning children – Criminal damage – Assault causing harm – Whether blameworthy prosecutorial delay – Whether breach of right to trial with reasonable expedition – Whether risk of unfair trial – Whether exceptional circumstances –Whether accused specifically prejudiced – Whether breach of special duty to expedite – BF v DPP [2001] IR 656 distinguished – SH v DPP [2006] IESC 65, [2006] 3 IR 575; Devoy v DPP [2008] IESC 13, [2008] 4 IR 235 and Corporation of Dublin v Flynn [1980] IR 357 applied – Constitution of Ireland 1937, Arts 38.1 and 40.3 – European Convention on Human Rights, art 6 – Relief refused (2011/325JR – Hedigan J – 5/7/2012) [2012] IEHC 286
McArdle v DPP

Practice and procedure

Time limit for service of book of evidence – Applicable time limit where offence indictable – Whether 42 day limit applied to indictable offences – Applicable time limit where hybrid offence – No extension of time given to serve book – Return of applicant for trial following service of book – Whether judge erred in not extending time – Whether judge erred in returning applicant for trial – Misuse of Drugs Regulations 1988 (SI 328/88) – Misuse of Drugs (Amendment) Regulations 1993 (SI 342/93) – District Court Rules 1997 (SI 93/1997), O 24 – District Court (Criminal Procedure Act 2010) Rules 2011 (SI 585/2011) – Criminal Procedure Act 1967 (No 12), s 4, Part 1A – Misuse of Drugs Act 1977 (No 12), ss 15, 15A and 27 – Interpretation Act 2005 (No 23), ss 4 and 5 – Criminal Procedure Act 2010 (No 27), s 37 – Reliefs refused (2011/233JR – Peart J – 7/2/2012) [2012] IEHC 54
Farrell v Judge Browne

Prisoners

Request for transfer – Ministerial decision – Right to family life – Whether issue of fundamental human rights concerned – Whether interference with right to family life permissible – Whether due consideration given to right to family life – Whether public interest in upholding full sentence imposed by court – Dickson v United Kingdom (App No 44362/04) (2007) 46 EHRR 927; Hirst v United Kingdom (No 2) (App No 74025/01) (2005) 42 EHRR 849; Meadows v Minister for Justice [2010] IESC 3, [2010] 2 IR 701; Moiseyev v Russia (App No 62936/00) (2008) 53 EHRR 306; Nascimento v Minister for Justice [2007] IEHC 358, [2011] 1 IR 1; Nash v Minister for Justice [2004] IEHC 356, [2004] 3 IR 296; O'Keeffe v An Bord Pleanála [1993] 1 IR 39; Ploski v Poland (App No 26761/95) [2003] 1 PLR 120; R (Mahmood) v Home Secretary [2001] 1 WLR 840; The State (Keegan) v Stardust Compensation Tribunal [1986] IR 642; Trosin v Ukraine (App No 39758/05) (Unrep, ECHR, 23/2/2012) and X v United Kingdom (App No 9054/80) (1982) 30 DR 113 considered – Transfer of Sentenced Persons Act 1995 (No 16), s 4 – European Convention on Human Rights and Fundamental Freedoms 1950, article 8 – Declaratory relief granted (2011/1121JR – O'Malley J – 30/7/2012) [2012] IEHC 347
Butcher v Minister for Justice and Equality

Proceeds of crime

Mutual assistance – Confiscation cooperation order – Limitation period – Statutory interpretation – Whether confiscation cooperation order fell within Statute of Limitations – Whether application for confiscation cooperation order constituted action to recover penalty or forfeiture of sum – Whether distinction between confiscation of property and forfeiture of property – Whether confiscation cooperation order in nature of penalty – Whether intention of confiscation cooperation order to deprive wrongdoers from benefit of criminal conduct – Whether enforcement of confiscation cooperation order required separate application – Whether mutual assistance legislation comparable with proceeds of crime legislation – Whether application for confiscation cooperation order statute barred – Whether application brought within two years from date of accrual of cause of action – Whether confiscation cooperation order should be granted – *F McK v AF* (Proceeds of crime) [2005] IESC 6, [2005] 2 IR 163; *F McK v GWD* [2004] IESC 31, [2004] 2 IR 470 and *Murphy v GM* [2001] 4 IR 113 applied – *McK v H* (Unrep, Finnegan J, 12/4/2002) and *R v May* [2008] UKHL 28, [2008] 1 AC 1028 approved – Criminal Justice (Mutual Assistance) Act 2008 (No 7), ss 6, 31, 51, 52 & 60 – Statute of Limitations 1957 (No 6), s 11 – Order granted (2010/11CAB – Feeney J – 18/4/2012) [2012] EHC 159
Minister for Justice and Law Reform v Devine

Road traffic offences

Drunk driving – Trial – Evidence – Reopening of prosecution case – Urine sample – Evidence of offer of statement in writing that accused could retain one sample – Judicial review – Fair procedures – Bias – Whether trial judge correct in allowing prosecution witness to be recalled – Whether evidence merely technical or essential proof – Whether substance of statutory obligation complied with – Whether evidence initially omitted by prosecution contested by accused – Whether trial judge behaved unfairly – Whether actions of trial judge gave rise to real apprehension of bias – Whether accused prejudiced – The State (Hegarty) v Winters [1956] IR 320; Piggott v. Sims [1973] RTR 15; Attorney General (Corbett) v Halford [1976] 1 IR 318; DPP v Kenny [1980] IR 160; DPP (O'Brien) v McCormack [1999] 1 ILRM 398; Leeson v DPP [2000] RTR 385; Jolly v DPP [2000] Crim LR 471; Bates v Brady [2003] 4 IR 111 approved – People (DPP) v Greely [1985] ILRM 320; Dineen v District Judge Delap [1994] 2 IR 228 and McCarron v Judge Groarke (Unrep, Kelly J, 4/4/2000) distinguished – Road Traffic Act 1961 (No 24), s 49 – Criminal Justice (Public Order) Act 1994 (No 2), s 8 – Road Traffic Act 1994 (No 7), ss 13 and 18 – Road Traffic Act 2010 (No 25), s 15 –Relief refused (2011/988JR – Kearns P – 18/5/2012) [2012] IEHC 195
O'Keeffe v District Judge Mangan

Sentence

Application for leave to appeal against sentence – Burglary – Trespasser on premises with intent to commit theft – Age of applicant at time of offence – Whether error in principle in imposing partially suspended sentence that would be reactivated – Failure of sentence to reflect plea of guilt – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 – Application for leave treated as appeal and new sentence imposed (50/2011 – CCA – 23/1/2012) [2012] IECCA 28
People (DPP) v Cash

Sentence

Application for review of sentence by DPP – Whether sentence unduly lenient – False imprisonment – Serious sexual assault – Offence at top end of spectrum of sexual assault cases – Victim impact statement – Effects of assault on victim – Previous convictions –Whether sentence inadequate – Delay between offences and sentencing – Criminal Justice Act 1993 (No 6), s 2 – Non-Fatal Offences Against the Person Act 1997 (No 26), s 15 – Sentence increased with final year suspended (313CJA/2009 – CCA – 20/1/2012) [2012] IECCA 22
People (DPP) v Finnerty

Sentence

Application for leave to appeal against sentence – Assault causing harm – Alcohol – Good background – Employment – History of alcohol abuse – Serious assault – Plea of guilt – Co-operation – Absence of previous convictions – Remorse – Absence of error of principle – Leave to appeal refused (17/2011 – CCA – 21/1/2012) [2012] IECCA 24
People (DPP) v Foley

Sentence

Application for leave to appeal against sentence – Reasons to be delivered on later date – Leave refused (193/2011 – CCA – 25/1/2012) [2012] IECCA 6
People (DPP) v Ismaeil

Sentence

Application for review of sentence by DPP – Whether sentence unduly lenient – Possession of drugs – Mitigating circumstances – Plea of guilt – Admissions in relation to additional drugs bringing total value within category of s 15A – Statutory presumptive minimum sentence – Imposition of suspended four year sentence – Unusual nature of sentence – Co-operation with Gardaí – Efforts to cease drug use – Absence of similar convictions – Minor role in transport of drugs – People (DPP) v Alexiou [2003] 3 IR 513 considered – Criminal Justice Act 1993 (No 6), s 2 – Criminal Justice Act 1999 (No 10), s 15A – Application refused (157CJA/2011 – CCA – 25/1/2012) [2012] IECCA 4
People (DPP) v Leigh

Sentence

Application for leave to appeal against sentence – Rape – Sexual assault – Victim impact statement – History of schizophrenia – Suggestion that applicant was probably psychiatrically ill at time of offences – Finding of criminal responsibility – Dysfunctional background – Breach of trust – Ages of applicant and victim – Gravity of offence – Effects on victim – Mitigating factors – Prompt admissions – Early plea of guilt – Absence of previous convictions – Genuine remorse – Substantive basis upon which applicant ought be sentenced – Punishment – Inapplicability of individual deterrence or general deterrence – Seriousness of offences – Low level of moral responsibility – Whether significant departure from norm in sentencing so that sentenced represented error in principle – R v Tsiaras [1996] 1 VR 398 considered – Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 2 – Leave to appeal refused (83/2011 – CCA – 15/2/2012) [2012] IECCA 56
People (DPP) v M(D)

Sentence

Application for leave to appeal against sentence – Sexual assault – Aggravating features – Number and nature of offences – Relationship of trust – Threats to victim – Effect upon victim – Mitigation – Remorse – Plea of guilt – Value of plea of guilt in cases of sexual assault – History of alcohol abuse – Deterioration in health – Failure of trial judge to set out manner in which decision on sentencing reached – Fresh sentencing exercise to be carried out – Whether suspension of two years of sentence inadequate recognition of mitigating factors – Criminal Law (Rape) (Amendment) Act 1990 (No 32), ss 2 and 4 – Three years of sentence suspended (27/2011 – CCA – 20/1/2012) [2012] IECCA 23
People (DPP) v Mulligan

Sentence

Application for leave to appeal against sentence – Assault causing serious harm – Maximum sentence of life imprisonment – Whether trial judge erred by suggesting that assault causing serious harm required sentence of more than five years – Experienced trial judge – Assessment of entire sentencing hearing as whole – Sentence in appropriate range – Discount in appropriate range – Non-Fatal Offences Against the Person Act 1997 (No 26), s 4 – Appeal dismissed (46/2011 – CCA – 23/1/2012) [2012] IECCA 25
People (DPP) v Ruane

Sentence

Application for leave to appeal against

sentence – Possession of drugs – Drugs courier – Poor background – Mitigating factors – Co-operation with Gardaí – Absence of previous convictions – Early plea of guilt – Remorse – Aggravating factors – Value of drugs Whether sentence unduly severe – Lengthy delay between sentencing hearing and imposition of sentence – Mismatch between hearings suggesting all matters not considered at second hearing – People (DPP) v Foster (Unrep, CCA, 15/5/2002) – Misuse of Drugs Act 1977 (No 12), s 15A – Application for leave treated as appeal and sentence reduced (9/2011 – CCA – 23/1/2012) [2012] IECCA 26
People (DPP) v van Staden

Sentence

Application for leave to appeal against sentence – Assault causing harm – Possession of firearm with intent to commit indictable offence – Robbery – Criminal record of applicant – Lighter sentence given to co-accused – Differences between applicant and co-accused – Late plea of guilt – Whether entitlement to make submissions where intention to impose life sentence – Suggestion in comments of judge that preventative detention being imposed – Criminal Justice Act 1999 (No 10), s 29 – Leave granted and 20 year sentence imposed in place of life sentences (226/2007 – CCA – 16/1/2012) [2012] IECCA 15
People (DPP) v Ward

Trial

Newly discovered fact – Miscarriage of justice – Subsequent judgment – Constitutional invalidity of statute – Retrospective effect – Jurisdiction to strike out application – Whether subsequent declaration of invalidity of statute capable of constituting newly discovered fact – Whether declaration of unconstitutionality of retrospective effect – Whether miscarriage of justice – Whether court entitled to strike out application – *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88; *Barry v Buckley* [1981] IR 306; *CC v Ireland* [2005] IESC 48, [2006] IESC 33, [2006] 4 IR 1; *Damache v Director of Public Prosecutions* [2012] IESC 11, [2012] 2 IR 266; *The People (Director of Public Prosecutions) v Birney* [2006] IECCA 58, [2007] 1 IR 337; *The People (Director of Public Prosecutions) v Cunningham* [2012] IECCA 64, (Unrrep, CCA, 11/5/2012); *The People (Director of Public Prosecutions) v Gannon* [1997] 1 IR 40; *The People (Director of Public Prosecutions) v Kavanagh* [2012] IECCA 65, (Unrep, CCA, 24/5/2012); *The People (Director of Public Prosecutions) v Kelly* [2008] IECCA 7, [2008] 3 IR 697; *The People (Director of Public Prosecutions) v McDonagh* [1996] 1 IR 305; *The People (Director of Public Prosecutions) v Meleady* [1995] 2 IR 517; *The People (Director of Public Prosecutions) v O'Brien* [2012] IECCA 68, (Unrep, CCA, 2/7/2012); *The People (Director of Public Prosecutions) v Pringle* [1995] 2 IR 547; *The People (Director of Public Prosecutions) v Shortt (No 1)* [2002] 2 IR 686 and *The People (Director of Public Prosecutions) v Shortt (No 2)* [2002] 2 IR 696 considered – Criminal Procedure Act 1993 (No 40), s 2 – Application struck out (263/2012 – CCA – 19/4/2013) [2013] IECCA 22
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DEFAMATION

Jurisdiction

Conflict of laws – Brussels Convention – Evidence – Whether claim in tort and contract or in tort only – Whether court had jurisdiction to hear claim of publication by UK newspaper – Whether plaintiff's case had shifted – Whether case solely based on internet publication – Whether evidence of internet publication – Whether plaintiff's case fatally flawed – *eDate Advertising GmbH v X; Martinez v MGN Limited (Joined cases C-509/09 & C-161/10)* [2012] QB 654 considered – Regulation 44/2001/EEC, arts 2 & 5 – Appeal allowed, proceedings dismissed (55/2007 – SC – 15/3/2012)
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EXTRADITION LAW

European arrest warrant

Points of objection – Prison conditions in Lithuania – Burden of proof – Whether decision made to charge respondent with alleged offence – Whether decision made to try respondent for alleged offence – Whether surrender of respondent created risk to constitutional rights to life and bodily integrity – *Miklis v Deputy Prosecutor General of Lithuania* [2006] EWHC 1032 (Admin); [2006] 4 All ER 808, DC followed – *Savenkovas v Lithuania (App. No. 871/02)* (Unrep, ECtHR, 18/11/2008); *Minister for Justice, Equality and Law Reform v Olsson* [2011] IESC 1, [2011] 1 IR 84; *Minister for Justice, Equality and Law Reform v Maurek* [2011] IEHC 204 (Unrep, Edwards J, 13/5/2011); *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16 (Unrep, SC, 1/3/2012); *Minister for Justice and Equality v Machaczka* [2012] IEHC 434 (Unrep, Edwards J, 12/102012) and *Minister for Justice and Equality v Connolly* [2012] IEHC 575 (Unrep, Edwards J, 6/12/2012) considered – European Arrest Warrant Act 2003 (No 45), ss 4A, 16, 21A and 37 – Constitution of Ireland 1937, Art 40.3 – Surrender ordered (2011/208EXT – Edwards J – 11/2/2013) [2013] IEHC 62
Minister for Justice and Equality v Holden

European Arrest Warrant

Points of objection – Application to amend points of objection – Time limits on application to amend points of objection – Breach of family rights – Factors regarding late filing of points of objection – Issues raised in timely fashion – Prospect of success of in sustaining amended points of objection – Acknowledged evidential deficit – Exceptional circumstances – Interests of justice – Whether amendment should be allowed – Whether breach of family rights – Whether issues raised in timely fashion – Whether prospect of success in sustaining amended points of objection – Whether exceptional circumstances – Whether in interests of justice –*Minister for Justice and Equality v Doyle* [2012] IEHC 433, (Unrep, Edwards J, 17/10/2012); *Minister for Justice, Equality and Law Reform v Skowronksi* [2006] IEHC 321, (Unrep, Peart J, 31/10/2006);

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Minister for Justice and Equality v M(D)

European arrest warrant

Points of objection – Respondent subject of arrest warrant issued by Lithuania – Allegation of police mistreatment of detainees – Allegation of inhuman and degrading conditions in prisons and police stations – Allegation of instances of prolonged pre-trial detention – Strength of evidence adduced by respondent – Whether surrender of respondent created risk to constitutional right to bodily integrity – Whether risk of inhuman or degrading treating – *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45, [2010] 3 IR 783 applied – *Minister for Justice and Equality v Holden* [2013] IEHC 62 (Unrep, Edwards J, 11/2/2013) distinguished – *Lithuania v Campbell* [2013] NIQB 19 (Unrep, High Court of Northern Ireland, 22/2/2013) considered – European Arrest Warrant Act 2003 (No 45), ss 4A, 16 and 37 – Constitution of Ireland 1937, Art 40.3 – European Convention on Human Rights 1950, art. 3 – Surrender refused (2008/37EXT – Edwards J – 16/4/2013) [2013] IEHC 216
Minister for Justice, Equality and Law Reform v McGuigan

European Arrest Warrant

Surrender – Burglary – Specificity – Whether warrant deficient – Whether warrant specified degree of involvement –Whether nature of respondent's involvement clear from warrant – Right to fair trial – Previous conviction – Whether breach of respondent's right to fair trial that law of England and Wales permitted respondent's previous conviction to be put into evidence – Whether fundamental differences of law concerning admissibility of evidence – Whether court could subject laws of another jurisdiction to constitutional scrutiny – Whether respondent would be subjected to an egregious breach of rights amounting to a fundamental defect in system of justice of issuing state – *Minister for Justice v Desjatnikovs* [2008] IESC 53, [2009] 1 IR 618; *Minister for Justice v Stafford* [2009] IESC 83, (Unrep, SC, 17/12/2009) *Minister for Justice v Hamilton* [2005] IEHC 292, [2008] 1 IR 60, and *Minister for Justice v Kaprowicz* [2010] IEHC 207, (Unrep, Peart J, 13/5/2010) considered – *Minister for Justice v Brennan* [2007] IESC 21, [2007] 3 IR 732; *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 669; *Nottinghamshire County Council v B* [2011] IESC 48, (Unrep, SC, 15/12/2011) and *Clarke v McMahon* [1990] 1 IR 228 applied – *Minister for Justice v Adams* [2011] IEHC 366, (Unrep, Edwards J, 3/10/2011) followed – European Arrest Warrant Act 2003 (No 45), ss 11, 16, 37, & 38 – Surrender ordered (2011/78EXT – Edwards J – 15/2/2012) [2012] IEHC 91
Minister for Justice and Equality v Shannon

European Arrest Warrant

Interpretation of European Arrest Warrant Act 2003, s 44 – Effect of repealed provision in Act of 2003, s 42 on rights of respondent – Interpretation of European Arrest Warrant Act 2003, s 21A – Whether reciprocity of offences – Whether respondent acquired right under s 42 not to be surrendered – Whether decision by issuing state to try respondent – Whether respondent ought to be surrendered – Aamand v Smithwick [1995] 1 ILRM 61; Attorney General v Abimbola [2007] IESC 56; [2008] 2 IR 302; Becker v Finanzamt Münster-Innenstadt (Case 8/81) [1982] ECR 53; Chief Adjudication Officer v Maguire [1999] 1 WLR 1778; Director of Public Prosecutions v Devins [2012] IESC 7, (Unrep, 8/2/2012); Grimaldi v Fonds des Maladies Professionnelles (Case 322/88) [1989] ECR 4407; Marleasing (Case C-106/89) [1990] ECR I-4135; Merck and Others v Primecrown and Others (Joined Cases C-267/95 & C-268/95) [1996] ECR 1-6285; Minister for Justice v Aamond [2006] IEHC 382, (Unrep, Peart J, 24/11/2006); Minister for Justice v Altaravicius [2006] IESC 23, [2006] 3 IR 148; Minister for Justice v Dundon [2005] IESC 13, [2005] 1 IR 261; Minister for Justice v McArdle [2005] IESC 76, [2005] 4 IR 260; Minister for Justice v Olsson [2011] IESC 1, [2011] 1 IR 384; Minister for Justice v Tobin [2008] IESC 3, [2008] 4 IR 42; Pupino (Case C-105/03) [2005] ECR 1-5285; Sloan v Culligan [1992] 1 IR 223; Van Gend en Loos v Nederlandse Administratis Der Belastingen (Case 26/62) [1963] ECR 1; Von Colson v Land Nordriiein-Westfallen (Case 14/83) [1984] ECR 1891; West v Gwynne [1911] 2 Ch 1 and Wilson v First County Trust Ltd (No 2) [2003] UKHL 40, [2004] 1 AC 816 considered – Extradition Act 1965, (Part II) (No. 1) Order 1966 (SI 161/1966) – Offences Against the Person Act 1861 (Section 9) Adaptation Order 1973 (SI 356/1973), article 3 – Extradition Act 1965 (Part II) (No 23) Order 1989 (SI 9/1989) – Offences Against the Person Act 1861 (24 & 25 Vict, c 100), s 9 – Extradition Act 1965 (No 17), ss 8, 16, 50, Part II – Criminal Procedure Act 1967 (No 12), s 8 – Prosecution of Offences Act 1974 (No 22), s 6 – Extradition (European Convention on the Suppression of Terrorism) Act 1987 (No 1), ss 1 and 3 – Criminal Justice Act 1999 (No 10) – European Arrest Warrant Act 2003 (No 45), ss 10, 11, 13, 14, 16, 20, 21A, 37, 42 and 44 – Criminal Justice (Terrorist Offences) Act 2005 (No 2), ss 63, 68, 83 and Part 8 – Interpretation Act 2005 (No 23), s 27 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28) – Council Framework Decision, 13th June 2002, articles 1, 2, 4, 8, recital 5 and 6 – European Convention on Human Rights 1950 – European Convention on Extradition 1957, articles 7 and 26 – Constitution of Ireland 1937, Articles 15 and 40 – Appeal allowed; surrender refused (174/2011 – SC – 1/3/2012) [2012] IESC 16
Minister for Justice v Bailey

European Arrest Warrant

Practice and procedure – Points of objection – Abuse of process – Application to strike out certain points of objection – Serious allegations of unlawful conduct – Vague and generalised assertions – 'Speculative assertions'- No evidence adduced to support assertions – Whether substantive grounds for making allegations of serious nature – Whether paragraphs constituted abuse of process – Whether paragraphs should be struck out – Affidavit of solicitor – Actual knowledge of facts deposed – Deponent must state grounds for belief – Whether actual knowledge of facts deposed – Application to set aside order for discovery – 'Fishing expedition' – Discovery sought to support objection to surrender – Whether documents sought related to any matter properly in question in proceedings – Whether discovery necessary for disposing fairly of issues – Whether application for discovery "fishing expedition" — Minister for Justice v Altaravicius [2006] IESC 23, [2006] 3 IR 148; Framus Ltd v Cement Roadstone Holdings plc [2004] IESC 25, [2004] 2 IR 20 and Carlow Kilkenny Radio Ltd v Broadcasting Commission [2003] 3 IR 528 applied – R v Secretary of State for Health ex parte Hackney Borough (Unreported, English Court of Appeal, 24/7/1994) followed – European Arrest Warrant Act 2003 (No 45) – European Convention on Human Rights, art 3 – Criminal Justice (Terrorist Offences) Act 2005 (No 2) – Rules of the Superior Courts 1986 (SI 15/1986), O 8; O 40 – Appeal allowed (322/2010 &361/2010 – Supreme Court– 23/2/2012) [2012] IESC 17
Minister for Justice, Equality and Law Reform v McGuigan

European Arrest Warrant

Surrender hearing – Preliminary issue – Jurisdiction– Claim that matter not properly before court – Validity of arrest – Alleged failure to comply with provisions of Act

– Claim arrest of respondent not properly conducted –Respondent advised of rights under Act subsequent to arrest – Abuse of process – Attempt to delay surrender hearing – Whether matter properly before court – Whether arrest of respondent valid – Whether provisions of Act complied with – Whether attempts to delay proceedings abuse of process – Whether appropriate to surrender respondent – DPP v Shaw [1982] 1 IR 1 applied – DPP v Buck [2002] 2 IR 268 and DPP v O'Brien [2005] IESC 29, [2005] 2 IR 206 considered – European Arrest Warrant Act 2003 (No 45), ss 13 and 16 – Surrender ordered (2011/281EXT – Edwards J – 25/7/2012) [2012] IEHC 321
Minister for Justice and Equality v Stefaniak

Surrender

Surrender to United State of America – Applicable principles – Offence alleged of conspiracy to commit counterfeit acts – Interpretation of 'offence' under s 15 of Extradition Act 1965 – Interpretation of offence of conspiracy – Whether offence regarded under law of State as having been committed in State – *Ellis v O'Dea (No 2)* [1991] 1 IR 251 applied – *Reg v Doot* [1973] AC 807; *R v Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, [2004] QB 1418; *R v Smith (Wallace)* TLR 13/11/1995 and *Liangsiriprasert v United States* [1991] 1 AC 225 approved – *R (Purdy) v* DPP [2010] 1 AC 345; *Stanton v O'Toole* [2000] IESC 36, (Unrep, SC, 9/11/2000); *Harris v Wren* [1984] ILRM 120*; Board of Trade v Owen* [1957] AC 602; *R (Purdy) v* DPP [2010] 1 AC 345; *Reg v Harden* [1963] 1 QB 8; *State (Furlong) v Kelly* [1971] IR 132 and *Hanlon v Fleming* [1981] IR 489; *Wilson v Sheehan* [1979] IR 423*; DPP v Stonehouse* [1978] AC 55 and *Reg v Ellis* [1899] 1 QB 230 considered – *Reg v Manning* [1999] QB 980 and *Attorney General v X* [1992] 1 IR 1 distinguished – Extradition Act 1965 (Part II) (No 22) Order 1987 (SI 33/1987) – Extradition Act 1965 (Application of Part II) Order 2000 (SI 474/2000), Part 9 – Extradition Act 1965 (Application of Part II) (Amendment) Order 2010 (SI 45/2010) – Explosive Substances Act 1883 (46 Vict, c 3), s 3 – Forgery Act 1913 (3 & 4 Geo 5 Ch 27), ss 6, 8 and 18 – Central Bank Act 1942 (No 22), s 55 – Extradition Act 1965 (No 17), ss 8, 9, 10, 11, 15, 18, 22, 23, 25, 26, 29, 37, 38, 50, Parts II and III – Misuse of Drugs Act 1977 (No 12), s 20 – Criminal Justice Act 1994 (No 15) – European Convention on Human Rights Act 2003 (No 20) – Criminal Justice Act 2006 (No 26), s 71 – Agreement on Extradition between the United States of America and the European Union 2003 – Statute of the Council of Europe 1949, arts 1, 3, 5, 6, 8 and 13 – Treaty on Extradition between the United States of America and Ireland1983, art II, IV(b) and VIII – European Convention on Human Rights 1950 – Constitution of Ireland 1937, Arts 40.1 and 40.3 – Surrender refused (2009/18EXT – Edwards J – 27/1/2012) [2012] IEHC 90
Attorney General v Garland

Surrender

Fundamental rights – Prison – Fundamental defect in system of justice of requesting state – Risk of violation of rights – Test to be applied – Evidence – United States – Whether surrender of respondent would place him at risk of prison rape or exposure to violence and death – Whether court could accept hearsay evidence of prison conditions – Whether extradition proceedings *sui generis* – Whether making of extradition arrangements presupposes requesting state will not impair fundamental rights – Whether sufficient evidence to displace presumption – Whether risk of violation of rights due to unique characteristic of respondent – *AG v Dyer* [2004] IESC 1, [2004] 1 IR 40; *AG v Parke* [2004] IESC 100, (Unrep, SC, 6/12/2004); *Minister for Justice v Rettinger* [2010] IESC 45, [2010] 3 IR 783; *Ellis v O'Dea (No 2)* [1991] 1 IR 251; *Minister for Justice v Mazurek* [2011] IEHC 204, (Unrep, Edwards J, 13/5/2011); *AG v Skripakova* [2006] IESC 68, (Unrep, SC, 24/4/2006) and *Minister for Justice v Altaravicius* [2006] IESC 23, [2006] 3 IR 148 applied – *Miklis v Deputy Prosecutor General of Lithuania* [2006] EWHC 1032 (Admin), [2006] 4 All ER 808 approved – *Farmer v Brennan* (1994) 501 US 825; *Minister for Justice v Brennan* [2007] IESC 21, [2007] 3 IR 732; *Shannon v Ireland* [1984] IR 548 and *Larkin v O'Dea* [1995] 2 IR 485 considered – *AG v Murphy* [2007] IEHC 342, [2010] 1 IR 445 and *AG v Russell* [2006] IEHC 164 (Unrep, Peart J, 23/5/2006) distinguished – Extradition Act 1965 (Application of Part II) Order 2000 (SI 474/2000) – Extradition Act 1965 (Application of Part II) (Amendment) Order 2010 (SI 45/2010) – Extradition Act 1965 (No 17), ss 8, 10, 23, 25, 26, 29 – Washington Treaty on Extradition between the State and the USA of 13/7/1983 – Surrender ordered (2009/194EXT – Edwards J – 1/5/2012) [2012] IEHC 179
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E(J) v E(D)

Child abduction

Removal of children from Poland to Ireland by father – Absence of consent from mother – Application by mother for return of children to Poland – Whether children should be returned to Poland -Consent – Real positive and unequivocal consent – Whether consent real positive and unequivocal – Discretion of court – Objections by child – Whether view of child to be considered – *AS v PS (Child Abduction)* [1998] 2 IR 244, *AU v TNU* [2011] IESC 39, [2011] 3 IR 683; *RK v JK (Child Abduction: Acquiescence)* [2000] 2 IR 416 and *SR v MMR* [2006] IESC 7, (Unrep, SC, 16/2/2006) applied – *WF v RJ* [2010] EWHC 2909 (Fam), [2011] 1 FLR 1153 distinguished – *Re T (Abduction: Child's Objections to Return)* [2000] 2 FCR 159 and [2000] 2 FLR 192 and *Zaffino v Zaffino (Abduction: Children's views)* [2005] EWCA Civ 1012, [2006] 1 FLR 410 mentioned – *In Re D(A Child) (Abduction:Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619 and *In Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288 considered – Child Abduction and Enforcement of Custody Orders Act 1991(No 6) – Convention on Civil Aspects of International Child Abduction 1980, arts 3 and 13 – Council Regulation 2201/2003, arts 10 and 11(2) – Application granted (2012/761JR – Finlay Geoghegan J – 21/09/2012) [2012] IEHC 378
D(MK) v D(KW)

Child abduction

Application for return of child – Child unlawfully retained in Ireland without consent of applicant – Discretion of court – View of child – Weight and significance to be afforded to view of child – Totality of evidence – Exceptional circumstances – Preference of child to remain rather than objection to returning to applicant – Whether return of child should be ordered -Whether view of child to be considered – Whether exceptional circumstances – Whether discretion of court should be exercised – ZD v KD [2008] IEHC 176, [2008] 4 IR 751 and AU v TNU [2011] IESC 39, [2011] 3 IR 683 applied – In Re M (Children)(Abduction: Rights of Custody) [2007] UKHL 55, [2008] 1 AC 1288 followed – AK v AJ [2012] IEHC 234 (Unrep, Finlay Geoghegan J, 8/6/2012) and P v P [2012] IEHC 31, [2012] 1 IR 666 distinguished – CA v CA [2009] IEHC 460, [2010] 2 IR 162 and Re E(Children)(Abduction: Custody Appeal)[2011] UKSC 27, [2012]

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Child abduction

Removal without knowledge or consent – Custody – Application to dismiss or strike out proceedings – Whether Polish custody order entitled mother to remove child without consent – Whether Polish District Court decision refusing to transfer custody constituted decision that removal breached custody rights of father – Whether sufficient evidence of Polish law before court – Whether child residing in Ireland for one year – HI v MG (Child abduction: Wrongful removal) [2000] 1 IR 110 considered – Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – Hague Convention on the Civil Aspects of International Child Abduction 1980, arts 3, 12, 13 and 28 – Council Regulation (EC) 2201/2003, art 10 – Application to dismiss or strike out proceedings refused (2012/1HLC – Finlay Geoghegan J – 2/5/2012) [2012] IEHC 183
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P(R) v D(S)

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Scheme to pay recoverable health charges – Application for repayment of health charge – Appeal against decision of Health Repayment Scheme Appeals Office – Determination that applicant not entitled to make claim under scheme on behalf of mother – Trial of preliminary issues – Whether necessary standing to maintain appeal – Whether 'connected person' within the meaning of Health (Repayment Scheme) Act 2006 – Whether 'relevant person' within the meaning of Act of 2006 – Whether entitled to make application for prescribed repayment of recoverable health charge – Whether 'aggrieved person' within meaning of Act of 2006 – Absence of ambiguity in wording of statute – Tingley v Muller [1917] 2 Ch 144 considered – Health (Repayment Scheme) Act 2006 (No 17), s 16 – Health (Charges for In-Patient Services) Regulations 1976 (SI 180/1976) and Health (Charges for In-Patient Services) Regulations 1987 (SI 300/1987) – Institutional Assistance Regulations 1954 (SI 103/1954) – Institutional Assistance Regulations 1965 (SI 177/1965) – Finding that appellant did not have standing to apply or to maintain appeal (2009/262MCA – Hedigan J – 9/4/13) [2013] IEHC 344
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K(J) (a minor) v Refugee Appeals Tribunal

Ayslum

Judicial review – Presentation of fundamentally different claim on appeal – Claim that national of Ghana at first instance – Claim that of Nigerian origin on appeal – Whether jurisdiction to determine claim on appeal where every material fact had changed – Inquisitorial role of tribunal – Alleged selective use of country of origin information – Alleged failure to have reasonable regard to country of origin information – Whether tribunal member wrongly required corroboration in respect of nationality – Conclusions of tribunal member – Explanation of findings – Assessment of credibility – DVTS v Minister for Justice [2007] IEHC 305, (Unrep, Edwards J, 4/7/2007); MN v Refugee Appeals Tribunal [2008] IEHC 218, (Unrep, Birmingham J, 2/7/2008); GO v Refugee Appeals Tribunal [2013] IEHC

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Asylum

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Asylum

Fair procedures – Appeal – Right to oral hearing –Safe country of origin – Credibility – Absence of oral hearing on appeal – Whether absence of oral hearing on appeal combined with presumption that applicant not refugee ineffective remedy – Whether Refugee Applications Commissioner had discretion to omit finding that applicant from safe country of origin – Whether Refugee Applications Commissioner obliged to omit finding that applicant from safe country of origin – Whether necessary to interpret domestic law in accordance with requirements of directive where transposition of directive was deemed unnecessary on basis that necessary procedures and standards already in force in domestic law – XLC v Minister for Justice, Equality and Law Reform [2010] IEHC 148, (Unrep, Cooke J, 10/2/2010); Commission of the European Communities v Germany (Case 248/83) [1985] ECR 1459; Commission of the European Communities v Germany (Case 29/84) [1985] ECR 1661; AD v Refugee Applications Commissioner [2009] IEHC 77, (Unrep, Cooke J, 27/1/2009); HID (A Minor suing by her Mother and Next Friend, ED) and BA v Refugee Applications Commissioner [2011] IEHC 33, (Unrep, Cooke J, 9/2/2011); Glover v BLN Ltd [1973] IR 388; In re Haughey [1971] IR 217; Moyosola v Refugee Applications Commissioner [2005] IEHC 218, (Unrep, Clarke J, 23/6/2005); MOOS v Refugee Applications Commissioner [2008] IEHC 399, (Unrep, Birmingham J, 8/12/2008); Silver v United Kingdom (Apps Nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75) (1983) 5 EHRR 347 and VZ v Minister for Justice [2002] 2 IR 135 considered – Refugee Act 1996 (Safe Countries of Origin) Order 2004 (SI 714/2004) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – European Communities (Asylum Procedures) Regulations 2011 (SI 51/2011) – Refugee Act (Asylum Procedures) Regulations 2011 (SI 52/2011) – European Communities (Amendment) Act 1973 (No 20) – Refugee Act 1996 (No 17), ss. 11, 11A, 11A(1), 11B, 12, 12(4), 12(5), 13, 13(1), 13(4)(b), 13(5), 13(5)(a), 13(6), 13(6)(d), 13(6)(e), 16, 16(1), 16(3) and 17(1) – European Convention on Human Rights Act 2003 (No 20) – Immigration Act 2003 (No 26) – Constitution of Ireland 1937, Arts 40 and 40.3 – Directive 2004/83/EC – Directive 2005/85/EC, arts 2(d), 2(e), 15, 15(3)(a), 30, 39, 39(1), 39(1)(a), 39(3), 44, 45, Chapter II, Chapter V, Annex 1 and Annex 2 – Treaty on the Functioning of the European Union, Arts 267 and 288 – Convention Relating to the Status of Refugees 1951, art 3 – European Convention on Human Rights 1950, arts 6 and 13 – Questions answered in affirmative (2007/1362JR – Cooke J – 30/3/2012) [2012] IEHC 338
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Subsidiary protection – Appropriate forum to challenge findings of fact – Unappealed adverse credibility findings adopted by first respondent – Whether obligation on first respondent to reconsider findings – Whether arguable grounds to challenge subsidiary protection – Interpretation of 'proceed to consider' under European Communities (Eligibility for Protection) Regulations 2006, reg 4 – Whether respondent must proceed to consider deportation only after subsidiary protection determination – Whether substantial grounds to challenge deportation order – *A(BJS) (Sierra Leone) v Minister for Justice and Equality* [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011) and *O(O) v Minister for Justice, Equality and Law Reform* [2011] IEHC 165 & 175, (Unrep, Cooke J, 16/3/2011 and 4/5/2011) approved – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 2, 3, 4, 7 – Refugee Act 1996 (No 17), ss 5, 13, 17 – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Council Directive 2004/83/EC, art 2 – European Convention on Human Rights 1950, arts 2 and 3 – Constitution of Ireland 1937, Art 40.3 – Leave refused (2011/129JR – Cooke J – 2/2/2012) [2012] IEHC 44
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Deportation

Judicial review – Subsidiary protection – Credibility of applicant – Absence of adverse credibility findings – New material evidence or information – Whether new material evidence of information presented to respondent – *ND v Minister for Justice and Law Reform* [2012] IEHC 44, (Unrep, Cooke J, 2/2/2012) and *BJSA v Minister for Justice and Equality* [2011] IEHC 381 (Unrep, Cooke J, 12/10/2011) considered – Refugee Act 1996 (No 17) ss 11 and 13 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) -Relief refused (2011/802JR – Clark J – 26/6/2012) [2012] IEHC 570
H(MA) v Minister for Justice and Equality

Deportation

Judicial review – Leave – *Certiorari* – Subsidiary protection – Leave to remain – Member of Ahmadi faith – Fear of persecution – Restriction on religious freedom – Irrationality –Irrationality of decision in light of country of origin information before respondent – Unlawful delegation of ministerial duty – Deportation order not signed by respondent – Respondent failed to personally make lawful determination on refoulement – Failure to provide effective remedy – Proportionality of theoretically indefinite deportation order – Whether conclusion on state protection rationally supported by country of origin information –Whether unlawful delegation of ministerial duty – Whether error in failing to personally make lawful determination on refoulement – Whether deportation order must be signed by respondent – Whether justifiable restriction on religious freedom – Whether respondent failed to provide effective remedy – *Federal Republic of Germany v Y* and *Z* (Opinion of Advocat General) (C-99/11 and C-71/11) [2013] 1 CMLR 5 followed – *LAT v Minister for Justice and Equality* [2011] IEHC 404, (Unrep, Hogan J, 2/11/2011); *Afolabi v Minister for Justice and Equality* [2012] IEHC 192, (Unrep, Cooke J, 17/5/2012); *Sivsivadze v Minister for Justice and Equality* [2012] IEHC 137, (Unrep, Hogan J, 26/4/2012); *ND v Minister for Justice and Law Reform* [2012] IEHC 44, (Unrep, Cooke J, 2/2/2012); *PM v Minister for Justice and Equality* [2011] IEHC 409, (Unrep, Hogan J, 28/10/2011); *PM (Botswana) v Minister for Justice and Law Reform (No 2)* [2012] IEHC 34, (Unrep, Hogan J, 31/1/2012) applied – *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 followed – *Meadows v Minister for Justice and Law Reform* [2010] IESC 3, [2010] 2 IR 701; *FL v Minister for Justice and Equality* [2012] IEHC 189, (Unrep, Hogan J, 10/5/2012); *R (Tariq) v Secretary of State for the Home Department* [2009] EWHC 1390 (Admin), (Unrep, English High Court, 19/6/2009) considered – *MML v Minister for Justice and Equality* (Unrep, *ex tempore*, Clark J, 21/3/2012) distinguished – Refugee Act 1996 (No 17) ss 5 and 17 – Immigration Act 1999 (No 22) s 3- Relief granted

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Deportation

Judicial review – *Certiorari* – Leave – Deportation order – Application for revocation of deportation order – Leave to remain – Subsidiary protection – 'Enmeshment' – Asylum application refused on negative credibility findings – Applicant married to Irish citizen – Right to respect for family life – Absence of insurmountable obstacles to couple enjoying family life in country of origin of applicant – Delay – Extension of time – Good and sufficient reason – Claim applicant had derivative rights as spouse of EU citizen – Principle of free movement – Right of Irish citizen to reside in State with spouse – Unmarried at time of asylum application – Subsidiary protection application refused – Proportionality – Whether respondent took account of all relevant factors – Whether personal rights weighed against interests of State – Whether EU law or domestic law applied – Whether applicant had derivative rights as spouse of EU citizen – Whether right to family life denied – Whether insurmountable obstacles to couple enjoying family life in country of origin of applicant – Whether good and sufficient reason for delay – *S v Minister for Justice* [2002] 2 IR 163l; *SM v Minister for Justice, Equality and Law Reform* [2005] IESC 27 ,(Unrep, Supreme Court, 3/5/2005); *VJ (Moldova) v Minister for Justice and Equality* [2012] IEHC 227, (Unrep, Cooke J, 31/7/2012); *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Oguekwe v Minister for Justice. Equality and Law Reform* [2008] IESC 25, [2008] 3 IR 795, *Lofinmakin v Minister for Justice, Equality and Law Reform* [2011] IEHC 116, (Unrep, Cooke J, 25/3/2011); *S v Minister for Justice and Equality* [2011] IEHC 417, (Unrep, Clark J, 13/10/2011) – *XA v Minister for Justice, Equality and Law Reform* [2011] IEHC 397, (Unrep, Hogan J, 25/10/2011); *HU v Minister for Justice and Equality* [2010] IEHC 371, (Unrep, Clark J, 29/9/2010) – *AO & DL v Minister for Justice* [2003] 1 IR 1; *Pok Sun Shum v Ireland* [1986] ILRM 593; *Osheku v Ireland* [1986] IR 733; *O'Leary v Minister for Justice Equality and Law Reform* [2012] IEHC 80, (Unrep, Cooke J, 24/2/2012); *Sivsivadze v Minister for Justice and Equality* [2012] IEHC 244, (Unrep, Kearns P, 21/6/2012) applied – *Dereci v Bundesministerien fur Inneres* (Case C-256/11),[2012] All ER (EC) 373; *Zambrano v. Office National de L'Emploi* [2012] 2 WLR 886; *McCarthy v Secretary of State for the Home Department* (Case C-434/09) (Unrep, ECJ, 5/5/2011); *OSL v Maahanmuuttovirasto* (Joined Cases C-356/11 and C-357/11) [2013] 2 WLR 1093 followed – *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 5, [2010] 4 IR 45; *O'Leary v Minister for Justice, Equality and Law Reform* [2011] IEHC 256, (Unrep, Hogan J, 20/6/2011); *Huang v Secretary of State for Home Department* [2007] 2 WLR 581; *VW(Uganda) and AB (Somalia) v Secretary of State for Home Department* [2009] EWCA Civ 5, [2009] Imm AR 436; *Agbonlahor v Minister for Justice, Equality and Law Reform* [2007] IEHC 166, [2007] 4 IR 309 – *R(Mahmood) v Secretary of State for Home Department* [2001] 1 WLR 840; *Abdulaziz v United Kingdom* (1985) 7 EHRR 471; *N v Secretary of State for the Home Department* [2005] 2 AC 296; *BIS (Sanni) v. Minister for Justice* [2007] IEHC 398, (Unrep, Dunne J, 30/11/2007); *Bouchelkia v. France* (1997) 25 EHRR 686 and *Boujlifa v France* (2000) 30 EHRR 419 and *R(Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 considered – *SP v Minister for Justice and Equality* [2012] IEHC 18, (Unrep, Cooke J, 20/1/2012) distinguished – Treaty on the Functioning of the EU 1958, art 21 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Constitution of Ireland 1937, Art 41 – European Convention on Human Rights 1953, art 8 – Leave granted (2011/1054JR – O'Keeffe J – 7/12/2012) [2012] IEHC 542
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Deportation

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PROBATE

Administration of estates

Proceedings issued against defendants as administrators where no grant of administration issued – Grant of administration issued subsequent to issuing of proceedings – Status of defendants as administrators subsequent to order granting liberty to apply for grant of administration but before obtaining grant of administration – Whether proceedings properly constituted and maintainable at law – Contingent competency to represent estate – Doctrine of relation back – *Austin v Hart* [1983] 2 AC 640; *Creed v Creed* [1913] 1 IR 48; *Finnegan v Cementation Co Ltd* [1953] 1 QB 688; *Finnegan v Richards* [2007] IEHC 134, [2007] 3 IR 671; *Flack v President of the High Court* (Unrep, Costello J, 29/11/1983); *Gaffney v Faughnan* [2005] IEHC 367, [2006] 1 ILRM 481; *Hilton v Sutton Steam Laundry* [1946] KB 65; *Ingall v Moran* [1944] K.B. 160; [1944] 1 All ER 97 and *O'Meara v Bank of Scotland plc* [2011] IEHC 402, (Unrep, Laffoy J, 28/10/2011) considered – Rules of the Superior Courts 1986 (SI 15/1986) , O 79 – Succession Act 1965 (No 27), s 27(4) – Proceedings properly constituted and maintainable against defendants (2011/4759S – Finlay Geoghegan J – 14/12/2012) [2012] IEHC 545
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Administration of estates

Wills – Consent order – Notice to re-enter – Litigants in person – Whether court had sufficient information to determine validity of notice to reenter proceedings – Succession Act 1965 (No 27), s 82 – Parties directed to file affidavits (2007/539SP – Laffoy J – 30/4/2012) [2012] IEHC 172
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PROFESSIONS

Administrators

Fees – Appropriate rate at commencement of administration – Appropriate rate thereafter – Whether appropriate to reduce administrator fees –Whether contractual fees to experts appropriate – Whether professional fees of solicitors appropriate – *In re ESG Reinsurance Ireland Ltd* IEHC 365, (Unrep, Kelly J, 2/11/2010) approved – Fees reduced in respect of administrators; other fees approved (2010/202COS – Kearns P – 26/1/2012) [2012] IEHC 68
In re Quinn Insurance Ltd

An Garda Síochána

Jurisdiction to set aside order granting leave for judicial review – Power of first respondent to inquire into practices of An Garda Síochána – Whether duty of care on gardaí in carrying out function of investigation and prosecution of crime – Whether courts might interfere with function – Whether alternative remedy – *Adam v Minister for Justice* [2001] 3 IR 53; *Voluntary Purchasing v Insurco Ltd* [1995] 2 ILRM 145; *Lockwood v Ireland* [2010] IEHC 430, [2011] 1 IR 374 and *M(L) v Commissioner of An Garda* Síochána [2011] IEHC 14, (Unrep, Hedigan J, 20/1/2011) approved – Garda Síochána Act 2005 (No 20), ss 39, 40, 41 and 42 and Part 5 – Criminal Justice Act 2007 (No 29), s 42 – Criminal Justice (Amendment) Act 2009 (No 32) – Relief granted (2010/1580JR – Hedigan J – 19/1/2012) [2012] IEHC 45
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Judgment mortgage

Registered land – Well charging order – Defendant claims no beneficial interest in subject property – Ownership of subject property – Claim company owner of subject property – Company entitled to beneficial ownership of lands when judgment mortgages registered – Motion of court to join company as co-defendant -Whether well charging order can be made – Whether defendant beneficial owner of land – Whether defendant had sufficient interest in subject property – Whether company appropriate defendant – *Tempany v Hynes* [1976] IR 101 distinguished – *ACC Bank Plc v Markham* [2005] IEHC 437, [2007] 3 IR 533; *CAB v AC* [2009] IEHC 351, (Unrep, Murphy J, 18/6/2009); *National Irish Bank v O'Connor* [2007] IEHC 302, (Unrep, Finlay Geoghegan J, 12/11/2007) considered – Conveyancing Act (Ireland) 1634 – Land and Conveyancing Law Reform Act 2009 (No 27) – Registration of Title Act 1964 (No 16) s 71 – Company joined as co-defendant (2010/183SP – Laffoy J – 7/12/2012) [2012] IEHC 524
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REVENUE

Value added tax

Deduction of value added tax – Qualifying activities for deducting value added tax – Economic activity justifying value added tax deduction or repayment – Whether appellant entitled to deduct value added tax on professional fees incurred by it in respect of acquisition of shares when income from business activity not subject to value added tax – Whether appellant entitled to claim deduction or repayment of value added tax on professional fees where no economic activity engaged in – Whether intention to engage in economic activity sufficient to give rise to an entitlement to deduction or repayment of value added tax – Qualifying activities for deducting value added tax – Economic activity justifying a value added tax deduction or repayment – Apportionment – BAA Limited v Commissioners for Her Majesty's Revenue and Customs [2013] EWCA Civ 112, (Unrep, Court of Appeal of England and Wales, 21/2/2013); Belgian State v Ghent Coal Terminal NV (Case C-37/95) [1998] ECR I-1; Cibo Participations SA v Directeur régional des impôts du Nord-Pas-du-Calais (Case C-16/00) [2001] ECR I-6663; Crawford (Inspector of Taxes) v Centime Ltd [2005] IEHC 328, [2006] 2 IR 106; Intercommunale voor Zeewaterontzilting (Inzo), in liquidation v Belgian State (Case C-110/94) [1996] ECR I-857; Kretztechnik AG v Finanzamt Linz (Case C-465/03) [2005] ECR I-4357; Re Frederick Inns Limited [1994] 1 I.L.R.M. 387 and Rompelman v Minister van Financiën

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SOLICITORS

Solicitors

Disciplinary Tribunal – Judicial review – Professional misconduct – Fair procedures – Whether misconduct charges formulated on basis that complainants were clients of applicant – Whether question of whether complainants were clients of applicant critical in determination of misconduct proceedings – Whether decision of respondent reasonable – Whether mistake of fact – Whether respondent misdirected itself – Whether respondent's taking into account of previous misconduct finding under appeal was irrelevant consideration – Whether applicant entitled to clear formulation of charges in advance of misconduct hearing – Delay – *Certiorari* – Discretion – Whether lateness of application militated against court's discretion to grant *certiorari* – Whether applicant's acknowledgement of gross delay should be taken into account – Whether court could fashion remedy to finalise matter without further recourse to courts – Whether misconduct proceedings should be remitted to respondent on issue of penalty only – *Flanagan v University College Dublin* [1998] IR 724; *McMahon v Law Society of Ireland* [2009] IEHC 339, (Unrep, Herbert J, 10/7/2009); *Atlantean Ltd v Minister for Communications* [2007] IEHC 233, (Unrep, Clarke J, 12/7/2007); *O'Laoire v Medical Council* (Unrep, O'Flaherty J, 25/7/1998) and *Mooney v An Post* [1998] 4 IR 288 followed – *Banks v Secretary of State for the Environment* [2004] EWHC 416 (Admin); [2004] (Unrep, Sullivan J, 15/3/2004) approved – Rules of the Superior Courts 1986 (SI 15/1986), O84 – Relief granted; proceedings remitted to respondent for consideration of penalty only (2011/971JR – Kearns P – 27/4/2012) [2012] IEHC 173
Condon v Solicitors Disciplinary Tribunal

Solicitors

Misconduct – Finding by Solicitors Disciplinary Tribunal that no *prima facie* case of misconduct by respondent – Finding appealed – Whether appeal of finding out of time – Whether misconduct regarding handling of applicant's affairs of estate of father – Solicitors (Amendment) Act 1960 (No 37), s 7 – Solicitors Acts 1954 to 2008 – Appeal refused (2011/96SA – Kearns P – 13/2/2012) [2012] IEHC 60
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Solicitors

Disciplinary procedures – Judicial review

– Dispute between applicant and client regarding costs – Application for inquiry into conduct of applicant – Whether failure by first respondent to observe fair procedures and natural justice – Whether first respondent in breach of principle of *audi alteram partem* – Whether preliminary investigation by first respondent – Whether first respondent obliged to afford applicant full spectrum of natural justice rights – Whether first respondent acted irrationally – Whether first respondent failed to give reasons – Whether first respondent acted *ultra vires* – Whether inordinate delay by first respondent – Whether applicant prejudiced by delay – *O'Driscoll v Law Society of Ireland* [2007] IEHC 352, (Unrep, McKechnie J, 27/7/2007) distinguished – *State (Shannon Atlantic Fisheries) v McPolin* [1976] IR 93; *Doupe v Limerick County Council* [1981] IR 75 and *Ó Ceallaigh v An Bord Altranais* [2000] 4 IR 54 considered – Solicitors (Amendment) Act 1994 (No 27), ss 8, 9 17 and 24 – Reliefs refused (2008/50JR – Edwards J – 31/7/2009) [2009] IEHC 632
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Solicitors

Litigation – Settlement – Whether plaintiff required to withdraw judicial review proceedings due to default of solicitor – Whether discovery sought – Whether delay in filing replying affidavits – Whether failure to investigate claim of bribery – Trial – Evidence – Appeal – Whether findings of fact open to trial judge – Whether basis to interfere with findings of trial judge – Northern Bank v Charlton [1979] IR 149 and Pernod Ricard & Comrie plc v FFI Fyffes plc (Unrep, SC, 11/11/1988) applied – Appeal dismissed (362/10 – SC – 15/5/2012) [2012] IESC 31
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Solicitors

Judicial review – Appeal – Allegation of misconduct against solicitor – Inquiry – Decision by respondent to apply to tribunal for inquiry – Prima facie evidence of misconduct – Committee stage of procedure – Early stage of investigation – Assertion that committee stage of procedure 'information gathering' exercise only – Assertion that committee stage not subject to right to fair procedures – Fair procedures – Natural and constitutional justice – Claim fair procedures denied to applicant – Claim applicant denied relevant material – Claim respondent compelled to dispose of complaint solely by reference to Solicitors (Amendment) Act 1994, s 9 – Consequences of failure to dispose of complaint solely by reference to section – Whether committee stage 'information gathering' only – Whether committee stage subject to principles of natural and constitutional justice – Whether s 9 inquiry undertaken by respondent – Whether respondent in breach of fair procedures – Whether applicant denied right to fair procedures – O'Ceallaigh v An Bord Altranais [2000] 4 IR 54 applied – O'Driscoll v Law Society of Ireland [2007] IEHC 352, (Unrep, McKechnie J, 27/7/2007) clarified and distinguished – McMahon v Law Society of Ireland [2009] IEHC 339, (Unrep, Herbert J, 10/7/2009) distinguished – Doupe v Limerick County Council [1981] IR 75; Miley v Flood and Law Society of Ireland [2001] 2 IR 50; Duffy v Dublin Corporation [1974] IR 33; O'Reilly v Limerick County Council [2006] IEHC 174, [2007] 1 IR 593; Re National Irish Bank Ltd (No 1) [1999] 3 IR 145 and Re National Irish Bank Ltd (No 2) [1999] 3 IR 190 considered – Solicitors (Amendment) Act 1994 (No 24), ss 2, 8, 9 and 11 – Solicitors (Amendment)Act 1960 (No 37), s 7 – Appeal dismissed (2009/442SC – McKechnie J – 23/2/2012) [2012] IESC 21
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TORT

Duty of care

Negligence – Personal injuries – Duty of care – Doctrine of *ex turpi causa* – Standard of care – Rules of road relating to road rage – Road rage action by plaintiff against defendant – Accident caused by response of defendant to road rage – Whether duty of care where plaintiff breached civil law – Appropriate standard of care – Whether response of defendant to road rage action intentional – Whether rule of road mandatory legal rule – Whether defendant negligent – *McComiskey v McDermott* [1974] IR 75 applied – *Anderson v Cooke* [2005] IEHC 221, [2005] 2 IR 607*; People (Director of Public Prosecutions) v Barnes* [2006] IECCA 165, [2007] 3 IR 130; *Hackett v Calla Associates Ltd* [2004] IEHC 336, (Unrep, Peart J, 21/10/2004); *Wasson v Chief Constable, Royal Ulster Constabulary* [1987] NI 420; *Gala v Preston* (1991) 100 ALR 29; *Hall v Herbert* (1993) 101 DLR (4th) 129; *Hanrahan v Merck Sharpe & Dohme* [1988] ILRM 629 and *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679 approved – Civil Liability Act 1961 (No 41), s 57 – Constitution of Ireland 1937, Art 40.3 – Claim dismissed (2009/794P – Hogan J – 15/3/2012) [2012] IEHC 59
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Medical negligence

Failed sterilisation – Liability – Entitlement to damages – Remoteness of damage – Child born after failed sterilisation – Whether sterilisation carried out negligently – Whether damages limited to moment of birth and no longer – Whether rigid timescale applicable – Nervous shock – Whether father suffered compensatable injury – Whether father suffered pure economic loss unassociated with injury – Whether father entitled to damages – *Allan v Greater Glasgow Health Board* [1998] SLT 580; [1993] 17 BMLR 135; *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651; *Byrne v Ryan* [2007] IEHC 207, [2009] 4 IR 542; *Kealey v Berezowski* (1996) 136 DLR (4th) 708; *McFarlane v Tayside Health Board* [2000] 2 AC 59; *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309; *Thake v Maurice* [1986] QB 644 and *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098 considered – Negligence found; damages awarded to mother only (2003/10829P – Ryan J – 1/2/2013) [2013] IEHC 72
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Medical negligence

Damages – Breach of duty – Gynaecological surgery – Total abdominal hysterectomy – Psychiatric injury – Severe anxiety disorder – Life of plaintiff grossly restricted – Loss of ability to earn – Whether defendant negligent – Whether damages should be awarded – Damages awarded (2009/8408P – Ó Néill J – 7/12/2012) [2012] IEHC 529
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Monahan v Dunnes Stores

Negligence

Liability – Children's play area – Injury while jumping from small foam 'wall' – Fracture to femur – Causation – Whether defendant liable for injury – Claim dismissed (2009/6805P – Cross J – 5/2/2013) [2013] IEHC 73
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Negligence

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Negligence

Damages – Fire caused by heater – Damage caused to adjacent premises by fire – Claim fire accidental – Whether fire accidental – Accidental Fires Act 1943 (No 8), s 1 – Damages awarded (2009/5619P – Hedigan J – 14/11/2012) [2012] IEHC 473
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Negligence

Personal injury – Duty of care – Foreseeability – Plaintiff assaulted outside defendant premises –Whether duty of care – Whether negligence – Whether incident foreseeable – Meagher v Shamrock Public Houses Ltd (Unrep, Herbert J, 16/2/2005) distinguished – Claim dismissed (2008/3162P – Peart J – 18/7/2012) [2012] IEHC 314
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Negligence

Personal injury – Unsafe system of work – Duty of care – Foreseeability – Plaintiff injured while working on truck for defendant – Claim that plaintiff author of own misfortune – Whether breach of duty of care – Whether unsafe system of work – Whether injury foreseeable – Whether plaintiff author of own misfortune – Claim dismissed (2009/6473P – Peart J – 20/7/2012) [2012] IEHC 301
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Occupiers Liability

Personal injuries – Private dwelling – Duty of care – Visitor – Failure to take reasonable care to prevent injury or damage – Injury caused by window shattering – Unsuitable glass used in window installed by defendant owner –Whether duty of care – Whether failure to take reasonable care to prevent injury or damage – *Wells v Cooper* [1958] 2 QB 265 considered – Occupiers Liability Act 1995 (No 10) s 3 – Action dismissed (2010/4706P – O'Neill J – 5/12/2012) [2012] IEHC 528
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Personal Injuries

Damages – Employment – Garda – Bullying and harassment – Psychiatric injury – Breach of contract – Conspiracy – Duty of care – Defamation – Repeated inappropriate undermining of dignity of employee – Reasonable forseeability – Whether incidents complained of amounted to bullying and harassment – Whether injury to health of plaintiff – Whether reasonably foreseeable injury would occur – *Kelly v Bon Secours Health Systems Ltd* [2012] IEHC 12, (Unrep, Cross J, 26/1/2012); *Nyhan v Commissioner of An Garda Síochána* [2012] IEHC 329, (Unrep, Cross J, 26/7/2012); *Quigley v Complex Tooling*

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Personal Injuries

Negligence – Road traffic accident – Trial – Evidence – Appeal – Whether appellate court should interfere with findings of fact based on demeanour of witnesses – Whether trial judge obliged to set out conclusions of fact in clear terms – Whether trial judge made significant and material errors in drawing conclusions – Whether trial judge erred in drawing adverse inference from absence of early complaint – Whether trial judge failed to correctly weigh conflicting evidence – Whether permissible for party to give evidence of strength or weakness of case – *Hay v O'Grady* [1992] 1 IR 210 and *Mannix v Pluck* [1975] IR 169 approved – *Doran v Cosgrove* (Unrep, SC, 12/11/1999) considered – Courts Act 1988 (No 14), s 1 – Civil Liability and Courts Act 2004 (No 31), s 8 – Appeal allowed; retrial directed (181/2009 – SC – 1/5/2012) [2012] IESC 25
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Personal injuries

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Personal injuries

Negligence – Liability – Onus of proof – Causation – Accident at work – Prison – System whereby prisoners permitted to carry beverages – Whether plaintiff required to eliminate every possibility by which accident may have been caused without negligence – Whether plaintiff adduced evidence that gave rise to inference of negligence – Res ipsa loquitur – Whether onus of proof shifted to defendant – Whether act or default particularly within knowledge of defendant – Whether any significant history of difficulty feeding prisoners – Whether evidence of previous similar incidents – Whether system well policed and orderly – Whether other plausible explanations for accident which did not involve negligence of defendant – Whether burden of proof of legal or factual causation discharged – Cosgrove v Ryan [2008] IESC 2, [2008] 4 IR 537; Rothwell v Motor Insurers' Bureau of Ireland [2003] 1 IR 268; Hanrahan v Merck Sharpe & Dohme [1988] ILRM 629; Rogers v Motor Insurers' Bureau of Ireland [2009] IESC 30, (Unrep, SC, 31/3/2009) and Bradley v Córas Iompair Éireann [1976] 1 IR 217 applied – Mahon v Dublin & Lucan Electric Railway Company (1905) 39 ILTR 126, Jones v Great Western Railway Co [1930] 47 TLR 39; Wakelin v London and South Western Railway Co (1886) 12 App Cas 41 and Gahan v Engineering Products Ltd [1971] IR 30 considered – Proceedings dismissed (1999/1308P – Irvine J – 30/3/2012) [2012] IEHC 203
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Personal injuries

Collision between bus and motor vehicle – Injury to passenger in upstairs compartment of bus – Denial of personal injuries on grounds that impact minor and slight – Claim for aggravated and/or exemplary damages on grounds that defence oppressive and untrue – Damage to vehicle – CCTV footage – Medical evidence – Whether plaintiff suffered soft tissue injuries – Whether plaintiff guilty of exaggeration – Aggravated or exemplary damages – Challenge to bona fides of consultant – Whether defence entirely unreasonable – R v Bus Éireann [2011] IESC 44, (Unrep, SC, 2/12/2011) and Philp v Ryan [2004] IESC 105, [2004] 4 IR 241 considered – Civil Liability and Courts Act 2004 (No 31), s 26– Compensatory damages awarded; aggravated/exemplary damages refused (2010/9115P – Cross J – 17/7/13) [2013] IEHC 341
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Personal injuries

Damages – Causation – Road traffic accident – Application to dismiss claim – False or misleading evidence – Whether plaintiff gave false or misleading evidence – Whether plaintiff swore false or misleading affidavit – Whether evidence of post-accident medical treatment corroborated – Whether plaintiff had genuine claim for compensation – Ahern v Bus Éireann [2006] IEHC 207, (Unrep, Feeney J, 16/5/2006); Carmello v Casey [2007] IEHC 362, [2008] 3 IR 524 and Farrell v Dublin Bus [2010] IEHC 327, (Unrep, Quirke J, 30/7/2010) considered – Civil Liability and Courts Act 2004 (No 31), ss 14 and 26 – Social Welfare Consolidation Act 2005 (No 26), s 286 – Application to dismiss refused; damages awarded (2009/11261P – Irvine J – 30/3/2012) [2012] IEHC 208
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Personal injuries

Assessment of damages – Apportionment of injuries – Previous injuries – Subsequent injury – Whether pain and suffering attributable to accident – Whether subsequent injury substantially changed nature of injury – Whether future loss of earnings claim should be limited to date of likely return to work – Whether injury benefit should be deducted – Whether plaintiff could recover interest on mortgage arrears – Whether damages awarded should be apportioned due to subsequent injury – Reddy v Bates [1983] IR 141 applied – Social Welfare Consolidation Act 2005 (No 26), s 286 – Damages awarded (2008/3727P – Irvine J – 20/4/2012) [2012] IEHC 207
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18(5) 2013 Bar review 102

BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 15TH NOVEMBER 2013 TO THE 29TH JANUARY 2014

[pmb]: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Health Insurance (Amendment) Bill 2013
Bill 112/2013

Appropriation Bill 2013
Bill 131/2013

Adoption (Amendment) Bill 2013
Bill 133/2013

ESB (Electronic Communications Networks) Bill 2013
Bill 135/2013

Health Service Executive (Financial Matters) Bill 2013
Bill 136/2013

Industrial Development (Forfás Dissolution) Bill 2013
Bill 139/2013

Merchant Shipping (Registration of Ships) Bill 2013
Bill 139/2013

Roads Bill 2014
Bill 1/2014

Water Services (amendment) bill, 2014
Bill 4/2014

Cannabis Regulation Bill 2013
Bill 116/2013
[pmb] Deputy Luke "Ming" Flanagan

Protection of Life in Pregnancy (Amendment) (Fatal Foetal Abnormalities) Bill 2013
Bill 115/2013
[pmb] Deputy Clare Daly

Pensions (Traceability of Assets) (Amendment) Bill 2013
Bill 117/2013
[pmb] Deputy Willie O'Dea

Pensions (Amendment) Bill 2013
Bill 118/2013
[pmb] Deputy Willie O'Dea

Environment and Public Health (Wind Turbines) Bill 2013
Bill 119/2013
[pmb] Deputy Clare Daly

Thirty-Fourth Amendment of the Constitution (Neutrality) Bill 2013
Bill 126/2013
[pmb] Deputy Shane Crowe

Planning and Development (Transparency and Consumer Confidence) Bill 2013
Bill 127/2013
[pmb] Deputy Catherine Murphy

Social Clauses in Public Procurement Bill 2013
Bill 134/2013
[pmb] Deputy Mary Lou McDonald

Charities (Amendment) Bill 2014
Bill 3/2014
[pmb] Deputy Padraig MacLochlainn

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 15TH NOVEMBER 2013 TO THE 29TH JANUARY 2014

Water Services (No. 2) Bill 2013
Bill 123/2013

Pyrite Resolution Bill 2013
Bill 128/2013

Health Insurance (Amendment) Bill 2013
Bill 112/2013
[pmb] Senators Sean D. Barrett, John Crown, Jillian van Turnhout

Recognition of Irish Sign Language for the Deaf Community Bill 2013
Bill 113/2013
[pmb] Senators Mark Daly, Thomas Byrne, Labhrás Ó Mhurchú

Critical Utilities (Security of Supply) Bill 2013
Bill 125/2013
[pmb] Senators Feargal Quinn, Senator David Norris, Senator Sean D. Barrett

Valuation (Amendment) Bill 2013
Bill 129/2013
[pmb] Senators Paul Coghlan and Maurice Cummins and Michael Cummins

Nama and Irish Bank Resolution Corporation Transparency Bill 2013
Bill 137/2013
[pmb] Senators Mark Daly and Darragh O'Brien and Thomas Byrne

PROGRESS OF BILL AND BILLS AMENDED DURING THE PERIOD 15TH NOVEMBER 2013 TO 29TH JANUARY 2014

Dáil

Appropriation Bill 2013
Bill 131/2013
Committee Amendments
Passed by Dáil
Enacted

Adoption (amendment) bill 2013
Bill 133/2013
Enacted

Child and Family Agency Bill 2013
Bill 81/2013
Report Amendments (Seanad)
Enacted

Credit Reporting Bill 2012
Bill 80/2013
Report Amendments
Enacted

Finance (No. 2) Bill 2013
Bill 102/2013
Amended in Select sub-Committee on Finance
Report Amendments
Enacted

Fines (Payment and Recovery) Bill 2013
Bill 87/2013
Committee Amendments

Health (Alteration of Criteria for Eligibility) (No. 2) Bill 2013
Bill 106/2013
Passed by Dáil Éireann
Enacted

Health Insurance (Amendment) Bill 2013
Bill 112/2013
Passed by Dáil Éireann
Enacted

Legal Services Regulation Bill 2011
Bill 58/2011
Committee Amendments

Local Government Reform Bill 2013
Bill 98/2013
Enacted

Road Traffic (No. 2) Bill 2013
Bill 74/2013
Committee Amendments
Report Amendments

Companies (Miscellaneous Provisions) Bill 2013
Bill 109/2013
Passed by Seanad Éireann
Enacted

Oireachtas (Ministerial and Parliamentary Offices) (Amendment) Bill 2013
Bill 100/2013
Report Amendments

Protected Disclosures Bill 2013
Bill 76/2013

Passed by Seanad

Public Service Management (Recruitment and Appointment) (Amendment) Bill 2013
Bill 58/2013
Report Amendments
Enacted

Pyrite Resolution Bill 2013
Bill 128/2013
Passed by Seanad Éireann
Enacted

Social Welfare and Pensions (No. 2) Bill 2013
Bill 114/2013
Report Amendments
Enacted

Water Services (No. 2) Bill 2013
Bill 123/2013
Passed by Seanad Éireann
Enacted

Gas Regulation bill 2013
Bill 91/2013
Enacted

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Government Legislation Programme updated 15th January 2014

http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Tanzanian Judiciary in Dublin for Training in Arbitration

The new year saw Irish Rule of Law International (IRLI) welcoming Tanzanian Chief Justice, Hon. Mr. Justice Mohamed Othman together with senior members of the Tanzanian judiciary and East African Court of Justice (EACJ) to Dublin to attend Training in Arbitration and Mediation. The five judges traveled to Ireland in January to participate in a week-long training programme which was supported by the Bar Council of Ireland, Law Society of Ireland and the Irish Courts Services. Colm O hOisin SC and Michael Carrigan, Partner in Eugene F. Collins Solicitors, were instrumental in developing the training programme.

As development agendas shift, there is an increased emphasis on sustainable and nationally led development. The rule of law, accountability and transparency in the affairs of governance are therefore indispensable elements not only of democracy and civil rights, but to social and economic development. In the last fifty years, there have been major advances in the approach to international arbitration and dispute resolution, not least as a result of the impact of globalization and economic growth. New institutions and improved procedures have been devised and there is increased recognition of the role of arbitration in developing and developed economies in attracting foreign direct investment. Of those countries that have become parties to international conventions in the last 15 years, or have adopted the UNCITRAL Model Law as the foundation of, or part of, their laws of arbitration, the majority have been developing economies. The IRLI training programme was therefore developed in partnership with the Tanzanian judiciary and EACJ to assist the judges in their critical tasks of overseeing and supporting alternative dispute resolution regimes in their countries.

The visiting judges also had the opportunity to attend at the Dublin Dispute Resolution Centre which caters for arbitrations, mediations, and other forms of alternative dispute resolution. During their visit, the judges met with Mr. John Shaw, President of the Law Society; Mr. David Nolan SC, Chairman of the Bar Council; as well as the Hon. Mrs. Justice Susan Denham, who facilitated a number of opportunities for the delegation to meet with members of the Irish judiciary and share experiences between the two countries. This exchange of knowledge and experiences is central to the achievement of international development goals. Tanzania is one of Ireland's nine development priority partner countries and Irish Aid has been providing development assistance to Tanzania since 1975. Approximately 9% of the annual budget for Irish Aid's current Country Strategy for Tanzania is targeted at strengthening national governance frameworks and the January Arbitration Training highlighted the strong role that the Irish legal profession can play in strengthening capacity and building partnerships internationally. ■

The welcome reception hosted by the Hon. Mrs. Justice Susan Denham on Mon 20th January in the Supreme Court Conference Room, which was attended by the visiting delegation, colleagues involved in organising the training programme, as well as members of the Supreme Court (the Hon. Mr. Justice Nial Fennelly and Hon. Mr. Justice William M. McKechnie).

Why do I teach Restorative Justice to Law students?

Janine Geske*

Introduction

As a former general jurisdiction trial court judge and Wisconsin Supreme Court Justice, I observed how lawyers who were good empathetic listeners and creative problem solvers best represented their clients' interests by guiding them to peaceful resolution of their disputes. While sitting in criminal court for nine years, I experienced both the successes of our criminal justice system as well as its failures in bringing restoration to victims and communities harmed by crime. I see the practice of restorative justice processes as a means to address those failures through the guidance of professionals who understand how best to address the needs of those who have been harmed. As a legal educator, I know that the best way for future lawyers to learn about serving others, particularly the disadvantaged, is for them to listen to and to collaborate with others in working toward creating processes and programs that truly address issues of justice and equality through addressing peoples' interests and needs.

The Development of Restorative Justice

As Professor Umbreit points out in his article, over the last thirty years, the restorative justice movement has grown to become an integral part of many American criminal justice systems.[1] Additionally, restorative processes are increasingly being utilized to address more than everyday criminal law issues. Around the world, countries are turning to similar techniques to address those political, religious, and cultural conflicts that harm both individuals and communities. In many different contexts, leaders are revisiting very old peacemaking and restorative practices used by indigenous people to increase respectful dialogue among people who are in conflict and to encourage them to work together to rebuild safer and more peaceful communities.

Marquette decided to address the growing need for academic leadership by a law school in the development of restorative justice programs. We created the Restorative Justice Initiative, which includes the academic study of restorative justice, the promotion of scholarly and community dialogue, and the formation of a clinical program to train the law students to become restorative justice leaders in their communities. The students provide services and serve as expert resources for victims, communities, and restorative justice organizations. Those interested in the field can take a substantive course in restorative justice as well as participate in an in-house clinical experience. Our students learn how to be leaders in this important field of working toward personal and community healing and restoration. We work side-by-side with other academic disciplines to maximize the expertise in the various fields to best serve the restorative justice movement. Since lawyers have the unique opportunity to bring the ultimate in service to others, bringing peace and healing to people in great distress, we wanted our law students to be academically and experientially prepared to undertake that work.

Marquette Law School

Marquette University is a Catholic, Jesuit institution committed to serving God by serving others. Specifically we are working to integrate restorative practices into the study of law. Marquette's guiding philosophy of *cura personalis* (care for the whole person) underlies a core university objective to educate and train men and women in service to others. Perhaps this objective is particularly important to Marquette's Law School since part of the Jesuit tradition of education is to encourage students to become agents for positive change. Positive change being the essence of restorative justice, our law school is an ideal environment to undertake such study and clinical work. These factors, coupled with the excellent academic rigor and resources of the law program, create a program that can contribute to the necessary high standards for conflict resolution training, research and writing in this emerging field.

Marquette Law Dean Joseph Kearney explains our mission in his letter to prospective students:

> "We want our students to be decent people, to give back to our communities, and to be leaders in doing good, both within and outside the profession. We are committed to encouraging our students upon becoming lawyers to provide legal assistance to people who lack the resources to retain counsel and to ensuring that all members of the profession are moral and ethical. We want to use law as an engine for positive change, not as a device to cause anger and unhappiness. Even in the context of adversarial relationships and an attorney's obligation

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* Justice Janine Geske (ret.) currently serves as a Distinguished Professor of Law at Marquette University Law School, Milwaukee, Wisconsin and as founder of its Restorative Justice Initiative. She is a retired Wisconsin Supreme Court Justice and trial court judge. For over six years, she has been actively involved in restorative justice work. This article was first published in the Marquette Law Review.

1 William R. Nugent, Mona Williams & Mark S. Umbreit, *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 Utah L. Rev. 137 (2003); see Mark S. Umbreit, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV.251 (2005).

to provide zealous representation to clients, lawyers must be skilled and committed to resolving disputes while maintaining respect for opposing parties and counsel."[2]

Restorative justice processes develop those necessary skills that will insure that our students can be agents for change and servant leaders[3] in the community. They get to experience firsthand how to work alongside other professionals for true justice and healing in creative ways that meet the needs of crime survivors, communities, and offenders. They go into the prisons to facilitate dialogue among inmates, victims and community members through restorative circle work, they work one on one with survivors of violent crimes and their specific perpetrators, and they design programs for juvenile offenders so that they can understand the depth of the harm they have caused and can work towards demonstrating their remorse and restoration of the victim and the community.

Victims and Offenders

Law students who have the opportunity to look into the eyes of survivors of crime who have been devastated by the offense and to hear how best to find some peace in victims' lives will be better positioned to be leaders in their communities when they graduate. Working with offenders who are taking responsibility for the harm they have caused and are desirous of making amends to the victims and to the community at large gives future lawyers an effective way to deal with crime. The students also learn that many of our perpetrators were child victims of violent crime and that our communities failed to work toward healing for them before they turned into adults committing violent crimes.

Collaborating with restorative justice programs across the state, students use their legal knowledge as well as their process experience to create restorative processes that will make a true difference for those whose lives have been ravaged by crime. They learn how to create safe environments for tough discussions and how to listen with open hearts and minds.

Many skeptics say restorative justice is really just social work and has nothing to do with the practice of law. They are wrong. Clients come to lawyers to be counselled on how to best handle the problems they are facing or the claims they want to make. Restorative skills are needed at all levels of client counselling and working towards settlement of claims. Lawyers and judges control our judicial and legal system. Lawyers and professionals from other fields must collaborate to effectively weave restorative theories into our societal treatment of crime and conflict. Judges, criminal lawyers, prosecutors, elected officials, nonprofit agency board members and other leaders, many of whom are lawyers, influence public policy in a myriad of ways.

The Role of Lawyers

We look at restorative justice through the specific study of that subject as well as by studying skills being used in other forms of our alternative dispute resolution curriculum. The listening skills, the techniques of insuring that someone knows they have been truly heard and understood, and the designing of a process that can best address the conflict are tools that every mediator and negotiator should understand. Future lawyers should understand the importance of those skills and be able to effectively utilize them at appropriate times. These are skills that lawyers are not taught once they leave law school. Some attorneys possess those abilities, but many do not, and as a result their clients receive less than the full benefit of their counselor at law best meeting their needs.

Restoration occurs both in our formal restorative justice clinic as well as in our in-house mediation clinic. Every Monday morning, we have eight law students in the Milwaukee County Courthouse Small Claims Court to serve as mediators in pro se cases. One of the law students, who is now a small town lawyer, encountered a woman in a wheel chair suing a much younger woman over an alleged unpaid $300 loan. That is how the complaint described the conflict. The mediator set the tone for a mediation in which the two women might be able to listen to each other and work towards a settlement. He had each of them talk about their conflict and how it occurred. Much to his surprise, the student learned that the plaintiff was the mother of the defendant. They had not spoken to each other for nearly three years.

The plaintiff described how she had a fatal illness and she was facing foreclosure of her home. She angrily described how she had loaned her daughter the $300 to buy a car and how she needed to be repaid. The defendant then countered by saying that her mother had given her the $300 as a gift. She obviously had a great deal of resentment toward her mom.

The student split the parties up and talked to them individually . The daughter was furiously telling the student all the things that her mother had done to her. The mediator sat quietly and listened. When she was finished, the student sat with her in silence for a few moments and then asked a terrific nonlegal question, "How do you feel about your mother dying?" This is not a question that we would ordinarily teach in law school, but it was exactly the right thing to ask. The daughter started sobbing and describing her sadness of the now imminent loss of her mother. The student asked her how she felt. She described the fact that she loved her mother, who obviously was not taking care of herself. The student asked her if she could tell her mom what she just said. The daughter refused, saying it would be too difficult. The mediator did not give up and asked if she would write it out, which she finally agreed to do.

The student mediator put the mother and daughter together once again and sat in silence. They started talking to each other more respectfully. At some point, the daughter passed the written document over to her mother to read. The mother started weeping and looked at the student mediator and said, "I am dismissing the lawsuit." The daughter replied, "I am going to work with you to get you some housing and better medical care." The daughter turned to the student and asked how she could ever thank him for what he had just done. The student mediator told her to "just go hug

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2 Joseph D. Kearney, Message from the Dean, http://law.marquette.edu/cgi- bin/site.pl?2130&pageID=1222 (last visited October 23, 2005).

3 ROBERT K. GREENLEAF, SERVANT LEADERSHIP (1991) (A servant leader is defined as someone who is a servant first—versus a leader first—and serves others interests prior to their own).

your mom." That law student, and those watching, learned an invaluable lesson that day. They learned the value of empathetic listening and providing a process in which people can communicate. They specifically learned the value of working beyond the legal surface of the dispute and to create an environment in which this relationship could be healed.

The Art of Listening

During victim-offender facilitated discussions, the students experience listening to both offenders and survivors describe their experiences with the criminal courts. In a homicide by intoxicated user case, the offender tells the surviving but profoundly injured couple that he had wanted to send flowers to them but was prohibited by his attorney from doing so. He also was told not to send the apology letter he had written and not to look at them when he appeared in court. He tells them how he always intended to admit what he had done and bear the consequences.

The couple tells the offender about the pain of losing their health and livelihood and then seeing in court what appears to be an offender who has no remorse for what he did. In a similar case, a surviving mother of the deceased son recounts that when the defense attorney hired an accident reconstructionist, she saw that act as the defendant adding insult to injury by looking to blame her son for the accident. Finally, the survivors of these offenses always tell the offender that the no contest plea is one final insult because in their eyes it appears that the defendant still is not taking responsibility for what he did. The students learn how lawyers' actions, when protecting the rights of offenders, are deeply impacting the victims of the offenses.

Future lawyers can see how our criminal court system is very good at protecting rights but fails in assisting in the healing process that is needed after the commission of a serious crime. Time and time again, victims will recount how they are as angry at our judicial system as they are at the perpetrator of the offense. They depended on the system to support them and to "provide them with justice." So often, even though the defendant may be convicted and sentenced, the victims feel that the system failed in providing them with what they truly needed.

As part of the Marquette Restorative Justice Initiative, the students meet with survivor support groups, as well as advocates, for those victims. Domestic violence treaters and advocates report how our criminal justice system continues not to meet the needs of battered women. They continue to search for better ways to support those who suffer at the hands of the abuser as well as working to stop the abuse by the offenders. There is a place for leaders in the law to work to design processes that can better accomplish the goal of safety and treatment for the individuals caught in this cycle of violence. The students are working with advocates to train survivors who will work in the treatment area with the abusers to communicate the pain and devastation of violence in their lives as well as in the lives of their children. Engaging in that kind of leadership activity prepares law students to leave the law school environment and go out into the community and be transformational leaders for justice.

Students are also working to support struggling community groups attempting to weave restorative justice into their schools, neighborhoods, police departments, court systems, and corrections' systems. The students do research, answer questions and assist in training.

Conclusion

Although many law schools proclaim that they are developing future leaders, very few offer leadership training. The breadth and the infancy of the restorative justice movement in our communities afford students an incredible opportunity to train and develop as leaders in a field that cries out for standards and creativity. There must be a natural intersection of restorative processes and the criminal justice system. Trained lawyers are well equipped to be at the forefront of that work.

Why teach restorative justice to law students? The answer is so that law students can read a letter from a convicted murderer they have worked with that says:

> "Crime has no face or age. I was always aware of what I was doing, but I never knew just how much pain I caused my victims and to what extent my victims hurt until [my restorative justice experience.] I stopped pretending to be the victim. I was no longer being beaten [by family members as a child], so there was no need for me to hurt someone. In one blink of an eye, I made a stupid mistake that not only affected me for the rest of my life but everyone around my victims and me . . . I now give every effort in my being to helping myself, others who show signs of my past and to kids, so they will never become who I used to be. My incarceration is my way to show people a different way to live their lives."

They also can read a letter from the surviving daughters of a murdered armed robbery victim who met face to face with their father's killer and then wrote:

> "It has been two weeks since our visit with [the offender] and we were still feeling blessed. Something has happened in our souls that will last through eternity. This has brought a new dimension to forgiveness. We've been seeing people differently. It seems quite clear that if we can forgive the man for shooting and causing the death of our father then we can certainly forgive anyone else of anything."

The most important benefit of teaching restorative justice in a law school is that the students develop the vision, the skills, and the passion to positively transform our justice system. The future lawyers, who participate in the study and experience of restorative justice, have experienced the enormous part they can play in providing an environment and process for people in pain to work toward healing and restoration. We will all be the beneficiaries of that work. ■

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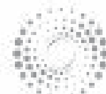

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The Development of the Irish Equality Guarantee by the Superior Courts in 2013

Dr. Elaine Dewhurst*

Introduction

Most recently, Article 40.1 has been variously referred to as "a normative statement of high moral value"[1] and a "critical dimension of any system of justice"[2]. Alongside this growing recognition of the importance of Article 40.1, the invocation of Article 40.1 is steadily increasing. Between June 2012 and December 2013, the Superior Courts have dealt with eight substantial cases relating to the equality guarantee, two of which have led to a determination of unconstitutionality. These determinations have raised interesting questions from the application of Article 40.1 to cases of indirect discrimination as well as solutions to cases involving under-inclusive legislative classification. The recent decisions provide some clarity as to how these issues are to be resolved.

This article will explore the impact of these decisions on the current interpretation of the equality guarantee in Ireland. From this analysis, it can be concluded that reliance on Article 40.1 by litigants is growing but establishing such cases before the Superior Courts is still extremely difficult due to a number of discrete barriers to its enforcement including a limited recognition of indirect discrimination, a perceived preference for formal as opposed to substantive equality and the preservation of the rule imposing the burden of proof on the applicant in all cases.

Equality 2012-2013: The Cases

An interesting example of the potential application of Article 40.1 in judicial proceedings arose in the successful Article 40.1 challenge in the case of *Brehuta v DPP and Another*[3]. The applicant alleged that she had been treated differently to two other individuals (AB and DR) during criminal proceedings. The applicant, AB and DR had all been charged with the same offence, had all pleaded guilty to this offence and none of them had any previous convictions. The only appreciable difference between the applicant and AB and DR was that the applicant was employed. The applicant received a conviction and a fine whereas both AB and DR were given the benefit of the Probation of Offenders Act 1907 and had their charges dismissed. The applicant argued that this was contrary to Article 40.1. The High Court held (*per* Peart J.) that there had been an inequality of treatment in the case and that persons "similarly situated [should] not receive different treatment because of some happenstance irrelevant to the question of guilt or innocence".[4]

The only other successful Article 40.1 challenge during the period examined was made in the case of *Byrne (a minor) v Director of Oberstown School*[5] which involved a challenge to legislation[6] which provided that remission of sentences was permitted for offenders of certain institutions but did not (by omission from the legislation) entitle offenders detained at Oberstown Boys School to any such remission. Hogan J. had no difficulty in determining that a law with differentiates between offenders so far as eligibility for remission was concerned engaged Article 40.1.[7] However, Hogan J. did note that "a great deal of latitude must be admitted for the purposes of Article 40.1 scrutiny where the Oireachtas differentiates between classes of persons for reasons of social policy, provided always that the differentiation is intrinsically proportionate and reasonable"[8]. Hogan J. went on to examine whether there was a difference in social function between detained at Oberstown Boys School given that, as was argued by the respondents, it was fundamentally different from a prison providing, as it did, a compulsory educational regime. However, Hogan J, held that in order for this argument to be successful, it would have to be shown that the Oireachtas had "sought to set Oberstown as a place apart from the rest of the custodial regime, so that young offenders were in effect being sent to a form of compulsory education for a fixed period in a closed non-prison environment".[9]

There were many indications that Oberstown was not regarded as essentially different from other places of detention including the fact that the Childrens' Act 2001 allows for the inter-institutional transfer of young offenders between St. Patricks Institution and other detention centres

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1 *Fleming v Ireland and Others* [2013] IESC 19 at paragraph 119 (referring to the decision of the High Court *per* Denham CJ)
2 *DF v Garda Commissioner and Others* [2013] IEHC 312 at paragraph 35.
3 *Brehuta v DPP and Another* [2012] IEHC 498.
4 *Brehuta*, at paragraph 24 (*per* Peart J).
5 *Byrne (a minor) v Director of Oberstown School* [2013] IEHC 562.
6 Section 35, Prisons Act 2007 and Rule 59 of the Prison Rules (S.I. No. 252 of 2007).
7 *Byrne*, at paragraph 26 (*per* Hogan J).
8 *Byrne*, at paragraph 27 (*per* Hogan J).
9 *Byrne*, at paragraph 29 (*per* Hogan J).

for children.[10] Therefore a young offender who commences their sentence at St. Patrick's Institution will be entitled to the benefit of the 25% remission regime even if he were to be transferred to Oberstown within days of commencing his sentence. No such remission would be available if he were to serve the entirety of his sentence at Oberstown. More importantly, Hogan J found that "detention at a children detention school is simply another manifestation of detention within the juvenile criminal justice system". He, therefore, held that a "custodial regime which brings about such a stark difference in terms of the release dates of offenders simply because of the location of the place where they serve their period of detention as a result of the application of the remission rules to one place of detention but not to another immediately engages the application of Article 40.1"[11]. It was a "clear breach of the precept of equality".[12]

In *Fleming v Ireland and Others*[13], a seminal constitutional law case in which the law on assisted suicide was challenged by an applicant suffering from multiple sclerosis, the equality guarantee's application in cases of indirect discrimination was questioned. The applicant challenged the constitutionality of section 2(2) of the Criminal Law (Suicide) Act 1993 on the grounds, *inter alia*, that it discriminated against disabled persons.[14]

She argued that the law, which essentially makes it a criminal offence for any person to aid, abet, counsel, or procure the suicide of another, discriminated against her as she was not able to commit suicide without assistance. The respondent submitted that the legislation was on a matter of "complex and important social policy, being objective and not arbitrary" and was "justified by the necessity to safeguard the lives of others who might be vulnerable and at risk of abuse". The Irish Human Rights Commission, who appeared as *amicus curiae*, argued that the effect of section 2(2) was that it indirectly discriminated against the applicant. Though neutral on its face, the provision "bears more heavily on some persons than on others".[15] In their view, the legislation was "unequal in decriminalising suicide".

In the High Court, it was held that Article 40.1 was engaged but that any difference in treatment was justified by reference to "the range of factors bearing on the necessity to safeguard the lives of others"[16]. The Supreme Court rejected this approach. Denham CJ held that Article 40.1 was not engaged as section 2(2) was neutral on its face and applied equally to everybody.[17] In particular, the Supreme Court held that it was not open to "anyone to complain of unequal treatment on the ground that he or she will commit a criminal act by assisting the suicide of another person"[18] and the appellant herself was not directly affected by section 2(2). The Supreme Court held that the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person could not be categorised as unequal treatment under Article 40.1, particularly where the impugned provision pursues an important objective of valuing equally the life of all persons.[19]

The applicant in *Akpekpe v Medical Council and Others*[20] was also unsuccessful in invoking Article 40.1. The applicant was a medical practitioner who had been sanctioned by the Fitness of Practice Committee of the Medical Council under section 71(a) of the Medical Practitioners Act 2007. This provision did not provide for a right of appeal against this sanction. The applicant argued that he was being treated differently contrary to Article 40.1 to other medical practitioners who were sanctioned under sections 71(b)-(f) of the same Act where such an appeal was available. While the applicant acknowledged that the sanctions outlined in section 71(a) were more lenient than those set out in section 71(b)-(f), the effect of such a sanction "nonetheless has an irreversible impact on the applicant's professional career and his livelihood"[21]. Section 71 also created an unfair anomaly whereby a doctor more severely sanctioned under section 71 may appeal to the High Court which could remove the sanction altogether, whereas the applicant in this case had no such remedy available to him. The respondent argued that there was no invidious discrimination in this case and that even if the section was found to be discriminatory, the provision could be justified as "without such differentiation, every offender could challenge a sanction imposed if that sanction differed from that opposed on some other offender".

Kearns P. in the High Court agreed with this analysis and held that the right to equality is not absolute and is subject to qualifications. In this case, the Medical Council was "enjoined to safeguard the rights of medical practitioners" and the "rights of patients and members of the public". In addition, the High Court held that a broad margin of appreciation must be extended to the various disciplinary bodies in "calibrating these different rights and interests". The right of appeal exists where the sanction is serious whereas the sanction complained of by the applicant was "at the lowest end of the scale and is not such as to warrant the existence of creation of a rights of appeal". There was no invidious discrimination and therefore there was no constitutional breach.

The case of *MR v an tArd Chlaraitheoir, Ireland and the Attorney General*[22] raised a rather traditional constitutional challenge to legislation on the grounds of sex and disability discrimination. The applicant, the mother of twins born by way of a surrogacy arrangement argued, *inter alia*, that she had been discriminated against contrary to Article 40.1 on the grounds of her inability to conceive and to give birth in the normal way, which could be viewed in law as a disability. The law also discriminated against the mother by providing that the determination of parentage was different for males

10 Section 156A, Childrens' Act 2001.

11 *Byrne*, at paragraph 36 (*per* Hogan J).

12 *Byrne*, at paragraph 41 (*per* Hogan J).

13 *Fleming v Ireland and Others* [2013] IESC 19. For more discussion on this decision see Liddane, "Fleming v Ireland: Is the door shut for Assisted Suicide in Ireland?" (2013) Letter to the *Cork Online Law Review* (8 May 2013); Garcia, "Case Comment: Assisted Suicide – Right to Die" (2013) *Medico-Legal Journal of Ireland* 115.

14 *Fleming*, at paragraph 24 (*per* Denham CJ).

15 *Fleming*, at paragraph 123 (*per* Denham CJ).

16 *Fleming*, at paragraph 120 (*per* Denham CJ) quoting the decision of the High Court [2013] IEHC 2 at paragraph 122 (per Kearns J).

17 *Fleming*, at paragraph 133 (*per* Denham CJ).

18 *Fleming*, at paragraph 133 (*per* Denham CJ).

19 *Fleming*, at paragraph 136 (*per* Denham CJ).

20 *Akpekpe v Medical Council and Others* [2013] IEHC 38.

21 *Akpekpe*, (per Kearns J.) "submissions of the applicant".

22 *MR v an tArd Chlaraitheoir, Ireland and the Attorney General* [2013] IEHC 91

(where it is based solely on genetic factors) and females (where is it based on delivery and birth), which essentially amounted to a form of sex discrimination. The High Court held that as the term 'mother' is defined in the Constitution as 'birth mother' there could be no discrimination as it is merely applying the Constitutional hierarchy as required by the Constitution itself. Also the High Court appeared to justify the present interpretation of 'mother' by reference to ensuring the integrity of the birth registration system which entitles the State to "take into account the difference in capacity and social function between the woman who donates the ova and the woman who gives birth".[23] This case was appealed to the Supreme Court and at the time this article went to print, judgment is pending.

Another interesting, but unsuccessful Article 40.1 challenge, was that of *Gilligan v Ireland and Others*[24] where the appellant alleged that a sentencing regime[25] was discriminatory in that allowed for the imposition of consecutive sentences on offenders serving a fixed term of imprisonment but not on those serving a life sentence. The applicant argued that that this amounted to discrimination against him as he was serving a fixed term sentence of 20 years which was in effect lengthier than many life sentences.[26] MacMenamin J. noted that the discrimination here did not engender race or disability or other "categories of person" but rather takes effect "in the protection of the rule of law". However, MacMenamin J did not consider that there was discrimination in this case. He held that just because the law "has an impact on a person coming within the plaintiff's category as an offender is not indicative of discrimination. The provision does not have any discriminatory effect under the heading where objection might legitimately be raised"[27]. He held that the litmus test was whether the classification made was for a "legitimate legislative purpose, is relevant to its purpose and treats members of each class fairly". The purpose in this case was to dissuade an offender in a specific category from committing further offences".[28] Life sentences and those serving them fall into a different category. A life sentence endures for life and "there would be a logical frailty in the imposition of a consecutive sentence to a life sentence. One cannot add a period that extends beyond that of a sentence for life"[29].

The last substantial reference to Article 40.1 was raised in the case of *Webster v Dun Laoghaire Rathdown County Council*[30], the applicants challenged a decision by the respondents to repossess their house under s.62 of the Housing Act 1966. One of the arguments made by the applicants was that s.62 discriminated between public housing tenants and private tenants. However, it was held by the High Court that any difference in treatment could be readily justified by reference to the "particular circumstantial differences between them". Housing authorities have to be able to effectively manage and control the housing stock as they have a duty to provide housing free or at very low cost to those in need. No such duty lies on the owners of private property. There could not therefore "be any arbitrariness, unreasonableness, caprice or unjust discrimination found in this different treatment of citizens. It is a legitimate process to achieve a balance between the rights of those enjoying the benefit of public housing and those whose need for housing cannot be met or adequately met".

The Lessons

Many interesting insights into the treatment of Article 40.1 by the Superior Courts can be gleaned from the decisions in these cases. This article will review these developments in four stages: the engagement of Article 40.1, the interference with Article 40.1, justifying a difference in treatment under Article 40.1 and remedying a breach of Article 40.1.

Engagement of Article 40.1

In order to engage Article 40.1 in the first instance it must be shown that the case in question falls within the scope of Article 40.1. Traditionally, it has been held that in order to determine this, two criteria must generally be satisfied. Firstly, the claimant must be a 'human person' and secondly, the claim must relate to an 'essential attribute of a human person'.

(a) A Human Person

The express wording of Article 40.1 provides that the right is applicable only to 'human persons'. It has been determined by the courts that non-human persons are not entitled to benefit from the guarantee of equality in Article 40.1[31] and, therefore, the provision does not apply to businesses or corporations of any sort.[32] This firmly established interpretation of Article 40.1 was again recently confirmed in the case of *Used Car Importers of Ireland v Minister for Finance and Others*[33] where the plaintiff, a limited company, sought to rely on the equality guarantee in Article 40.1 but was correctly prevented from doing so by Murphy J. on the grounds that Article 40.1 does not apply to limited companies.[34]

(b) The Essential Attribute Test

Even if the claimant is a human person, it has been held that a claim can only be made if the claim relates to the "essential attributes of the human person". The courts have tended to interpret this concept either contextually or in a manner which examines whether the discrimination is based on some essential attribute of the human person (the basis approach). The latter approach would appear to be favoured by the superior courts and, indeed is to be commended as it provides the widest possible terms for reviewing compatibility with Article 40.1.[35] The decisions of the superior courts in the

23 *MR*, at paragraph 87 (*per* Abbott J).
24 *Gilligan v Ireland and Others* [2013] IESC 45.
25 Sections 13(1) and (2), Criminal Law Act 1976.
26 *Gilligan*, at paragraph 45 (*per* MacMenamin J).
27 *Gilligan*, at paragraph 48 (*per* MacMenamin J).
28 *Gilligan*, at paragraph 50 (*per* MacMenamin J).
29 *Gilligan*, at paragraph 52 (*per* MacMenamin J).
30 *Webster v Dun Laoighaire Rathdown County Council* [2013] IEHC 118.

31 *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345.
32 *Quinn's Supermarket v. Attorney General* [1972] 1 IR 1.This was reaffirmed by the Supreme Court in *Abbey Films v. Attorney General* [1981] IR 158 at 172 (*per* Kenny J).
33 *Used Car Importers of Ireland v Minister for Finance and Others* [2013] IEHC 128.
34 *Used Car Importers of Ireland*, at paragraph 29.5 (*per* Roderick Murphy J).
35 Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (Dublin: Butterworths , 4th ed., 2003) at p. 1345. Dewhurst, "*The Recent*

past two years have not referred expressly to the "essential attributes" test but the types of cases considered would certainly be indicative of a more permanent move towards the basis approach or, as Barrington J. described it, an approach concerned with "human beings in society".[36]

Of the eight substantial cases dealing with Article 40.1, only two of the cases before the courts involved clear examples of the application of the basis approach: disability in *Fleming*, disability and sex in *MR* and employment status in *Brehuta*. More complicated are the cases of *Gilligan* (term of imprisonment), *Byrne* (location of detention), *Webster* (public tenant) and *Akpekpe* (sanctions imposed on a medical practitioner) which, at first glance, may not appear to be based on either the basis approach or the contextual approach. However, closer analysis of the decisions reveals that the basis approach is actually being adopted in these cases. All of these classifications demonstrate a relationship between the individual and society, whether that relationship is related to their status as a prisoner, where they are imprisoned, their status as a tenant of public authority housing or a restriction on their right to practice their profession. Despite the fact that it is possible to link these characteristics to the basis approach, the exercise is somewhat artificial and it is clear that Article 40.1 is still hampered by this unusual reference to "human persons" and the "essential attributes" doctrine. The approach of the superior courts is, however, a refreshing move in the direction of a more expansive reading of the equality doctrine and rids the doctrine of an unnecessary level of complexity.

Interference with Article 40.1

The second stage in any examination of a case under Article 40.1 will necessitate a consideration of whether the applicant has been subjected to some difference in treatment which will amount to an interference with Article 40.1.[37] Two important aspects of this analysis have emerged from the recent decisions of the superior courts: the centrality of the comparator doctrine[38] and a limited recognition of the fact that both direct and indirect discrimination are protected by Article 40.1.

(a) The Comparator Doctrine

In most cases, the identification of a comparator is relatively straightforward. Many of the recent decisions before the Superior Courts have involved simple comparators, for example, disability in *Fleming* and *MR* and sex in *MR*. However, the courts have not been reticent in identifying comparators but have insisted in all cases (as would be expected) that the comparator be similar in all respects other than the characteristic unique to the applicant. In the case of *Brehuta*, the obvious comparator with the employed accused was an unemployed accused who had committed the same offence and who had was in a similar position to the applicant (no previous convictions and had pleaded guilty to the same charge before the court). In *Byrne*, the comparator was another juvenile offender who had been sent to a place of detention other than Oberstown. In *Gilligan*, it was an offender who had been sentenced to life imprisonment as opposed to a fixed term of imprisonment and in *Webster,* it was a person who was a private as opposed to a public tenant.

In *Akpekpe*, the determination of a comparator was more difficult and ultimately proved fatal to the applicant's claim. The applicant was a medical practitioner who had received the most minor sanction (sanction A) under the relevant legislation for which there was no appeal. It was argued, by the applicant, that his comparator was a medical practitioner who had received a more serious sanction (sanction B) under the legislation but to whom an appeal was available. It was the unavailability of the appeal mechanism which troubled the applicant and led him to argue that he had been discriminated against. However, as the applicant and his comparator were not in the same position (one had been given sanction A and the other had been given sanction B), it was not a comparable situation. Therefore, as the applicant was not being treated differently to someone in a similar position to him, there could be no difference in treatment and no constitutional breach.

(b) Direct v. Indirect Discrimination

Article 40.1 does not expressly state whether it protects against both direct and indirect discrimination and most of the cases before the courts to date have tended to encapsulate clear examples of direct discrimination where the applicant is treated differently to another individual (the comparator) based on a particular characteristic.

However, one of the more recent decisions of the Supreme Court, *Fleming,* involved a claim in indirect discrimination: a neutral provision which the disabled appellant claimed was disproportionately more disadvantageous to her than to other persons who were not disabled. Section 2(2) of the Criminal Law (Suicide) Act 1993 provided that it was a criminal offence to assist another person to commit suicide. Ms. Fleming argued that while this applied to all persons on its face equally, it disproportionately burdened persons who were disabled and who could not commit suicide themselves as it meant that they could not get assistance in committing suicide. As all other persons were free to commit suicide, the prohibition on assisted suicide discriminated against those who were not free and able to commit suicide. The Irish Human Rights Commission, who appeared as *amicus curiae* in the case, argued that the effect of section 2(2) was that it indirectly discriminated against the applicant. Though neutral on its face, the provision "bears more heavily on some persons than on others".[39] The High Court also had no difficulties in accepting that indirect discrimination could constitute an interference with Article 40.1.

However, in the Supreme Court, Denham C.J. held that Article 40.1 was not engaged as section 2(2) was neutral on

Development of the Irish Equality Guarantee by the Superior Courts" (2012)17(5) *Bar Review* 115.

36 *Brennan v Attorney General* [1983] ILRM 449.

37 See for example, *Dillane v. Ireland* [1980] ILRM 167; *G v. District Judge Murphy and Others* [2011] IEHC 445.

38 *Breathnach v. Ireland* [2001] 3 IR 230 (comparison between prisoners), *JW v. JW* [1993] 2 IR 477 (married and unmarried women), *Foy v. An t-Ard Chlaraitheoir & Ors* [2002] IEHC 116 (comparison between transgender persons), *de Burca* v. *Attorney General* [1976] IR 38 (comparison between men and women).

39 *Fleming*, at paragraph 123 (*per* Denham CJ).

its face and applied equally to everybody[40] and the appellant was not directly affected by section 2(2). Nobody was entitled to assist another person in committing suicide and section 2(2) was not addressed to the applicant. The Supreme Court held that the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person could not be categorised as unequal treatment under Article 40.1, particularly where the impugned provision pursues an important objective of valuing equally the life of all persons.[41]

The decision that Article 40.1 was not engaged in this case is hard to justify. The approach adopted by the Supreme Court appears to infer that Article 40.1 only protects formal equality. Formal equality is achieved where the law appears to treat everyone alike. However, as Day and Brodsky note, where individuals are not identically situated (a disabled person and a person without a disability) formal equality can have the effect of "perpetuating discrimination and inequality because it cannot address real equality in circumstances"[42]. Adopting a substantive equality approach, on the other hand, would have allowed the effect of the law to be examined to determine whether it is discriminatory. On this analysis, section 2(2) creates a clear distinction based on physical disability by criminalising assisted suicide as persons who are rendered unable, by physical disability, to take their own lives are precluded from receiving assistance in order to do so. This difference in treatment amounts to discrimination as it perpetuates the disadvantage experienced by individuals who have a disability. It is regrettable that the Supreme Court did not adopt this substantial equality model, particularly as it was likely that any discrimination found could have been justified by reference to the right to life (a matter expressly referred to by Denham CJ). The effect of this decision is that Article 40.1 has been potentially limited to a formal equality model which reduces the ability of Article 40.1 to eradicate more subtle forms of disadvantage and discrimination.

What is positive about this decision of the Supreme Court is that there appears to be tacit acceptance of the principle that indirect discrimination may engage Article 40.1[43], although it is specifically noted in the judgment of Denham CJ that such cases will not be easy to establish. Denham CJ clearly states that "it is difficult to succeed in an equality challenge to a law which applies to everyone without distinction, and which is based on the fundamental equal value of each human life".[44] The decision in *Fleming* would, therefore, suggest that indirect discrimination is protected but that formal, as opposed to substantive equality, may be envisaged.

Justifying an Interference with Article 40.1

In all cases where Article 40.1 is engaged and an interference with Article 40.1 has been established, it is open to the court to determine that this interference is justifiable and proportionate.

(a) Burden of Proof

An important opening question in this respect is who carries the burden of proof in establishing discrimination. The general rule is that in all constitutional challenges the applicant has the burden of proving that the particular statutory provision in question is unconstitutional. However, there has been some discussion in equality cases that there may be an exception in cases where the discrimination is based on one of the very essential attributes of human personality such as sex or race. In these cases, the burden of proof will shift to the State to defend the classification. Interesting cases for such an analysis are the cases of *Fleming* and *MR* both of which involved alleged discrimination on the grounds of disability which could have allowed for the application of the exception in these cases. In both cases, however (and in all other cases citing the equality guarantee during this period), the general rule and not the exception was applied. It appears that this exception to the traditional rule is not being maintained and "while this reduces uncertainty in the preparation of claims, it does mean that the burden on the applicant in equality cases, as in all other constitutional cases, is very high"[45].

(b) Legitimate Justification and Proportionality

Even where there is evidence of disparate treatment, there may be a legitimate justification for the difference in treatment which will save the measure from falling foul of the equality guarantee. Where a difference in treatment has been found by the court, such differences may in fact be legitimate as long as they are related to a difference in capacity; physical or moral or a difference in social function or protect a particular constitutional value. However, the courts have also held that the rule must also satisfy a proportionality test defined as a "legitimate legislative purpose…it must be relevant to that purpose, and that each class must be treated fairly".[46] This test has been expanded upon in recent years and the most cited formulation is now that of Costello J. to the effect that the measure must:— "(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible, and (c) be such that their effects on rights are proportional to the objective".[47] Where there is no justification, then a violation of Article 40.1 will be established.

In the case of *Brehuta*, Peart J. held that there could be no justification for the invidious discrimination experienced by the applicant. However, in all other cases the justification provisions were invoked.

Where justifications were invoked, social policy and the protection of constitutional values were commonly cited. In *Fleming*, the respondent submitted that the legislation

40 *Fleming*, at paragraph 133 (*per* Denham CJ).
41 *Fleming*, at paragraph 133 (*per* Denham CJ).
42 Day and Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (March, 1998), 43 available at: http://www.cwp-csp.ca/wp-content/uploads/2011/07/WomenandtheEqualityDeficit_Shelagh-Day-Module-4.pdf.
43 See also the opinion of Garcia, "Case Comment: Assisted Suicide – Right to Die" (2013) *Medico-Legal Journal of Ireland* 115 at 117.
44 *Fleming*, at paragraph 133 (*per* Denham CJ).
45 Dewhurst, "*The Recent Development of the Irish Equality Guarantee by the Superior Courts*" (2012)17(5) *Bar Review* 115. See also for a more recent discussion of these issues in more detail: Doyle, "*Judicial Scrutiny of Legislative Classifications"*, (2012) 47(1) *Irish Jurist* 175.
46 *Brennan* v. *Attorney General* [1983] ILRM 449 at p. 480 (*per* Barrington J.).
47 *Heaney* v. *Ireland* [1994] 3 IR 593 at p. 607 (*per* Costello J.).

criminalising assisted suicide was on a matter of "complex and important social policy, being objective and not arbitrary" and was "justified by the necessity to safeguard the lives of others who might be vulnerable and at risk of abuse". In the High Court, it was held that any difference in treatment was justified by reference to "the range of factors bearing on the necessity to safeguard the lives of others"[48]. The Supreme Court did not address the issue of justification as it was held that Article 40.1 had not been engaged but there was an invocation of the right to life by Denham CJ which did point towards the possibility of a social policy and protection of constitutional values justification. Similarly in *Akpekpe*, the Medical Council was "enjoined to safeguard the rights of medical practitioners" and the "rights of patients and members of the public". In addition, the High Court held that a broad margin of appreciation must be extended to the various disciplinary bodies in "calibrating these different rights and interests".

Differences in capacity and social function were the central grounds of justification in *MR* and *Byrne*. In *MR*, the High Court justified the present interpretation of "mother" in the Constitution by reference to ensuring the integrity of the birth registration system which entitles the State to "take into account the difference in capacity and social function between the woman who donates the ova and woman who gives birth".[49] The use of the social function justification was also highlighted in *Byrne* where Hogan J. had to determine whether there was a difference in social function between Oberstown Boys School (which provided a compulsory educational regime) and other places of detention. In order for this argument to be successful, it would have to be shown that the Oireachtas had "sought to set Oberstown as a place apart from the rest of the custodial regime, so that young offenders were in effect being sent to a form of compulsory education for a fixed period in a closed non-prison environment".[50] Hogan J found that "detention at a children detention school is simply another manifestation of detention within the juvenile criminal justice system". He, therefore, held that such a difference in treatment could not be justified as there was no essential difference between Oberstown and other places of detention.[51]

Differences in capacity and social function also appeared to form the basis of the justification of the apparent differences in treatment in *Gilligan* and *Webster*. MacMenamin J in *Gilligan* held that the litmus test was whether the classification made was for a "legitimate legislative purpose, is relevant to its purpose and treats members of each class fairly". The purpose in this case was to dissuade an offender in a specific category from committing further offences".[52] Equally in *Webster*, it was held that any difference in treatment could be readily justified by reference to the "particular circumstantial differences between them". Housing authorities have to be able to effectively manage and control the housing stock as they have a duty to provide housing free or at very low cost to those in need. No such duty lies on the owners of private property. "There cannot therefore be any arbitrariness, unreasonableness, caprice or unjust discrimination found in this different treatment of citizens. It is a legitimate process to achieve a balance between the rights of those enjoying the benefit of public housing and those whose need for housing cannot be met or adequately met".

Remedying a Breach of the Equality Guarantee

Normally a determination that a legislative provision is contrary to Article 40.1 leads to the striking down of that provision which will necessarily remedy the situation for the applicant. However, where there is a legislative exclusion (as occurred in the case of *Byrne*) which disadvantages the applicant, striking down the legislative provision for unconstitutionality will leave the individual with no remedy. The *Byrne* case highlights the difficulties which may arise where the legislation challenged is under-inclusive in the sense of being drawn too narrowly so as to exclude others unreasonably from its remit. In *Byrne*, the legislation permitting remission of sentences for prisoners expressly applied to all offenders, except, by omission, those detained in Oberstown. Hogan J. was cognizant of the fact that if the court found the legislation unconstitutional, then the provision would become null and void but the applicant would not have benefitted in any way from this decision. The legislature would have had to step in to remedy the situation.

The issue of under-inclusive classifications has arisen in numerous cases[53] and the courts have been consistently deferential to the Oireachtas by holding that a consitutional invalidation "would not redress any injustice"[54]. Casey refers to the case of *Schachter v Canada*[55] which approved two techniques for dealing with such situations: (a) granting a declaration that the "impugned legislation is invalid, but to suspend its effect to give Parliament an opportunity to bring the legislation into line with constitutional requirements"[56] or, (b) extend the benefits of the impugned legislation to the excluded classes. The problem with the latter option is that there is a potential intrusion by the judiciary into the legislative domain which may raise issues under the separation of powers. Casey argued that such an approach would be "unlikely to appeal to the Irish courts" as "[s]eparation of powers considerations would seem to militate against it". Indeed, Casey points to the decision of the Supreme Court in *MacMathuna v Attorney General*[57] to the effect that "the court has no jurisdiction to substitute for the impugned enactment a form of enactment which is considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment"[58].

With this in mind then, it would have been open to Hogan J in *Byrne* to strike down the legislation and defer to the Oireachtas to remedy the situation which was then

48 *Fleming*, at paragraph 133 (*per* Denham CJ), High Court decision [2013] IEHC 2 at paragraph 122 (*per* Kearns J).
49 *MR*, at paragraph 87 (*per* Abbott J).
50 *Byrne*, at paragraph 29 (*per* Hogan J).
51 *Byrne*, at paragraph 41 (*per* Hogan J).
52 *Gilligan*, at paragraph 50 (*per* MacMenamin J).

53 *Dennehy v Minister for Social Welfare* High Court July 20 1984; *Loftus v Attorney General* [1979] IR 221; *Norris vv Attorney General* [1984] IR 36; *Draper v Attorney General* [1984] IR 277; *Somjee v Minster for Justice* [1981] ILRM 324; *O'B v S* [1984] IR 316.
54 *Somjee*, at paragraph 327 (*per* Keane J).
55 *Schachter v Canada* (1992) 93 DLR (4th).
56 Casey, *Constitutional Law in Ireland* (Dublin: Roundhall, 3rd ed., 2000) at p. 468.
57 *MacMathuna v Attorney General* [1995] 1 IR 484.
58 Casey, at p. 468.

presented. However, Hogan J. in *Byrne* held that it was clear after the decisions in *Carmody v Minister for Justice*[59] and *District Justice MacMenamin v Ireland*[60] that courts can grant a declaration to remedy a legislative omission. Hogan J. gave a useful example of cases involving constitutional omission and how the courts can deal with such issues. Take for example, a situation in which a statute clearly states that where an offender is detained at institutions A and B, but not at C, they are entitled to remission. In this case, the court would have the power to invalidate the reference to the positive exclusion of institution C. However, in a situation where a statute clearly states that where an offender is detained at institutions A and B but is silent as to C, the court would be powerless to assist the offender. Hogan J. held that "it could scarcely ever have been intended that the Constitution's command of equality before the law in Article 40.1….could have been so easily circumvented – perhaps even compromised – by means of such a simple drafting technique".[61] While in general, the solution should lie in the legislative branch and, in theory, the Oireachtas could bring about equality by abolishing the remission regime for all offenders, any retroactive enforcement could have constitutional implications. The only practical solution in this case was to treat the offender "as if the provisions of Rule 59 were applicable to him".[62] This clear statement of the role of courts in cases of under-inclusive legislation should be commended as providing a satisfactory remedy for applicants in such equality cases.

Conclusions

In an article in this journal in 2012, this author commented that there appeared to be a rationalisation of some of the more complex elements of the equality guarantee and that Article 40.1 was "moving towards its natural place as the cornerstone of Irish human rights jurisprudence"[63]. This trend appears to be continuing with a widening of the grounds upon which equal treatment can be claimed, the reduction in significance of the "essential attributes" test, the expansion of the comparator doctrine and the recognition of the positive role of the courts in cases of under-inclusive legislative classifications. However, Article 40.1 is still prevented from achieving its full potential because of the existence of a rather daunting burden of proof, the uncertainty surrounding its application to cases of indirect discrimination and the unfortunate promotion of formal, as opposed to substantive, equality.

Three distinct conclusions can be drawn from the emerging case law on equality in 2012-2013. Firstly, engagement and identification of an interference with Article 40.1 is becoming simpler and there has been a distinct simplification of some of the more cumbersome aspects of the doctrine. This certainly eases the difficulties previously faced by applicants and may be partially accountable for the increase in invocation of Article 40.1 before the superior courts. Secondly, inequalities are becoming more complex and often involve indirect forms of discrimination. The superior courts have had limited opportunity to address such concepts and are reticent (as was identified in *MR*) to expand the interpretation of Article 40.1 beyond its traditional parameters. The interpretation of Article 40.1 in *MR* as providing for formal, as opposed to substantive, equality is also indicative of this reticence. Thirdly, where the superior courts do find evidence of discriminatory treatment which is not justifiable, there is a judicial willingness to ensure that the protection afforded by Article 40.1 is not compromised by a failure to provide a practical remedy to the claimant. Therefore, while there are aspects of Article 40.1 which are still in need of clarification and development, the superior courts most recently have taken a rather active approach to the protection of the right to equality in recognition of its central importance in the lives of ordinary citizens. ■

59 *Carmody v Minister for Justice* [2009] IESC 71.
60 *District Justice MacMenamin v Ireland* [1996] 3 IR 100.
61 *Byrne*, at paragraph 43 (*per* Hogan J).
62 *Byrne*, at paragraph 51 (*per* Hogan J).
63 Dewhurst, at p. 115.

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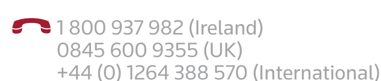
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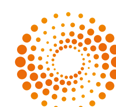

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