# The Bar Review

*Journal of the Bar of Ireland • Volume 6 • Issue 2 • November 2000*


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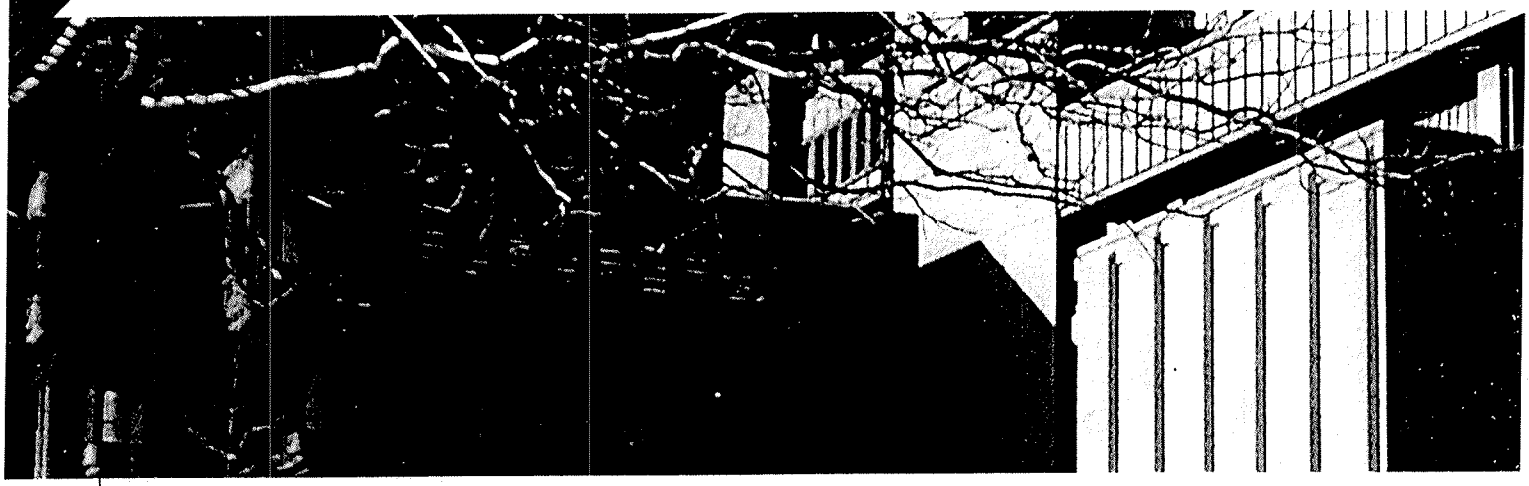

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# Contents






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At a reception for international arbitrators in the Distillery Building, (from left to right), Dr Nael Bunni, President of C.I.A.R.B., Rory Brady SC, Chairman, Bar Council, and Michael McDowell SC, Attorney General.

## Remembrance Day for Barristers from the Great War

During a recent visit to Flanders and the Somme with the Royal Dubln Fusilier's Association, Anthony P. Quinn BL continued his research into the stories of the Irish barristers who died in World War One. The tour visited Ginchy and remembered Tom Kettle, who was killed there on 9 September 1916 while serving with the Dublin Fusiliers. He has no known grave, but is commemorat ed both on the Thiepval Memorial in France and in St.Stephen's Green, Dublin. Tour participants also remembered Willie Redmond at his lonely grave in Loker, Flanders,not far from the Irish Peace Park at Mesen.

Only limited information is available on many of the other 25 barristers listed on the Bar Memorial at the Four Courts, Dublin. Any relevant information on the following barristers who fell during the Great War would be especially appreciated and acknowledged :

Robert H .Cullinan, John H .Edgar ,Edmund Chomley Farre(a)n, Cecil S. Kenny, Martin A. Lillis, Cornelius A. Mac Carthy (also of the Dublin Fusiliers), Edmund Meredith, Arthur R .Moore, Hubert M . O Connor, James C .B.Proctor, George B J Smyth.

All communications please to Anthony P. Quinn BL, Law Library, Dublin 7; and for further reference, see his article, *Wigs and Guns,* (2000) 18 ILTSJ, number 6.

## CLE Lectures for Michaelmas

The following is a list of CLE activities for the remainder of the Michaelmas term. A further plan will be published in December for the remainder of the legal year. In addition, it is proposed to hold a weekend conference and social event outside Dublin for devils and 2nd practitioners at the start of the Easter term 2001 (subject to there being sufficient interest). Further details from Paul McGarry on 817.2957.

**From 16th October**
Restart of language courses in French, Italian, Spanish (two levels)

**24th October**
Devils lecture series: Discovery applications

**31st October**
Speciality lecture: Recent developments in probate practice

**4th November**
Refresher Course lecture

**14th November**
Devils lecture series: Financial management and accounting

**21st November**
Speciality lecture: Planning and development

**28th November**
Devils lecture series: District Court Criminal Procedure

**12th December**
Devils lecture series: Devilling for a second year and going on Circuit

**18th December**
Devils lecture series: District Court Civil procedure

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The New York University School of Law is offering a Masters of Law (LL.M.) through their new Global Public Law Service. This carries between 10 and 12 scholarships covering tuition, housing, travel and living expenses. They are reserved for non-American practising public service lawyers who have at least two years post-graduate practice experience.

Applications for the 2001-2002 academic year are due by 1 December 2000. Those interested in applying should write to the Graduate Admissions Office at: PO Box 904, New York, NY 10276-0904. They may also apply online as www.law.nyu.edu or request a print application via e-mail at law.llmadmissions@nyu.edu.

# DAMAGES IN DEFAMATION: WHAT PRICE A REPUTATION?

Two articles in this issue of the Bar Review are concerned with the principles developed by the courts for the assessment of damages, one relating to general and special damages in personal injuries cases and the other with limitations on recovery for pure economic loss in the law of negligence. In these as in other areas of the law of damages, any attempt to identify legal rules or guidelines for the range of monetary damages which might be awarded for any particular wrong or injury must take account also of the inevitable difference of approach not just of individual trial judges, but also of any particular jury. More importantly, perhaps, it is as well to remember that general damages in tort are compensatory, and therefore include a host of both subjective as well as objective elements which defy strict classification. Some people may shrug off an insult or wound, whereas others may suffer the injury very profoundly. The circumstances in which an injury has been suffered may be humiliating or amusing. The context of a physical may be a sporting occasion, or a difficult endeavour at work, or the result of serious criminal activity. In other words, every case is different.

It is for this reason that recent calls by newspapers and other media for the imposition of rules or guidelines which limit or cap the amount of damages which a jury may award in libel cases should be scrutinised carefully. In particular, it would be wrong to conclude from a few high profile awards alone that jury awards in libel cases are excessive or disproportionate. These cases may prove to be the exception. They may also contain elements which, objectively, mark them out as extraordinary cases involving very well known plaintiffs whose reputation was severely tainted by the libels in question.

The newspapers have rightly pointed out that a complete failure to constrain juries may fall foul of the constitutional guarantee of freedom of expression and of the equivalent and more explicit guarantee of media freedom under Article 10 of the European Convention of Human Rights. In particular, where a particular award is found to be disproportionate, the European Court of Human Rights will regard the excessive size of the award together with the absence of adequate and affective directions to the jury as giving rise to a breach of Article 10, Tolstoy Miloslavsky v UK (1995) 20 EHRR 442. On the other hand, as the Supreme Court has very recently reaffirmed in O'Brien v Mirror Group Newspapers Ltd, 25 October 2000, the Supreme Court has jurisdiction in libel cases as in any other case to overturn awards which are so disproportionately high as to go beyond what a reasonable jury could reasonably have awarded.

As mentioned by Mr. Justice Geoghegan, although in libel cases, unlike for example a broken hip or lost eye case, the Supreme Court might only intervene with diffidence rather than confidence, nonetheless, in exercising this jurisdiction, the Court sends a general message to courts and juries which is unhampered by detailed and perhaps overly technical and confusing criteria which the Supreme Court has now twice refused to countenance. This 'general message' is that there are real ceilings to the amount of damages which can reasonably be awarded even for the most damaging slurs on the most important reputations. Over time, these ceilings are occasionally adjusted and become known and acted upon in advising clients and informing settlements in the ordinary tradition of the common law. On this view, the need for further detailed legislative or judicial guidance has not been demonstrated.

The alternative view, favoured by Mrs Justice Denham in her dissent on this point in both the De Rossa v Independent Newspapers and O'Brien cases, is that there is a need to introduce greater rationality to the calculations of juries when it comes to matters of money and damage to reputation. Yet it must be said that juries are to be particularly trusted, not distrusted, in these matters. Furthermore, it may be questioned whether a compelling case has been made out by the newspapers that Irish law fails to strike a fair balance between freedom of expression and the protection of one's reputation. Viewed at its simplest the present debate is about the price you pay for getting it wrong, and it may well be that the particular genius of the Irish people, expressed through the jury system, quite simply places a high premium on your one and only good name. •

# ECENT DEVELOPMENTS IN THE LAW OF DAMAGES

***John Healy BL** provides an overview of recent Superior Court decisions bearing on the assessment of general, special and exemplary damages in personal injuries cases.*

## General Damages and the Notional Threshold

In *Sinnott v Quinnsworth* (1983), a decision well remembered by personal injury practitioners, O'Higgins CJ reduced an award of general damages from £800,000 to £150,000, and asserted that "unless there are particular circumstances which suggest otherwise, general damages in a case of *this nature* should not exceed a sum in the region of £150,000."[1]The judge's reasoning clearly displayed a scepticism of the ability of large sums of money to achieve their stated aim, namely to "compensate" a plaintiff - in the present case a young man rendered quadriplegic - for pain and suffering of an immeasurable nature. In 'assaying the impossible', the judge urged future juries not to 'lose all sense of reality', and to resist awarding damages which were so high as to constitute a punishment for the infliction of the injury rather than a reasonable, if imperfect, attempt to compensate the injured.[2]

Following the Supreme Court's earlier ruling in *Reddy v Bates*,[3] O'Higgins CJ reasoned that when assessing general damages the court should take into account the extent to which the plaintiff would be compensated in special damages for actual loss suffered,[4] and the possibility that the lump sum would be invested to generate an independent yearly income. Further, when deciding the final sum of damages to be awarded, the court should have regard not just to the figure agreed for each individual head of damages, but also to the appropriateness of the award as a whole. The judgments in *Reddy* and *Sinnott* thus effectively encouraged the courts to adopt a discretionary, intuitive approach to the final assessment of damages. To this extent, they elicited the criticism that such an approach corrupted the process of assessing the plaintiff's loss objectively and categorically by recourse to the well-established heads of recovery. In addition, it was said that the decision threatened the constitutional principle of equality by encouraging lower general damages where the plaintiff's special damages, through loss of earnings, are high.[4] Despite these misgivings, the 'intuitive' approach has gained momentum over the years, and was implicitly approved by the President of the High Court last year in *Kealy v Minister for Health*,[6] where it worked to the plaintiff's advantage.

It was assumed for some time after *Sinnott* that £150,000 operated as a cap or 'rough tariff' on quantum of general damages awards. The Supreme Court, at least initially, seemed to favour a trickle-down approach to the temporary upper limit.[7] O'Higgins CJ had spoken, however, of the general desirability of relating damages to "contemporary standards and money values", and it would seem that his primary concern was that damages not notably exceed those standards.[8] Nevertheless, the threshold figure was not tampered with until 1996 when the High Court in *Connolly v Bus Eireann*[9] raised it to £200,000. Last year, in *Cody v Hurley*,[10] it updated the figure to £250,000.

Some months later in *Kealy v Minister for Health*,[11] Morris P dismissed the notion that the *Sinnott* figure represented an 'omnibus sum'. O'Higgins CJ had referred to the figure in the context of cases where very large sums had already been awarded for loss of earnings and future expenses, where it was thus appropriate when assessing general damages to have regard to the total damages being awarded. Further, *Sinnott* had been decided at a "time of depression when interest rates were high, and incomes, relative to the present day, were small."[12] In the judge's view, the correct sum for a middle-aged lady whose life had been ruined, in this case by transmission of the Hepatitis C virus, was £250,000.[13]

*Kealy* has been succeeded by a number of awards at the top end of the notional scale. In *Troute v Brassil & Tucker*,[14] O'Neill J awarded £225,000 general damages for medical negligence necessitating removal of the plaintiff's uterus, leaving her infertile, incapable of sexual relations, and mildly brain damaged. In *O'Mahony v Buckley*,[15] Smith J awarded £205,000 general damages for injuries that included fractures to the chest, pelvis, femur, patella, and tibia, major surgery on abdomen, future hip replacement, incipient arthritis, and post-traumatic stress disorder and depression. This current aversion to limitations on quantum was epitomised in *De Rossa v Independent Newspapers*,[16] the much publicised defamation case, where the Supreme Court approved a jury award of £300,000 for injury to the plaintiff's reputation. By a majority, the court upheld the jury's prerogative in defamation cases to decide a sum of damages entirely from the facts of the case, and without reference to previous awards or figures

recommended from the bench, on condition solely that damages be fair and proportionate to the injury.[17]

## Loss of Earnings

*Reddy v Bates* is authority for the further proposition that when assessing a plaintiff's lost future earnings, the court should take account of the possibility that the plaintiff's employment would have been interrupted by, for instance, future unemployment, redundancy, ill health, or marriage. Despite its grounding in the fluctuating state of the labour market in the early eighties, this element of the *Reddy* decision continues to be invoked, though now as a more general requirement to take account of likely future interruptions in work. Barron J confirmed recently in *Murphy v Minister for Defence*[19] that *Reddy* is best interpreted as a necessary reminder to juries, at a time when the risks of unemployment or redundancy were comparatively high, that the plaintiff's future loss of earnings must be established realistically as an integral component of his claim, and that it is not always appropriate to assume that he would have worked each week of the rest of his working life.

Whereas in 1983 *Reddy v Bates* directed attention to general risks that the plaintiff's employment would have been interrupted, the tendency in recent years, no doubt buoyed by the present state of the economy, has been instead to highlight specific aspects of the plaintiff or his case which enable the court to reach findings of fact in relation to his likely future loss. In *Jeffers v Cahill* [20] Costello J emphasised that "plaintiffs are individuals, not statistics, and in each case [the court should] take into account the particular circumstances of each plaintiff, family, personal and social, relevant for the purpose of reaching a fair figure for compensation." In the *Murphy* decision, Barron J explained that the court must first make the necessary determinations of fact regarding the plaintiff's loss (based on the type of person he is, his ability to overcome handicaps, etc); after it makes the determinations, but not before, the court decides the appropriate actuarial multipliers to employ, modified according to those findings.

Though indications are that the plaintiff may be given the benefit of the doubt on his hypothetical employability within the forseeable future, the opportunities currently presented by the market may be such that it will be more difficult for a plaintiff, where not physically incapacitated, to claim with credit that he has been rendered wholly unfit for employment. This was evident in *O'Donoghue v Deecan & Sons*[21] where the plaintiff woodworker claimed he was no longer fit for work by reason of a resultant phobia of preaccident and like work, brought on by facial injuries caused by a blade at work. On appeal, Keane J expressed dissatisfaction with the trial judge's decision to give more weight to the views of the plaintiff's GP in preference to two psychiatrists qualified to assess the type of injury of which the plaintiff claimed to suffer. He felt further that excessive weight had been given to the evidence of a careers counsellor and the plaintiff's wife on the plaintiff's current employability of 'nil'. His view of evidence by careers counsellors, now routine in personal injury actions, was that it is useful evidence but nonetheless bare opinion evidence which does not relieve the court of its primary fact-finding duties. The court must itself ascertain what the plaintiff's "actual medical situation" is, his "physical capacity for work", and then "the psychiatric consequence" of the injuries for the plaintiff - all determinations of fact which the court makes before selecting the appropriate actuarial multipliers.

*O'Donoghue* implicitly demonstrates that though the courts apply a subjective effect test when determining the impact of injury upon the plaintiff, the plaintiff who claims that his injuries have left him incapable of work does not benefit from a presumption of veracity on this point, but must prove as best he can that such a state of affairs actually exists. The courts continue to honour the well-established principle that the defendant tortfeasor takes the plaintiff as he finds him, whether robust or hyper-sensitive.[22] The plaintiff's claim for damages on this basis depends, however, upon the plaintiff adducing proof sufficient to persuade the court that the claim is a legitimate one.

**"Although the courts apply a subjective effect tes when determining the impact of injury upon the plaintiff, the plaintiff who claims that his injuries have left him incapable of work does not benefit from a presumption of veracity on this point, bu must prove as best he can that such a state of affairs actually exists."**

The courts were invited twice recently to decide how to assess future loss of dependency arising from fatal injury in cases where the deceased had, up to his death, failed to declare the full extent of his income to the Revenue authorities. In *Fitzpatrick v Furey*[23] the deceased (a self-employed dental technician and specialist in prosthetics) had made tax returns which were clearly at variance with his outgoings over the years prior to his death. For tax year ending 31st July 1994, the plaintiff's actual profit (assessed by reference to his outgoings and disposable income) had been approximately £14-15,000 and not £9,000 as declared. The defence submitted that, for the purpose of assessing lost earnings and dependency, public policy required the court only to have regard to the income as declared in the deceased's tax returns. Against this, counsel for the plaintiff submitted that the dependency claim differs from the lost earnings claim in that it centres upon the loss caused to the *dependent*, and awards compensation for *actual loss*, given that 'but for' the defendant's wrongdoing the plaintiffs would have continued to enjoy the same or similar support and lifestyle. Laffoy J, evidently with some reluctance and in the absence of authority on the issue, accepted the defendant's submission that it would be contrary to public policy to measure the plaintiff's claim by reference to support from undeclared income.

The decision was persuasively criticised at the time by Byrne and Binchy for levying a "disproportionate penalty, directed at the wrong targets." White's Law of Damages,[24] considered in Laffoy J's judgment, puts forward a view which many would share. It recognises that the dependency claim is a separate cause of action strictly between the dependents and the person who is legally responsible for the deceased's death. As such, a dependent ought not to be automatically debarred from recovering lost financial support merely because the deceased committed an illegality affecting the funds, typically by failing to disclose full earnings to the Revenue; on the other hand, recovery could be denied where the defendant shows knowledge, conduct, or complicity on the dependent's part such that it offends public policy to make the award.

*Downing v O'Flynn*[26] usefully retested this issue by way of appeal on a point of law to the Supreme Court. The decision centred on two claims for loss of dependency and financial support, arising from regular payments by the deceased of £1,000 a month to his mother and £37.50 a week to a child for whom he had been in *loco parentis*. The deceased had successfully established a new retail business shortly before his death, and had not yet prepared formal accounts or made comprehensive returns to the Revenue. On the basis of his most recent declarations of income, the deceased would have been earning £153-173 a week. The court had much to say on this specific issue of basing loss of financial support on undeclared income, though it did not venture further and lay down broader principles applicable to dependency claims tainted by other types of illegality or crime.

While the court accepted, as had Laffoy J in *Fitzpatrick*, that it was restricted to determining the likely contribution which the deceased would have continued to make out of his *net* income, it unanimously rejected the learned judge's conclusion that public policy necessarily requires the court to have regard only to the deceased's declared income. The court was also unanimously of the view that the deceased would have continued to make the financial contributions, and could have afforded to do so out of his 'probable net income.' Geoghegan J considered that the public policy argument had been misused, and that the true analysis of any claim for loss of dependency and financial support is whether the court has heard evidence in relation to the deceased's undeclared income sufficient to enable it to quantify "the true net amount of that income if tax were paid." Concerned to confine his findings to the type of case at hand, Geoghegan J distinguished *Fitzpatrick* on the basis that in the instant case there was clear evidence that the deceased had made regular payments of £1,000 a month and £37.50 a week to specific dependents for whose support the deceased had considered himself responsible. Furthermore, the deceased's financial affairs suggested that he would have continued to make those payments even if his income had been fully taxed. More generally, both Geoghegan J and Denham J expressed the view that for cases of this type, in the absence of evidence to the contrary, the court should presume that the deceased would have continued paying equivalent financial support, unless it is shown that the payments could only have been made out of the untaxed income.

The court was clearly not comfortable with the assumption that public policy necessarily requires the court in lost dependency claims to have regard only to financial support from funds entirely free of unlawfulness or illegality. It was, however, careful to restrict its decision to the particular issues of the case, as a result of which the decision can offer few pointers for future cases. Of likely interest is the manner in which Denham J distinguished the present case from claims of dependency on the proceeds of crime. She drew the distinction not according to the nature of the offence allegedly tainting the claim (whether criminal or statutory), but according to how the money was *obtained*, whether legally or illegally.[27] Otherwise, factors which are likely to influence the courts in future decisions are (1) knowledge and complicity on the dependent's part, and (2) the extent to which public policy would be offended by making the award.

## Hospital Charges and the Kinlen Order

In an effort to ensure that the cost of medical aid and treatment for the victims of motor accidents is ultimately borne by defendants and their insurers, section 2(1) of the Health (Amendment) Act 1986 requires health boards to "charge" the patient directly where the patient has received or is entitled to receive damages for his injuries. Since Kinlen J's ruling in *O'Rourke v Scott*,[28] known as the Kinlen Order, the practice has been to charge £100 (more lately £150) a day for in-patient bed and board. Kinlen J had expressed the view that the Health Boards "cannot charge the full economic cost of running the hospital just because there is probably an insurance company who will take up the bill. That is a form of indirect taxation which I think may well be unconstitutional."

The parameters of the section 2(1) 'charge' were examined by the High Court in *Crilly v T & J Farrington*[29] after a dispute emerged between the Eastern Health Board and the defendant's insurer over assessment of special damages. The Health Board submitted that the charge should be calculated by extracting a daily average from the annual cost of hospital beds for the particular hospital (approximately £525 a day for Beaumont Hospital). The insurer argued that the reference in section 2 to 'charge' must be construed by reference to 'charge' under section 55 of the Health Act 1970 (otherwise known as the 'maintenance charge,' at approximately £158).[30] Both interpretations were rejected on appeal. Geoghegan J considered that statements made by the Minister when piloting the Bill - to the effect that 'charge' would mean the average daily cost of bed [31]- demonstrated a clear intention not to make section 2 charges referable to section 55 charges (though the learned judge refused to interpret section 2 in the light of those words, on the grounds that they were merely indicative of departmental policy at the time).[32] The learned judge upheld the Kinlen Order, now at £150 for daily hospital stay. All other charges, he reasoned, must be for actual services, to be assessed on a strictly *quantum meruit* basis, in line with the general common law approach to interpreting unspecified charges in written contracts.

## Hearing Injury and the Army Deafness Cases

Under the Civil Liability (Assessment of Hearing Injury) Act 1998, for all cases of hearing injury the courts are required to take 'judicial notice' of the Report to the Minister for Health and Children. Known as the 'Green Book,' the Report provides a formula for assessing levels of hearing disability. In *Hanley v Minister for Defence*,[34] Johnson J addressed the strengths and weaknesses of the Green Book formula, and proposed a second formula for establishing quantum per disability. The learned judge approved the Green Book formula for most cases, but expressed dissatisfaction with its failure to account for future deterioration caused by the combined effect of noise induced hearing loss (NIHL) and age related hearing loss (ARHL). He preferred to supplement the Green Book formula with a formula adopted by the International Organisation for Standardisation (ISO 1999) specifically designed to gauge future deterioration. According to this model, the plaintiff would have a cumulative 20% hearing disability by the age of 60, compared to his estimated present hearing disability of 9%. Johnson J outlined his scheme of quantum, under which £3,000 would be awarded for each 1% of disability to a person at the age of 30, on a scale which decreased to £1,500 for each 1% by the age of 60%. For cases of serious hearing loss, ranged between 10-25 % disability, the award per cent would range from £6,000 (age 30) to £3,000 (age 60).

On appeal,[35] the Supreme Court concurred with Johnson J's view that the 1998 Act does not impose a duty on the courts to

adhere strictly to the terms of the Green Book, and does not limit the court's freedom to consider alternative formulas more appropriate to the case at hand.[36] The court agreed that the Green Book formula was inadequate to estimate future deterioration of disability and the combined effect of NIHL and ARHL. Invited to choose between the formulas favoured by Johnson J (the High Court Scale) and the Department of Defence (the State Scale), the court unanimously favoured the latter. The State Scale had the advantage of merging future deterioration into a single system of total estimated disability, requiring a single calculation as opposed to three under the High Court Scale (present disability, future deterioration, and actuarial calculation of compensation for future loss). The High Court Scale adopted a linear mathematical system, which in Keane J's view failed adequately to account for periods when the plaintiff's disability would have occurred through ARHL alone: it would, for instance, award £1,500 to a 59 year old with a disability of which he was unaware, being as mild as an inability to hear rustling in the woods.

The Supreme Court also rejected the base figures used in the High Court Scale, particularly the award of £1,500 for each *per* cent disability for persons aged 60, and the doubling up for disabilities ranged between 10-25 %. The court was united in its view that the scale would lead to 'inordinate awards' out of proportion to what is considered the "going rate for total deafness" (*per* Keane J). Under the State Scale, each per cent in the range of 1%-10% for a 30 year old would receive £1,500 (of which £375 would cover future aging), by contrast with £3,000 under the High Court Scale.

The court acknowledged that the public interest was concerned to bring consistency and efficiency to the resolution of army deafness cases, and that formulas for assessing hearing disability are desirable to the extent that they aim to treat like cases alike. Such formulas, however, are never more than "guide lines for a judge in similar cases from which a judge may depart in a particular case if the specific circumstances so require to achieve a just result" (*per* Denham J). Keane J instanced one such situation. Under the State Scale, a 35 year old person with a 25% degree of disability would receive only £39,531, despite the fact that he would never again be able to hear 'living room speech' and would suffer serious social and economic disadvantage for many years. According to Keane J, the State Scale loses its significance the closer one comes to 25% disability, and cases of serious disability are more appropriately determined upon their own facts. Identifying a further weakness in the State Scale, both Keane J and Lynch J expressed the view that the basic figures are too low to compensate a person of 60 or so years who suffers the cumulative effect of NIHL and ARHL, and that the Scale should be treated as if it omitted the words 'including future aging.' The Court therefore encouraged the State to make special provision to allow 10-15 years future loss for persons aged 60-62 plus.

## Aggravated and Exemplary Damages

Two recent High Court decisions by Barr J contrast starkly with the traditionally guarded, tentative approach of the Irish courts to the award of aggravated or exemplary damages. In the first, *FW v BBC*, £15,000 in aggravated damages[38] were awarded against the defendant for 'gross negligence and professional incompetence' in the conduct of an interview with the plaintiff on sexual abuse and for divulging the plaintiff's name in breach of an undertaking to preserve his anonymity. In the second, *Crawford v Keane*, £7,000 in exemplary damages[38] were awarded against the defendant for having deliberately given false testimony throughout the hearing, chiefly by claiming that the plaintiff's car had reversed into his, and that the plaintiff had been inebriated - allegations which were rebutted by evidence given by an independent garda witness who unbeknownst to either party had witnessed the defendant's van 'smash into the back of the plaintiff's BMW'

The decision in *FW v BBC* to award aggravated damages for 'gross negligence and professional incompetence' was as understated as it was unexpected. Aggravated damages, where granted, form part of the award of *compensatory damages*. They are said to be justified by, and to reflect, the exceptional nature of the defendant's wrongdoing, be it bad motive, spitefulness, malice, or misconduct. Despite the penalising undertones, the compensatory element of the aggravated damages award centres upon the additional injury to the plaintiff's feelings caused by the defendant's behaviour (such as indignity or loss to self-esteem, but not including physical injury).[39] In *FW v BBC*, this additional personal non-physical injury was the 'shattering effect of the defendant's breach of trust' on the plaintiff, which undermined his self-confidence and adversely affected relations with his wife and children.[40]

Since aggravated damages are generally justified by intentional or reckless behaviour on the defendant's part, they have traditionally been considered inappropriate for cases of negligence, being an unintentional wrong. For this reason, the House of Lords in *AB v South West Water Services*[41] definitively ruled out the possibility of awarding either aggravated or exemplary damages for the defendant's negligence howsoever 'crass'. It is not clear whether Barr J intended to establish a precedent for the award of aggravated damages in negligence cases, or whether he considered that the award was justified equally by the defendant's breach of undertaking to preserve anonymity. On the other hand, the learned judge may have felt that the defendant's gross and wilful negligence bordered on the intentional, and justified the award in its own right. Certainly, the rigidly categorical approach adopted by the English courts is no longer representative of the common law. In Australia, for instance, awards of aggravated or exemplary damages may be made, albeit rarely, where the defendant's negligent conduct is contumelious to the point of near maliciousness.[42] In Canada, exemplary damages may follow where the defendant's conduct equals high-handed arrogance or where the defendant recklessly took an unjustified risk.[43]

The decision in *Crawford v Keane* implicitly confirms the inapplicability of *Rookes v Barnard*,[44] a needlessly resonant decision by the House of Lords which limited the award of exemplary damages in England to three case-scenarios: (1) "oppressive, arbitrary or unconstitutional action by the servants of government"; (2) cases where the defendant's conduct was calculated to make a profit in excess of the compensation ordinarily recoverable by the plaintiff; and (3) where expressly authorised by statute. The view that *Rookes* had the effect of freezing the cases in which exemplary damages could be sought was upheld more recently by the House of Lords in *AB v South West Water Services* [45] - where the House refused to extend exemplary damages to cases of public nuisance or negligence (specifically, contamination of drinking water supplies by the defendant water undertakers).

The *Rookes* categorisation has been rejected in the US, Canada, Australia, and New Zealand, and is widely believed to lack logical or thematic coherence. It makes little sense to limit the first category of 'oppressive and unconstitutional conduct' to

**"The Irish courts are disinclined to limit the award of exemplary damages to fixed categories of misconduct - though they have in the past implied that its primary use is the defence of constitutional rights... This is to say that the award of exemplary damages, though directly benefiting the plaintiff, is intended primarily to fulfill a public function."**

the public sphere, particularly in light of the threats continually posed by private enterprise, but also in light of the evolving right to sue a private party for interference with one's constitutional rights.[46] It was no more clear why the House of Lords under the second category singled out the defendant's drive to make a profit as behaviour which ought to be punished and deterred, particularly given the availability of restitutionary damages which more sensibly eschews the rhetoric of punishment and deterrence in favour of a neutral attempt to reverse the defendant's unjust enrichment. The attitude of the Irish courts to *Rookes* was at best ambivalent and tentative until the Supreme Court's decision in *Conway v INTO,*[48] where: McCarthy J expressly rejected the three categories; Griffin J, confining himself to the issue at hearing, rejected the first category; and Finlay CJ avoided reference to *Rookes* when describing the purpose and scope of exemplary damages. The Supreme Court has since interpreted *Conway* as an outright rejection of the *Rookes* categories.[49]

Thus one could say that the Irish courts are disinclined to limit the award of exemplary damages to fixed categories of misconduct - though they have in the past implied that its primary use is the defence of constitutional rights.[50] This is more in keeping with the nature of the *exemplary* or *punitive* damages award,[51] which is distinct, practically and ideologically, from compensatory damages, and, unlike aggravated damages, does not depend for its justification upon the 'compensation for loss' principle. This is to say that the award of exemplary damages, though directly benefiting the plaintiff, is intended primarily to fulfill a public function. Part deterrent and part punitive, it aims, according to Griffin J in *Conway*, 'to punish the wrongdoer for his outrageous conduct, to deter him and others from such conduct in the future, and to mark the court's detestation and disapproval of that conduct. Such damages are to be awarded even though the plaintiff who recovers them obtains the benefit of ... a fortunate windfall.'[52]

The *Crawford* decision is also noteworthy for basing an award of exemplary damages on the defendant's misconduct in the aftermath of the tort - specifically, his perjurious assertion of a false version of events during the hearing of the negligence action. The courts' power to award exemplary damages, and the plaintiff's right to seek them, is not necessarily contingent upon the plaintiff having formally sought exemplary damages in the grounding summons and statement of claim.[53] As a general rule, however, a plaintiff is only entitled to recover damages for injury caused by the defendant's *tortious* or *actionable* conduct, and damages do not normally arise against the defendant for the manner in which he dealt with the incident or responded to the litigation. As a qualification to this, it has been recognised that aggravated damages may be recovered in a defamation case on foot of the defendant's persistent and groundless justification of the defamation in court, though it has been reasoned that this is not an exception to the rule against recovery for post-tort injury, since damages in this instance lie for injury to the plaintiff's self-esteem which is the linchpin of damages in a defamation case.[54]

The courts have consistently maintained that exemplary damages may be awarded only in very exceptional cases.[55] It will be difficult in practical terms to predict when the court wishes to publicise a particular issue by making an example of the defendant. When the Supreme Court upheld the modest award of £1,500 exemplary damages in *Conway,* it was motivated by the importance of the right which the defendant had infringed, being the constitutional right to receive primary education. In *Crawford,* Barr J clearly believed that an award of £7,000 exemplary damages might better serve to deter others from lying in court than the contempt of court process. On the other hand, in *Kearney v Minister for Justice,*[56] Costello J refused to make the award on the basis that the defendant's denial of the plaintiff prisoner's constitutional right to communicate by post was not sufficiently 'oppressive' or 'vindictive' to justify the award. More recently, in *Cooper v O'Connell,* the Supreme Court declined to make the award on the basis that the defendant's actions (forcing the plaintiff to prove liability before admitting negligence) "could not conceivably be regarded as circumstances justifying the invocation of this drastic, although essential, rule grounded on public policy."[57]

The extent of the court's power to award exemplary damages in civil actions (particularly for the tort of negligence)[58] is anything but self-evident, and until a number of consequential issues are addressed, its foothold in the scheme of civil remedies will remain tentative. Many of these issues were rigorously examined by the Law Reform Commission in its most recent analysis,[59] where the following concerns in particular divided the Commissioners: (1) the award of exemplary damages is necessarily punitive by nature, yet is decided according to the civil standard without the protection of the procedural safeguards considered vital to the criminal trial; (2) since the award is intended to make a public example of the defendant, independent of any loss suffered by the plaintiff, the plaintiff does not deserve to reap the benefits of the resulting windfall; (3) an early award of exemplary damages for the benefit of one plaintiff in a 'mass tort' action may have the effect of depleting the fund available to other or imminent litigants;[60](4) vicarious liability should not lie for exemplary damages unless the co-defendant was also at fault; and (5) the courts or legislature should impose a cap on the quantum of exemplary damages to mitigate the foregoing concerns.[61] The ramifications of exemplary damages are certainly complex enough to justify parliamentary research and enactment. In the meantime, the courts would do well to continue its practice of restricting such awards to exceptional cases.

## Conclusion

Though typically a rather piecemeal subject, more concerned to tweak than reconfigure the available nuts and bolts, it has been possible to discern a principled shift in the law of damages from the retrenchment marked by decisions such as *Reddy v Bates* and *Sinnott v Quinnsworth* to a preference for flexibility

and liberality sufficient to keep pace with recent aggrandising changes to Irish economics and culture. The judges have begun to emphasise once again the case-by-case nature of personal injury claims, in turn eschewing the notion that quantum should be reined in by caps, tariffs, or analogues. This has been evident in their rejection of the assumed upperlimit to general damages, their emphasis on the individual nature of the court's factual assessment of the plaintiff's loss, and the heavily qualified nature of the Supreme Court's endorsement of the State Scale in *Hanley.*●

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1. [1984] ILRM 523 at 532-3 (SC): emphasis added. The plaintiff's injuries had transformed him from "an active, healthy young man on the threshold of adult life, into a helpless dependent, paralysed, being conscious of what he [had] lost and facing a bleak, uncertain and limited future."
2. *Ibid* at 532. A similar comment had been made by Griffin J in *Reddy v Bates* [1983] IR 141 at 146, namely that when deciding an award of damages, the court is "required to consider the evidence not only with sympathy and understanding for the plaintiff but also with *fairness to both the plaintiff and the defendant,* as the administration of justice is not a one-way operation." (emphasis added)
3. [1983] IR 141.
4. See also *Burke v Blanch* (HC, 28 July 1989), where Costello J awarded only £100,000 GD to a young man whose injuries were described as 'devastating' chiefly because he had already recovered approximately £500,000 under the other heads of damages.
5. McMahon & Binchy, *Irish Law of Torts* Butterworths: 1990, at page 785.
6. [1999] 2 IR 456 (HC). £250,000 GD were awarded in light of the fact that the plaintiff's loss of earnings had been assessed at only £50,000.
7. Eg, in *Griffiths v Van Raj* [1985] ILRM 582, the Supreme Court reduced GD from £160,000 to £100,000 on the basis that though the girl had suffered "severe and permanent intellectual and emotional impairment", her injuries could not "be regarded as comparable with, for example, a case of quadriplegia".
8. [1984] ILRM 523 at 532.
9. HC, Barr J, 29 January 1996.
10. HC, McCracken J, 20 January 1999.
11. [1999] 2 IR 456 (HC).
12. *Ibid* at 459.
13. Followed in *O'N v Minister for Health and Children* (HC, 19 October 1999), where O'iNeill J awarded £250,000 GD for the same injury.
14. HC, 19 November 1999.
15. HC, 21 January 2000.
16. SC, 30 July 1999.
17. For criticism, see Leonard, *Irish Libel Law and the European Convention on Human Rights* (2000) 5 *Bar Review* 410. See more recently the Supreme Court Decision in *O'Brien v Mirror Group Newspapers Ltd.*, 25 October 2000.
18. Eg, *Troute v Brassil & Tucker* HC, 19 November 1999.
19. SC, 29 July 1999.
20. HC, 21 May 1996.
21. SC, 19 July 1999.
22. Applied in *Nugent v DH Burke & Son* (HC, Geoghegan J, 8 February 1999): £85,000 GD awarded for soft tissue injury which caused ongoing pain in the neck, back, arms, and legs two years beyond the expected period for recovery.
23. HC, Laffoy J, 12 June 1998.
24. *Annual Review of Irish Law,* 1998, at page 664.
25. *Volume 1,* at page 321.
26. SC, 14 April 2000.
27. Distinguishing *Burns v Edman* [1970] 2 QB 541, a case where the deceased had not engaged discernibly in any honest employment, of which fact the applicant dependent had been fully aware.
28. HC, 25 November 1993.
29. [2000] 1 ILRM 548.
30. Under section 55, the Health Board may provide private or semi-private in-patient facilities for patients who do not wish to avail of free public health care under section 52; and if so, the Board "shall charge for any services so provided approved of or directed by the Minister."
31. Comparable to the situation in England, where under the Road Traffic Act 1988 hospitals can charge averaged hospital bed costs for in-patient care (up to £2,000) and for out-patient facilities any 'expenses reasonably incurred' (not to exceed £200).
32. Applying *People v McDonagh* [1996] IR 565 (SC).
33. The judge accepted, however, that some averaging would be permissible for treatment within a particular speciality.
34. [1998] 4 IR 496 (HC).
35. SC, 7 December 1999.
36. Approving Lavan J in *Green v Minister for Defence* [1998] 4 IR 464 (HC).
37. HC, 25 March 1999: in addition to £75,000 GD.
38. HC, 7 April 2000: in addition to £30,000 GD.
39. *Rookes v Barnard* [1964] AC 1229 (HL).
40. According to one line of authority in England, since the award is for injury personally incurred by the plaintiff, it cannot be made for the benefit of a corporation whose 'feelings' are incapable of being hurt: *Columbia Picture Industries Inc v Robinson* [1987] Ch 38.
41. [1993] 1 All ER 609.
42. *Lamb v Cotongo* (1987) 164 CLR 1.
43. *Dhalla v Jodrey* (1985) 16 DLR 732.
44. [1964] AC 1229.
45. [1993] 1 All ER 609 at 618, 626.
46. *Meskell v CIE* [1973] IR 121 (SC); *Hanrahan v Merck Sharp & Dohme* [1988] ILRM 629 (SC).
47. E.g., *Dillon v Dunnes Stores* SC, 20 December 1968; *McDonald v Galvin* HC, 23 February 1976; *McIntyre v Lewis* [1991] 1 IR 121 (SC).
48. [1991] 2 IR 305 (SC).
49. *Cooper v O'Connell* SC, 5 June 1997.
50. *Garvey v Ireland* [1981] ILRM 266 (HC); *Kennedy & Arnold v Ireland* [1988] ILRM 472 (HC); and *McIntyre v Lewis* [1991] 1 IR 121 (SC).
51. The courts have consciously used the terms interchangeably in the past, despite separate references under the Civil Liability Act 1961 to "exemplary" (s.7) and 'punitive' (s.14) damages. More recently, however, the judges have favoured reference to exemplary damages: eg, *Conway* [1991] 2 IR 305 (SC), *per* Finlay CJ and Griffin J.
52. *Ibid* at 323: quoted with approval by Barr J in *Crawford v Keane.*
53. *McIntyre v Lewis* [1991] 1 IR 121 (SC).
54. *AB v South West Water Services* [1993] 1 All ER 609 at 629 (HL), *per* Bingham MR.
55. Notably in *McIntyre v Lewis* [1991] 1 IR 121 at 140-41 (SC), O'Flaherty J remarked that the award of exemplary damages is "anomalous" and should be kept 'on a tight rein'. In his view, the courts should adhere to three considerations identified by Lord Devlin in *Rookes:* (1) the plaintiff must be the victim of the punishable behaviour; (2) the courts should exercise restraint since the award of exemplary damages equally may work against liberty; and (3) the means of both plaintiff and defendant are material considerations.
56. [1986] IR 116 at 122 (HC).
57. SC, 5 June 1997, *per* Keane J.
58. In *Conway* [1991] 2 IR 305 at 323, Griffin J determined that exemplary damages may be awarded for "wilful and *conscious* wrongdoing in contumelious disregard of another's rights" (emphasis added). In *Lopes v Walker* (HC, 19 July 1999), a professional negligence action, Lynch J peremptorily rejected the application for exemplary damages for which there was "no basis in law".
59. Law Reform Commission, *Consultation Paper on Aggravated, Exemplary, and Restitutionary Damages,* April 1998.
60. A factor identified by the House of Lords in the AB case [1993] 1 All ER 609 at 624, 627, *per* Stuart-Smith LJ and Bingham MR.
61. In *Thompson v Commissioners of Police* (20 February 1997), the Court of Appeal set an upperlimit of £50,000 for exemplary damages.

# SUBSIDIARITY, FEDERALISM THE INTERNAL MARKET

***Mr Justice Nial Fennelly,*** *former Advocate General at the European Court of Justice,*
*considers the role and significance of the new principle of subsidiarity in European law.*

## Introduction

Subsidiarity, as a fully fledged principle, with a name, made its first appearance in the EC Treaty[1] on the coming into force of the Treaty on European Union (Maastricht Treaty)[2] in 1993. The principle is that the Community should act only when it can do better than by leaving action to the Member States.

I make a clear distinction between subsidiarity in what I consider to be the true Treaty sense of a criterion affecting the decision whether an acknowledged Community competence *should* be exercised and the structural or built-in allocation of functions between the Community and the Member States, although some distinguished writers have treated the latter as another expression of subsidiarity.[3] Subsidiarity does not concern the familiar question of the existence of competence or what, in Community law, is called "legal basis". It asks rather the more problematic and elusive question of whether the Community should act or refrain from acting.

Subsidiarity remains a shadowy notion. From time to time Europe's political leaders have urged the Court of Justice to have resort to it, apparently to police the boundaries between Community and Member State competence. Writing during the negotiation of the Maastricht Treaty, the late President of the Court of Justice, Lord Mackenzie-Stuart, thought it "a political maxim not a legal one" which he thought likely even "to endanger the reputation of the Court of Justice."[4]

The provenance of the principle of subsidiarity is frequently, though confusingly, traced to Pope Pius XI, who in the Encyclical Letter, *Quadragesimo Anno*, stated, without using the word, that "it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do." Apart from the fact that modern secular Europe is not noted for seeking ecclesiastical inspiration, it is clear, from the context, that the Pope was concerned with the distribution of power *within* a state. He thought that the state "ought...to let subordinate groups handle matters and concerns of lesser importance.." He was not concerned with the vexed question of whether, within the framework of a quasi-federal structure such as that established by the Treaty, the Community should act itself or leave the field free for action - or, indeed, inaction - by the Member States.

## The Treaty Provisions

The notion of subsidiarity, without the name, first appeared in the Treaty in 1987 when the Single European Act provided a basis for Community action related to the protection of the environment, an objective whose effective pursuit often depends on international co-operation. Nonetheless, the Community was to take action only to the extent that the desired objectives could "be attained *better* at Community level than at the level of the individual Member States"[5] (my emphasis).

The introductory "Common Provisions" of TEU contain the first explicit reference to subsidiarity.[6] Article 2 (formerly Article B) TEU identifies a number of new objectives for the Union such as the promotion of "economic and social progress and a high level of employment.."; the "implementation of a common foreign and security policy..", ".. the introduction of a citizenship of the Union"; the maintenance of "an area of freedom, security and justice.."; "maintaining and building on the *acquis communautaire.*" These, however, are to be achieved "while respecting the principle of subsidiarity as defined in article 5 of the EC Treaty."

The principle of subsidiarity is formulated in Article 5 (formerly Article 3b) of the EC Treaty. Although its first paragraph states the commonly accepted proposition that the Community can exercise only those powers which are attributed to it, and the third is a formulation of the principle of proportionality, they provide part of the context and are

closely related to the principle of subsidiarity. Thus, I quote the Article in full:

> "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

The principle of subsidiarity set out in the second paragraph raises many difficult questions. The most important ones are: its meaning, in the absence of any definition; its scope of application, in view of the exclusion of matters within the "exclusive competence" of the Community; the extent, recalling Lord Mackenzie's characterisation as a political maxim, to which it is truly justiciable.

In addressing these questions account must be taken of the "Protocol on the application of the principles of subsidiarity and proportionality" adopted by the Treaty of Amsterdam which entered into force on 1 May 1999. The Protocol has Treaty status and replaced similar non-binding declarations adopted at the European Council meeting at Edinburgh on 11-12 December 1992.

## The Meaning of Subsidiarity

As already noted, the Treaty offers no definition of the principle of subsidiarity.

The Member States, in a reference not devoid of papal echoes, recorded in the Protocol their wish to "ensure that decisions are taken as closely as possible to the citizens of the Union." This repeats the reference in Article 1 (formerly Article A) TEU to "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."Although this must be taken as an expression of some version of the principle of subsidiarity, it clearly has little to do with the concrete issue of choice between Community and Member State action.The Community has no concern with the extent to which citizens of the Union are involved in the decision-making process within the Member States. Nor do persons having the status of Union citizens by virtue of Article 17 (formerly article 8) of the EC Treaty have any right, other than as voters for the European Parliament, to take part in the decision-making process of the Community.[7]

The negative formulation, 'only if and insofar as..', comprises a presumption in favour of Member State action. In other words, the institutions must discharge a positive burden before action at Community level can be justified.

Subsidiarity, not being otherwise defined, can only in concrete terms be coterminous with the satisfaction of the precondition for Community action. It is not obvious, however, whether there are two tests or one. The text treats the hypothesis of insufficiency of Member State action as the basis for concluding, "therefore", that the desired results could "by reason of the scale or effects of the proposed action, be better achieved by the Community". One writer regards the first part of the condition as comprising a "test of effectiveness or efficiency"[8] and the second as a "test of scale". Another speaks of an *"efficiency by better-results criterion"*. (emphasis in the original). The Protocol says that both aspects "shall be met" but proceeds to state guidelines to be used "in examining whether the...*condition* is fulfilled" (emphasis added). The guidelines are:

- "the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States."

If operated in practice and interpreted by the Court of Justice in accordance with the presumption in favour of Member State action and with these guidelines, the principle has serious potential to restrain future Community action with consequent effects on the balance of power between the Community and the Member States. The core of the criterion of appreciation is qualitative: would Community action be *better*? This, as I have said, is the term used in the environmental provision of the Single European Act. As I note below, the Protocol and the exclusion of the field of exclusive Community competence largely negative this expansive perception of subsidiarity.

## Exclusive Competence: How Exclusive is Exclusive?

The most difficult and debated question about the principle of subsidiarity and the most crucial to its range of application concerns what are the "areas which do not fall within [the] *exclusive competence* of the Community", because it is only in those areas that the principle of subsidiarity can have any application. The Treaty has never, even in the TEU which uses the term, designated those matters which fall within exclusive competence. Since, by its very nature the principle of subsidiarity can apply only to areas of Community competence, the range of its application can be narrowed drastically by broadening the application of exclusiveness. An enormous amount of academic ink has been spilt on this debate.

The Protocol does not enlighten us much further. It appears to protect the excluded zone. It speaks of "... Maintaining in full the *acquis communautaire* and the institutional balance...". In particular, the principle of subsidiarity is not to "affect the principles developed by the Court of Justice regarding the relationship between national and Community law...".

An orthodox view, based on long-standing case-law of the Court of Justice, though admittedly derived from judgments delivered before the principle of subsidiarity existed, maintains that all the areas of the original EEC Treaty which concerned the establishment of the internal market or the four freedoms

are ones of exclusive competence. To quote one writer:

> "The Court has confirmed time and time again, in numerous decisions dealing with a wide variety of matters (such as treaty-making, tariff and commercial policy, fisheries, the common organisation of the agricultural markets, free movement of goods and persons, etc) that in all matters transferred to the Community from the Member States, the Community's competence is, in principle, exclusive and leaves no room for any concurrent competence on the part of the Member States. Therefore, where the competence of the Community begins, that of the Member States ends."[10]

This view is not universally accepted , in particular because "it would undermine the very purpose for which the provision was created."[11]

Exclusive Community competence can arise in two ways. Firstly, a particular competence may, by its nature, belong exclusively to the Community. Secondly, Community action in a particular field may pre-empt Member State competence.[12]The division is not completely satisfactory and is not based on any clearly developed concept of the nature of *exclusive competence*. Most crucially, the Court has not decided whether the Community competence to harmonise national laws is, in its nature, exclusively a matter for the Community.

To date, the Court has designated the common commercial policy as a competence which is by its nature as described in Article 133EC (formerly article 113 of the Treaty) exclusive to the Community. The conditions for conclusion of commercial agreements with third countries "show clearly that the exercise of concurrent powers by the Member States and the Community...is impossible."[13] A similar approach was adopted in respect of the external authority of the Community in international fishery negotiations.[14]

Some aspects of Community pre-emption are well-known. Member States may no longer take action affecting the machinery set up by a common organisation of the market established by the Community in a given agricultural sector.[15] The system established by the common market organisation may be so complete that "Member States no longer have competence in that field..."[16] Similarly, where the Community has exercised its power to take measures for the conservation of fish, those provisions "preclude any conflicting provisions by the Member States."[17]

More generally, Community action harmonising national rules may deprive Member States of recourse even to those express Treaty provisions which recognise their right to adopt national rules concerning public morality, public policy or the protection of public health.[18]

In these circumstances, the Community, already having legislated, has occupied the field and precluded future Member State action. The central dilemma is whether the principle of subsidiarity applies to initial Community action in such fields and in the area of harmonisation in particular. This dilemma takes on the guise of an essential federalism question, where the Community is considering harmonisation in pursuit of the internal market. On the one hand, Community competence exists only in order to pursue the "object [of] the establishment and functioning of the internal market." (Article 95EC). Normally, it has no substantive competence in the subject-matter being regulated. On the other, the national rules which it is proposed to harmonise usually pursue such diverse national policy objectives as:

- animal welfare: Council directive 91/629/EEC ..laying down minimum standards for the protection of calves, considered in *Compassion;*
- conservation of wild birds: Council Directive 70/409...considered in *Van den Burg;*
- control of marketing of dangerous substances: Council Directive 67/548/EEC ...on the approximation of laws...relating to the classification, packaging and labelling of dangerous substances, considered in *Caldana.*

## Notions of Federalism

The Community, when it decides to harmonise in pursuit of the internal market, simultaneously pursues two objectives. Its competence and hence its power to act derives solely from the imperative of the internal market. However, once the pre-condition for internal-market action is satisfied and it commences to formulate the new Community rules, it necessarily substitutes itself for the Member States, both those which have and those which have not had rules affecting the subject-matter. In that way, the subject-matter of the rules and not merely their prior trade-restricting features become, as a consequence of Community action, a matter of Community competence. Furthermore, there is no theoretical limit to Community internal-market competence. The Community's harmonising power is horizontal. It is capable, in principle, of applying to every subject of national legislation which affects the functioning of the internal market.

The well-known experience of the United States with its Commerce clause can be very instructive. Article I, Section 8 of the Constitution of the United States gives Congress power to "regulate Commerce with foreign nations, and among the several States..." The Court pointed out in its important recent judgment in *United States v Morrison,*[20] that the "interpretation of the Commerce clause has changed as [the] Nation has developed" Nonetheless, Chief Justice Rehnquist emphasised the limits even to the "modern expansionist interpretation of the Commerce Clause." Even at its high water-mark in the Roosevelt era, the Court had warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[21]

The US Supreme Court has over its history and moved by the political temper of the times as well as its own composition been quite open about the constitutional and political implications of its decisions about the allocation of power between the federal government and the states. Chief Rehnquist, in the Morrison judgment, referred to the fact that the Court, at the time of one of its earlier decisions was composed of members "appointed by Presidents Lincoln, Grant, Hayes, Garfield, or Arthur" to show their "familiarity with the events surrounding the adoption of the Fourteenth Amendment."

On the other hand, it seems to be accepted that there is not, in US constitutional theory, any doctrine or principle of

subsidiarity. The Supreme Court has never translated subsidiarity "into an express and judicially enforceable statement of preference for state over federal action."[22]

The Court of Justice has not to date addressed itself in these express terms to the federal issue in the same way as the US Supreme Court. It has not developed any explicit theory of allocation of competence between the Community and the Member States. Nonetheless, the underlying constitutional notion is that the Community enjoys only the powers attributed to it. The first sentence of Article 5EC obliges the Community to "act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it."

One further feature of the legislative structure merits particular mention in this context. Prior to the passing of the Single European Act, most harmonising action was subject to the requirement of a unanimous vote in Council. Since the introduction in 1987 of the possibility of qualified majority voting (for matters other than taxation), it has been possible for the opposition of a minority of Member States to be over-ridden. Hence, Member State legislative competence in a given field may involuntarily be transferred to the Community, subject of course to satisfaction of the conditions for valid Community action on the legal basis of the internal market.

The recent decision of the Court in the Tobacco cases[23] contains some extremely important statements bearing on the relationship between the exercise of the Community's internal-market competence and the limits of Community power. The Court said[24] with reference to article 95EC (formerly Article 100 A)

> "To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article†3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it."

Further, in response to a strong presentation to the opposite effect by the Community institutions, the Court ruled that:

> "Moreover, a measure adopted on the basis of Article [95 EC] a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article [95 EC] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 164 of the EC Treaty (now Article 220 EC) of ensuring that the law is observed in the interpretation and application of the Treaty."[25]

The Court concluded that the Tobacco advertising directive[26] did not, in fact, contribute to the elimination of obstacles to the free circulation of goods, to the free provision of services or elimination of distortions of competition. Far from ensuring the free circulation of products which complied with its requirements, the Directive even permitted Member States to adopt stricter prohibitions. Hence, the Court has declined to countenance a Community interpretation of its internal-market competence so broad as to confer a general regulatory power and thus to extend Community competence into a field not covered by the Treaty.

## Subsidiarity and Harmonisation

Although the *Tobacco cases* demonstrate that the Court is prepared to be more vigilant than believed by some in the policing of the boundaries of Community power, the fact remains that the almost limitless range of Community harmonising power retains the potential to encroach on the domains of the Member State. This is why the possibility of treating the harmonisation of laws as an exclusive Community competence so seriously affects the scope of application of the principle of subsidiarity.[27]

Since the principle of subsidiarity has to be applied at the moment of the initial Community decision to act in a particular field, and since, by its very nature, harmonisation of Member-State laws can only be carried out by the Community, it seems logical that this competence would have to be considered to be exclusive by its nature. This is, in fact, the view that this writer took of the issue in his Opinion in the *Tobacco cases*.[28] Since the Court followed the primary recommendation made in that Opinion, namely to annul the Directive for lack of a valid legal basis, it did not need to address the issue of subsidiarity at all.

The Court gave some albeit very indirect indication of its possible approach to the issue whether harmonisation is an exclusive Community competence in the case[29] concerning the application of the United Kingdom for annulment of the "working time" Directive.[30] However, the subject matter of Article 118a of the Treaty (now Article 138 EC) is, in its own terms, clearly one which is shared between the Community and the Member States. Furthermore, subsidiarity was raised only indirectly. Nonetheless, the Court considered that: "once the Council has found that it is necessary to harmonise conditions in this area...achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action..."

At the time of writing, therefore it remains to be seen whether the Court will judge the competence to harmonise national laws to be an area of exclusive Community competence. What is clear is that such a conclusion would drastically limit the scope of application of the principle of subsidiarity.

**"The recent decision of the Court in the Tobacco cases23 contains some extremely important statements bearing on the relationship between the exercise of the Community's internal-market competence and the limits of Community power... In particular, the Court has declined to countenance a Community interpretation of its internal-market competence so broad as to confer a general regulatory power and thus to extend Community competence into a field not covered by the Treaty."**

## Justiciability

The principle of subsidiarity is clearly stated in a Treaty provision with all the appearance of a binding legal rule. At the very least, the Court must take account of it in performing its general assigned task of ensuring that "in the interpretation and application of this Treaty the law is observed".[32] Its imperative and negative formulation - "The Community *shall* take action ... *only if* and insofar" would not seem to leave room for treatment of the principles as merely "programmatic"[33] and incapable for that reason of direct application by the Court.

The question then arises as to whether a court is fitted or can properly be asked to decide the question of whether action can "better" be taken at Community or Member State level. This is clearly an intensely political question. It involves consideration of the *raison d'être* of the principle. Why is it better to take action "closer to the people"?

Some of the reasons are obvious. Decisions made closer to the people may better represent the democratic principle. As between the Community and Member States, respect for diversity of national cultural values may operate in the same direction. Against these points, some of the fundamental Community freedoms, such as free movement of goods and persons, may require the adoption of common product or employment rules even at the expense of diversity.

Some indication of the likely approach to the Court in reviewing Community action is given by the "working time" case. There, the Court deferred very explicitly to the judgment of the Community legislator once Community action was found necessary.

It seems unlikely that the Court will interpret its duty of application of the principle of subsidiarity in the sense that it should review the legislator's qualitative judgment that Community action is "better".

Its likely preferred alternative is that it should ensure that the Community legislative or other act is sufficiently reasoned to comply with the obligation imposed in Article 253 EC to ensure that such acts "state the reasons on which they are based...". This means that "the measures concerned should contain a statement of the reasons which led the relevant institutions to adopt them, so that the Court can exercise its power of review and so that the Member States and the nationals concerned may learn of the conditions under which the Community institutions have applied the Treaty".[34]

## Conclusion

Subsidiarity is a political principle of enormous potential importance in the allocation of power and its exercise between the Community and the Member States. However, the exclusion of areas of "exclusive Community competence" may drastically limit its scope. It is a principle to be respected, in the first instance, by the political institutions. The Court of Justice is likely to play a subsidiary part.●

1. By "Treaty", I mean only the Treaty Establishing the European Community. Other treaties will be defined according to context. Treaty articles are referred to as e.g. Article 95 EC when using the new numbering.
2. Hereinafter called TEU. TEU established what has become known as the pillar structure, the EC Treaty being the first pillar of three.
3. See, for example Lenaerts and Van Ypersele "Le principe de subsidiarité et son contexte: étude de l'article 3B du Traité CE" in *Cahiers de droit européen* no. 1-2 (1994), especially paragraphs 6 to 8.
4. *Subsidiarity - A Busted Flush?*, in Constitutional Adjudication in European Community and National Law, Essays for the Hon. Mr Justice T. F. O'Higgins, Deirdre Curtin and David O'Keeffe eds. Butterworths Dublin 1992.
5. Article 130r(4) of the Treaty, repealed upon the entry into force of the Treaty on European Union on 1 November 1993.
6. The Court of Justice by virtue of Article 46 (formerly Article L) has no jurisdiction to interpret or apply this provision, for example by giving a preliminary ruling: see case C-167/94, *Grau Gomis* [1995] ECR I-1023. The Treaty of Amsterdam amended Article 46 only to permit the Court to interpret Article 6(2) (formerly Article F.2) regarding fundamental rights.
7. They have the right to petition the European Parliament and to apply to the Ombudsman (Article 21 formerly Article 8d).
8. See, for example, A. G. Toth, *"A Legal Analysis of Subsidiarity"* in *Legal Issues of the Maastricht Treaty,* O'Keeffe an Twomey eds. (Hereinafter "O'Keeffe and Twomey") ( London) 1994 p 43.
9. Jo Steiner in O'Keeffe and Twomey, p 59.
10. Toth, loc. cit. See footnote 8 above page 39.
11. Steiner, loc. cit. page 58. See also Lenaerts at paragraph 23 footnote 48.
12. This is the division proposed by Lenaerts, loc. cit., paragraph 14.
13. Opinion 1/75 [1975] ECR 1355; Case 41/76 *Donckerwolke* [1976] ECR 1921 par 32.
14. Joined Cases 3,4 and 6/76 [1976] ECR 1279.
15. Case 177/78 *Pigs and Bacon Commission v McCarron* [1979] ECR 2161 paragraph 14
16. Case 16/83 *Prantl* [1984] ECR 1299.
17. Case 61/77 *Commission v Ireland* [1978] ECR 417 at paragraph 64.
18. Case C-169/89 *Van den Burg* [1990] I-2143 paragraph 8; Case C-1/96 *R. v MAFF, ex parte Compassion in World Farming* [1998] ECR I-1251, par 41 (hereinafter "*Compassion*").
19. Case 187/84 *Caldana* [1985] ECR 3013.
20. 529 U.S. Judgment May 15 2000.
21. *NLRB v Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
22. See the detailed study by Professor George A. Berman: "Taking Subsidiarity Seriously: Federalism in the European Community and the United States", *Columbia Law Review*, March 1994, Vol 94, No 2 page 331.
23. Case C-376/98 *Germany v Council* (hereinafter "*Germany*") and Case C-74/99 *The Queen Secretary of State for Health and others, ex parte Imperial Tobacco,* judgments 5 October 2000.
24. Paragraph 83 of judgment in *Germany.*
25. Paragraph 84 of the judgment in *Germany.*
26. Directive 98/43/EC of the European Parliament and the Council, of 6 July 1998, concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1998 L 213, p 9).
27. See par 20 above.
28. Opinion of Advocate General Fennelly, delivered 15 June 2000, paragraph [??]
29. Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755.
30. Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.
31. Paragraph 47 of the judgment.
32. Article 220 EC.
33. See Case C-416/96 *El-Yassini judgment* of 2 March 1999.
34. Paragraph 177 of the Opinion in *Germany.*

# EU LAW THE RULES OF SPORTING ORGANISATIONS

***Brian Kennedy BL*** *outlines recent developments in EU sports law affecting employment, selection, national quotas and the transfer system.*

## Introduction

It is well established since the judgment of the European Court of Justice ("ECJ") in *Walrave*[1] in 1974 that EU law applies to sport, "in so far as it constitutes an economic activity."[2] In the last few years, however, there has been a huge growth in sport related litigation in Europe. In addition, the European Commission has been asked to consider the impact of EU competition law in over sixty sporting cases. This advance can be put down to two factors - the increased economic significance of sport, due in particular to the emergence of pay per view television, and the implications of the ECJ's judgment in *Bosman*[3] in 1995, which awakened both sports authorities and participants to the potential scope of EU law in this area. This article considers the most significant developments since *Bosman* on the impact of EU law on restrictions contained in the rules of sporting organisations, including the recent controversy relating to the transfer system. Such restrictions fall to be considered under both competition and free movement rules.

## *Bosman* and its Immediate Aftermath

In *Bosman*, the ECJ held that two significant practices were contrary to Article 39 of the Treaty of Rome, which protects the free movement of workers. First, it held that rules limiting the number of foreigners on a team playing in UEFA competitions infringed the fundamental principle of non-discrimination on grounds of nationality. Secondly, it held that rules which required the payment of a transfer fee by one club to another, when engaging a player after he had completed his contract with the first club, unlawfully hindered the free movement of workers who wished to pursue their activity in another member state. Bosman, a Belgian footballer, had argued that such rules had effectively prevented his transfer at the end of his contract from a Belgian club to a French one.

In line with its established caselaw in this area,[4] the ECJ further stated that such restrictions on free movement could be justified if they pursued a legitimate aim compatible with the Treaty, were justified by pressing reasons of public interest and were proportionate. The main argument offered in support of the nationality restriction was that it could be justified on non-economic grounds, concerning only the sport as such. The ECJ considered that while nationality restrictions relating to the particular nature and context of certain matches are acceptable (the most obvious example of this being matches between national sides), the restriction must be kept to its proper objective. It was unpersuaded that reasons of a sporting nature could require an enforced link between the location of a club and the origins of individual players.

While two main justifications were presented in support of the transfer restrictions, neither was accepted by the court. First, it was argued that the transfer rules were justified by the need to maintain a financial and competitive balance between clubs. The ECJ considered that the rules did not achieve this aim as they did not prevent the availability of financial resources from being a decisive factor in competitive sport. Secondly, it was argued that the rules supported the search for talent and training of young players. While the ECJ accepted that the prospect of receiving transfer fees was likely to encourage this process, it considered that the prospect of receiving such fees was not a decisive factor in encouraging recruitment and training, bearing in mind that it was impossible to predict the sporting future of young players with any certainty.

The ECJ did state, however, that:-

> "In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate."[5]

This principle has been relied on to justify restrictions in subsequent cases before both the ECJ and Commission.

Another significant aspect of *Bosman* was the opinion of Advocate General Lenz, who considered both practices to infringe Article 81 (which prohibits anti-competitive agreements, decisions by associations and concerted practices) and Article 39. He argued that the rules replaced the normal system of supply and demand with a uniform machinery, which led to the existing competition situation being preserved and the clubs being deprived of the possibility of hiring players that they would have in a normal situation. The ECJ itself did not consider it necessary to consider this point in light of its decision on Article 39. However, the Directorate General of Competition of the Commission has subsequently been asked to consider the compatibility of a large number of sporting practices with both Articles 81 and 82.

In the aftermath of *Bosman*, European sports administrators, in particular UEFA, lobbied member state governments for an exemption for sports from EU law. While such lobbying was unsuccessful, the following declaration was made by the 1996-97 Inter-Governmental Conference:-

> "The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport."

Following this, the European Council invited the Commission to submit a report to its meeting at Helsinki in December 1999 "with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework." While much of this Helsinki[6] Report considers matters such as the educational role of sport and measures to combat drug use, the Commission gave some indication as to its attitude towards competition law issues.[7]

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The Commission essentially divided the practices of sports organisations into those which do not come under the competition rules, those which were prohibited in principle by the competition rules and those which were likely to be exempted from the competition rules.

The first category contains:-

"The regulations of sporting organisations drawing up rules without which a sport could not exist, or which are necessary for its organisation or for the organisation of competitions, might not be subject to the competition rules. The rules inherent to sport are, first and foremost, the 'rules of the game.' The aim of these rules is not to distort competition."[8]

In contrast, the second category contains restrictive practices in sporting areas such as restrictions on the parallel importation of sports products and the sale of entrance tickets to stadia that discriminates between residents and non-residents. It also refers to systems of international transfers based on arbitrarily calculated payments which bear no relation to training costs.

In the third category fall agreements between clubs or decisions by organisations which are genuinely designed to achieve the objectives, referred to in *Bosman*, of maintaining a balance between clubs while preserving a degree of equality of opportunity and uncertainty of result, as well as the encouragement of recruitment and training of young players. The same would also be true, it stated, of a system of transfers or standard contracts based on objectively calculated payments related to costs of training. The Commission also considered the types of broadcasting agreements which might qualify for exemption, a matter outside the ambit of this article.

A potential difficulty which arises in relation to the Commission's analysis of the rules is that where private bodies and organisations are concerned, the Commission only has jurisdiction to investigate abuses of competition rules. While it must take the free movement provisions into account when analysing sporting rules under competition law, it has no jurisdiction to investigate alleged breaches of Article 39 or of Article 49 (which relates to the freedom to provide services and essentially protects the self-employed in the same way that Article 39 protects employees by a sporting body) unless that body is state-controlled. Such issues can only be raised by litigants in proceedings before domestic courts. To date, the ECJ has not had the opportunity to consider the inter-relationship between Articles 39 and 49 on the one hand and the competition rules on the other in relation to the rules of sporting organisations, as, in the cases which have come before it under Articles 39 and 49, it has either considered it unnecessary to examine such restrictions[9] or has considered that it did not have sufficient information as to the relevant market in order to consider the competition rules.[10]

It would appear from the foregoing analysis of such restrictions by the Commission under competition rules, that it considers a similar approach to be appropriate when considering such restrictions under either set of rules. One key distinction is, however, of relevance. When considering a rule under Article 81 of the Treaty, the Commission has stated that it constitutes a restriction on competition requiring an exemption under Article 81(3) if it is not inherent to the sport in question but is designed to maintain a balance between clubs or to encourage the recruitment and training of young persons. Following *Bosman*, however, such a rule would appear to be a legitimate restriction which does not infringe Article 39 or 49.

In order to obtain an exemption under Article 81(3), it is, of course, necessary to notify the agreement in question to the Commission. As the Commission has the sole power to exempt, any agreement which is not notified is, under the Commission's analysis, void under the provisions of Article 81(1). It remains to be seen whether the ECJ, in future cases referred to it under Article 234 where it is given sufficient detail to enable it to examine the competition law implications of such rules, will adopt a 'rule of reason' approach and consider such rules to fall outside Article 81 altogether. In the meantime, however, any rule of a sporting organisation not 'inherent' to the sport would appear, in the absence of notification, to be contrary to Article 81, assuming that the usual criteria, such as an effect on inter-state trade, are met, notwithstanding its possible compatibility with Articles 39 and 49.

## Recent ECJ Caselaw

From the foregoing, it would appear that in considering the legality of the rules of sporting organisations, it is first

necessary to decide whether a practice is so "inherent" to a sport so as to fall outside the scope of EC law and, if not, whether it fulfils a legitimate objective in a proportionate manner so as to pass muster under Article 39 or 49 and also be capable of exemption from the competition rules. In two recent cases, the ECJ, in examining sporting rules under Articles 39 and 49, has shown an amount of flexibility towards sporting bodies in upholding two significant restrictions which it considers to be inherent in the organisation of sports, namely, selection for international competitions by national federations exercising national quotas and the imposition of transfer deadlines.

The first case, *Deliege*,[12] concerned a Belgian judoka who was aggrieved at not being selected by the Belgian Judo Federation for certain international tournaments. She considered that her non-selection frustrated her career development and reduced the grants and sponsorship available to her. She instituted proceedings claiming that the European Judo Union rules, which limited the number of athletes from each national federation who could compete in major international tournaments, were illegal.

Deliege asserted that the systematic requirement of a quota and selection at national level constituted a barrier to her freedom to pursue an activity of an economic nature and were accordingly contrary to both the competition rules and Article 49. She argued that permission to compete in such tournaments should instead be open to anyone satisfying objective requirements in terms of sporting skills.

The ECJ, which considered the Article 49 issue only, rejected her argument. It considered that while the selection rules inevitably had the effect of limiting the number of participants in a tournament, such a limitation was inherent in the conduct of an international high level sports event, which necessarily involved the adoption of certain selection rules or criteria. The adoption of such rules was based on a large number of criteria unconnected with the personal situation of any athlete, such as the nature, the organisation and financing of the sport involved.

The ECJ stated that, while a selection system might prove more favourable to one category of athletes than another, it could not be inferred that the adoption of the system constituted a restriction on the freedom to provide services. It pointed out that in most sporting disciplines, such a task was delegated to the relevant national federation, which would normally have the necessary knowledge and experience.

It concluded that such a rule requiring authorisation or selection by a national federation did not in itself, as long as it derived from a need inherent in the organisation of such a competition, constitute a restriction on the freedom to provide services under Article 49.

It is arguable, however, that a rule of this type does not derive from a need inherent in the organisation of such a competition. Sports such as golf and tennis generally grant permission to compete in international tournaments to those who satisfy objective requirements in terms of sporting skills, such as those who have a high world ranking or who have earned tour cards on the basis of previous performances. While the elimination of the national selection system would constitute a radical change in the organisation of the sport, it is submitted that there is *no need* for such a selection system, in circumstances where it clearly restricts the ability of self-employed individuals such as Deliege from providing services.

The second recent case to come before the ECJ, *Lehtonen*,[13] considered transfer deadlines restricting the registration of players in the Belgian national basketball league after a certain date in a given season. The league rules provided that no player could play for two Belgian clubs in the same season, while players could not come from another country in Europe after 28 February in a given season. Players from outside Europe could join a Belgian club up to 31 March. Jari Lehtonen, a Finn, was engaged in early April by a Belgian club to play the final stages of the season. His club was penalised for picking him. Lehtonen sued, arguing that the rules restricted his rights to obtain gainful employment under Article 39 and were also anti-competitive.

The ECJ, which examined the rules under Article 39 only, held that while the rules were not discriminatory, they were liable to restrict the free movement of players who wished to pursue their activity in another member state and they consequently constituted an obstacle to freedom of movement for workers.[14] The question then arose as to whether this obstacle could be objectively justified.

The ECJ accepted the submission that the transfer period rules were justified on non-economic grounds concerning sport. It acknowledged that the setting of deadlines for transfers of players might meet the objective of ensuring the regularity of sporting competitions. Late transfers might be liable to change substantially the sporting strength of one or other team. This was particularly a concern in the context of play-offs for the title or for relegation, where a team could be strengthened for a short period of time or even a single match.

The ECJ did object, however, to one aspect of the rules. Pointing to the requirement that the restrictions should not go beyond what was necessary for achieving the aim pursued, it noted that a more generous transfer period applied to players coming from outside Europe than from inside. Insofar as transfers from outside Europe were taking place up to 31 March, this suggested that the 28 February deadline for

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internal European transfers went beyond what was necessary to achieve the aim pursued. The ECJ left the final determination on this point to the national court.

## The Commission's Approach

As already stated, the Commission's analysis of sporting rules arises under a consideration of competition law issues. In two cases considered by it in late 1999, it appeared to demonstrate a similar tolerance to rules it considered to be inherent in the organisation of sports. In *Mouscron*,[15] a complaint was made to the Directorate General of Competition by the Lille municipal authorities against UEFA, the European football authority, in relation to its UEFA Cup rule to the effect that each club must play its home match at its own ground except in exceptional circumstances. The complaint followed a decision by UEFA not to allow a home match of Mouscron, a Belgian club located near the French border, to be played in Lille, thus rendering it impossible for the complainants to hire out their stadium to Mouscron.

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The Commission considered that the "at home and away from home" rule and the exceptions to it are needed to ensure equality between clubs. It considered that by adopting the rule and the exceptions, UEFA had exercised its legitimate right of self-regulation as a sports organisation in a manner which could not be challenged by the competition rules.

The Commission was more circumspect in relation to a further condition of the rule which prevented a club from playing its home match in its opponent's home country. It considered, however, that there was not sufficient Community interest in examining more closely whether this further condition and its application could constitute examples of improper exercise of UEFA's regulatory powers that might significantly affect trade between member states.

In the Commission's opinion, the possibility that the rule infringed competition law, specifically Article 82 which prohibits abuses of a dominant position, was reduced for a number of reasons. First, it noted that the case had to be assessed within the context of the national geographical organisation of football, which was not called into question by EU law. Additionally, it pointed out that the case was an isolated one that had given rise to a dispute in the past and that the investigatory measures needed would be disproportionate to the probability of establishing that an infringement had taken place.

The second case was the notification to the Commission by UEFA of its rules prohibiting cross-ownership, management or control of football clubs playing in the same competition.[17] This rule had already been upheld by the Lausanne based Court of Arbitration in Sport in proceedings referred to it by UEFA and ENIC, a company holding stakes in AEK Athens and Slavia Prague, who had both qualified for the UEFA Cup in the same season.[18] In the opinion of the Court of Arbitration, the rule was not a disproportionate response to the legitimate aim of guaranteeing uncertainty of results.

Following this decision, UEFA referred the rule to the Directorate General of Competition for exemption or negative clearance under Article 81(1). It submitted that the rule was concerned not with economic or commercial activities but with football as a sport. In seeking to preserve the integrity of the competition and the uncertainty of results by preventing a conflict of interests, it pursued a sporting objective. The Commission, having regard to the social objectives of football, considered that the restrictions might not fall within Article 81(1). In order to establish whether this preliminary conclusion could be upheld, it sought observations as to whether there were any less restrictive means to achieve the same objective. It is understood that at least one observation has been made in the form of a complaint and that the Commission has now proceeded to examine the matter in more detail.

The clubs involved have argued that the regulation is not necessary to protect the integrity of European football competitions and is disproportionate in its impact to the attainment of that objective, in particular because it applies in a blanket fashion and does not allow for exceptions in cases where, for instance, the common owner can pass a test showing him to be a "fit and proper person". Significantly, such a test is applied in the rules of the English Premier League and the Scottish Football Association, whose rules restrict multiple shareholdings in clubs except with the prior consent of the association or league. In such circumstances, the proportionality of the UEFA restriction must be called into question.

## The Demise of the Football Transfer System?- The *Perugia* Case

While *Bosman* abolished the payment of a fee on the transfer of out of contract football players, the rules have continued in place in relation to the transfer of players who are under contract. Under the current transfer system, a player under contract is only entitled to move to another club with the consent of his current club. Additionally, such contracts often contain clauses requiring players to pay large sums to their employer club if they wish to leave to play for another club. For example, when Portuguese international Luis Figo left Barcelona for archrivals Real Madrid in July 2000, a fee of $56.1 million was paid in compensation.

Following receipt of complaints from three clubs, including the Italian side Perugia, and from players' organisations and a lobby group campaigning for "sport and liberty", in 1998 the Commission challenged the compatibility of the FIFA transfer rules with competition law and sent a statement of objections to FIFA. In the Commission's view the rules unduly restrict transfers. Its primary concern is that while a typical employee who terminates his contract and pays any compensation due to his existing employer under his contract is entitled to move from one job to another, this is not the case for footballers. Additionally, large compensation fees, such as that in Figo's case, can tie a player to a club and similarly restrict transfers.

The Commission has stated that it has no desire to abolish the transfer system altogether or to create a system where players have the right to terminate contracts on the spur of the moment. In accordance with domestic employment law, some form of compensation will usually be justified should a player break his contract with a club to join another club. Additionally, the Commission accepts, in line with the ECJ's decision in *Lehtonen*, that in order to avoid disruption of championships, rules requiring transfers to take place during specified periods only are permissible. It also understands the importance of encouraging the training of young players, and accordingly considers it permissible for a club to demand compensation on a transfer reflecting the costs incurred by it in training young players, unless it creates a situation of undue dependency between players and clubs.

The Commission considers, however, that the present system respects neither the principles of Community law nor the specific needs of sport which might justify restrictions. In the Commission's view the system restricts both competition between clubs, contrary to Article 81, and the free movement of players, contrary to Article 39. It notes that the current system has not prevented the over-commercialisation of sport, the widening of the gap between the economically powerful and less powerful clubs and the fact that players, in particular young players, have become, in the words of Viviane Reding, the Education and Culture Commissioner, "objects of speculation."[19]

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Having waited for FIFA to present an alternative to the current system, the Commission made it clear in June 2000 that if no such alternative was proposed, it would proceed to a formal decision that the existing system is void. In late August 2000 FIFA accepted that its rules were not in conformity with Community law and announced its intention to bring forward an alternative. A proposal was due to have been made by the end of October 2000.

In its preliminary proposals, FIFA suggested:-

(i) that there be no international transfers on players under 18;

(ii) that compensation should be payable to a club selling a player aged 18 to 24 who has been trained and developed by that club and that no transfer fees should be payable for players over 24;

(iii) that transfers during the season should be abandoned and contracts should be for a minimum of one year;

(iv) that a system should be set up to regulate competition issues in relation to contracts which were rescinded before their expiration.

While the details of this proposal are awaited, a number of points would appear to arise. In the first place, the prohibition of international transfers for under-18's, assuming that FIFA considers "international" transfers to include transfers within the European Economic Area, would appear to limit free movement of such young players, in particular where some countries do not have clubs with similar training and development facilities to the academies now commonly found at Europe's largest clubs.

Secondly, the level of compensation payable for training players is likely to be contentious. While the Commission has stated that it is willing to consider a system which takes into account, in the assessment of compensation, the general costs of training players in a club as opposed to the costs of training the individual player being transferred, there are bound to be serious difficulties in establishing a formula which would satisfy both the Commission and individual clubs.

In addition, FIFA's statement that "transfer fees" would disappear for players over the age of 24 is qualified by its statement that it wishes to set up a system to regulate issues for contracts rescinded before their expiration. One assumes that this would include compensation for the club losing the player under contract.

The Commission accepts that such compensation should be paid and should be in accordance with domestic employment law. Irish and UK employment law would not appear, of themselves, to prohibit a "Figo" type clause providing for a contract term allowing for significant compensation to be payable on the loss of a player. However such compensation must constitute a genuine pre-estimate of the damage which would probably result from the player's breach of contract, as it would otherwise be a penalty clause which would be unenforceable.[20] If, for example,

Manchester United were to include a liquidated damages clause in Roy Keane's contract providing for significant compensation were he to leave Old Trafford, it may be able to stand over such a clause by pointing to the likely adverse financial impact of his departure. It would appear difficult, to put it mildly, to quantify such financial impact.[21]

It is submitted, however, that in addition to domestic employment law, Articles 39 and 81 might also have to be taken into account as, if such clauses were to become commonplace in football, the free movement of footballers could be unduly restricted and clubs could be deprived of the possibility of hiring players which they would have in a normal situation. As Article 81 does not apply to a contract of employment, because it is not an agreement between undertakings,[22] it could only apply if it were considered that the existence of such clauses amounted to an agreement or decision between undertakings or, as would be perhaps more likely, a concerted practice. Similarly, while the precise application of Article 39 to such a context is unclear, it would appear that some form of *de facto* collective regulation would have to be found before it would apply. In the event that such liquidated damages clauses are considered to be unacceptable, the permitted duration of notice periods in contracts, which will effectively fix compensation, will become vital.

**"Irish and UK employment law would not appear, of themselves, to prohibit a "Figo" type clause providing for a contract term allowing for significant compensation to be payable on the loss of a player. However such compensation must constitute a genuine pre-estimate of the damage which would probably result from the player's breach of contract, as it would otherwise be a penalty clause which would be unenforceable."**

Another suggested effect of this new system is that clubs may introduce bonus structures, whereby players would earn far greater sums in the final years of their contracts, in order to encourage players to remain with them. It is submitted, however, that such a system could run foul of Articles 39 and/or 81 in the same way as liquidated damages clauses if such payments were to become common place and reduce free movement.

## Conclusion

Both the ECJ and the Commission have taken the first steps towards a comprehensive EU set of sports rules post *Bosman*. Perhaps unsurprisingly, given an apparent lack of support at Council level, their general approach has been relatively deferential to the rules of sporting organisations, as is evidenced by the Commission's preliminary view on the UEFA rule on multiple club ownership and by the ECJ's acceptance of national selection quotas in *Deliege*. The current controversy on the transfer system, which may well result in an appeal or preliminary reference to the ECJ, may give both institutions the opportunity to further refine the extent to which the rules of sporting organisations can be afforded special treatment in light of the specific needs of the sector. •

1. Case 36/74 *Walrave v. Union Cycliste Internationale* [1974] ECR 1405
2. *Ibid*, at para 4
3. Case C-415/93 *Union Royale Belge des Societes de Football Association ASBL v. Bosman* [1995] ECR I-4921
4. See, for example, Case C-19/92 *Kraus v. Land Baden-Wurttemberg* [1993] ECR I-1663
5. *Bosman*, at para 106
6. Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework. (Brussels, 10 December 1999 COM (1999) 644)
7. The Commission's attitude towards competition law issues in sport has been outlined in more detail in speeches by Deputy Director Pons ("Sport and European Competition Policy", speech delivered to Fordham Corporate Law Institute Conference, 14-15 October 1999) and Commissioner Monti ("Sport and Competition", speech delivered to Commission Conference on Sports, 17 April 2000).
8. Helsinki Report, at para 4.2.1.1
9. *Bosman*
10. *Deliege, Lehtonen* (considered *infra*)
11. For an example of the rule of reason approach, which involves a consideration of whether the overall effect of an agreement is pro or anti-competitive, see Case 161/84 *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.
12. Joined Cases C-51/96 and C-191/97 *Deliege v. Ligue Francophone de Judo et Disciplines Associees ASBL* (European Court of Justice, unreported, 11 April 2000)
13. Case C-176/96 *Lehtonen v. Federation Royale Belge des Societes de Basketball ASBL* (European Court of Justice, unreported, 13 April 2000)
14. If the Commission's analysis in the Helsinki Report were to be followed, this finding by the ECJ would suggest that such rules might fall into the third category of rules and be considered to restrict competition and, in the absence of notification, be void.
15. *Complaint by the Lille municipal authorities against UEFA* (Unpublished Commission decision, 3 December 1999, Press Release IP/99/965)
16. While no market analysis is evident from the Commission's press release, one must assume that it approached the issue from the viewpoint that UEFA is at least arguably an undertaking in a dominant position in relation to the regulation of sport.
17. See Communication pursuant to Article 19(3) of Council Regulation 17/62 (OJ C363/2 17 December, 1999)
18. *AEK Athens FC and Slavia Prague v. UEFA* CAS 98/200 (Decision of the Court of Arbitration in Sport, 20 August 1999)
19. See Statement of Commissioner Viviane Reding to the European Parliament, 7 September 2000
20. See *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.* [1915] AC 79
21. Another possible ground upon which long term contracts might be considered illegal would be if they were considered to be in restraint of trade. In this regard, see Beloff, Kerr and Demetriou, *Sports Law* (Hart Publishing, 1999) at pp.94-96.
22. See Cases 40/73 etc. *Suiker Unie v. Commission* [1975] ECR 1663 at 2007. Best evidenced, perhaps, by the recent Joint Statement of Chancellor Gerhard Schroder and Prime Minister Tony Blair expressing concern at the negative effects of any radical reform of the transfer system (see German Government Press Release No. 425/00).

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# Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 6, Issue 1

**A directory of legislation, articles and written judgments received in the Law Library from 21 August 2000 to 13 October 2000.**
**Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.**
**Edited by Desmond Mulhere, Law Library, Four Courts.**

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Mr. Neil Steen LL.B, B.C.L. (Oxon.) B.L., Mr Jason Steward, LLB, B,C.L. (Oxon.)
Mr. Rory White, B.C.L, B.C.I. (Oxon.).

## Administrative

**Nevin v. Judge Crowley**
Supreme Court: Barrington J., Barron J., **Murray J.**
17/02/2000

Administrative; judicial review; *audi alteram partem;* exhaustion of remedies; respondent sentenced applicant to six months' imprisonment and disqualification from driving for two years; appeal against order of *certiorari* quashing the order made by respondent; whether applicant was denied fair hearing in breach of principle of *audi alteram* partem; whether it was correct for order of *certiorari* to quash both the conviction and sentence; whether order of *certiorari* should have been refused on the ground that there was an adequate alternative remedy of appeal available to applicant and one which he had purported to exercise; whether matter should be remitted to District Court; s. 53(1), Road Traffic Act, 1961, as amended.
**Held**: Appeal dismissed.

**Bridgeman v. Limerick Corporation**
High Court: **Finnegan J.**
02/06/2000

Administrative law; judicial review; respondent had made certain bylaws designating a casual trading area; spaces allotted were incapable of accommodating applicant's trading vehicle; applicant seeks an order of *certiorari,* together with declaratory and injunctive relief; applicant had neither exercised right of appeal nor made representations to the respondent under relevant legislation; whether respondents had jurisdiction to make such bylaws; whether the applicant enjoyed *locus standi;* whether court should exercise its discretion to refuse the reliefs sought; Casual Trading Act, 1995.
**Held:** Relief refused; applicant did have *locus standi.*

**DPP v. Judge Kelliher**
Supreme Court: **Keane C.**J. *(ex tempore),* Murray J., McGuinness J.
24/06/2000

Administrative; judicial review; applicant instituted prosecution for rape against notice party; respondent issued order refusing to send the notice party forward for trial on ground that there was insufficient evidence; applicant appeals High Court refusal to grant *certiorari* quashing the respondentís order and remitting the matter to the District Court; whether the order of a District Judge to send an accused forward for trial or discharging him in respect of the same offence can be set aside on *certiorari;* s.7, Criminal Procedure Act, 1967.
**Held:** Appeal dismissed.

**Buckley v. Judge Kirby**
Supreme Court: Murphy J., McGuinness J., *Geoghegan J.*
18/07/2000

Administrative; judicial review; alternative remedies; applicant convicted by respondent in District Court; applicant appeals High Court's refusal of leave to apply for judicial review; applicant also appealed conviction to Circuit Court; appeal to Circuit Court still pending; whether remedy by way of judicial review is appropriate; whether leave should be granted to apply for judicial review on the grounds that there was a lack of evidence to support a decision; whether is within the Court's discretion to refuse leave where a trivial point is raised and where the alleged unremedied procedural defect results in no substantial injustice and which should more appropriately be dealt with by a private law remedy.
**Held:** Appeal dismissed.

**Herron v. Haughton**
Supreme Court: **Murphy J., Barron J., Geoghegan J.**
19/05/2000

Judicial review; road traffic; applicant had been tried by first named respondent in District Court for two motoring offences; applicant had pleaded guilty to one of these offences; applicant had been convicted of both offences; applicant had alleged that there was a conspiracy against her and an attempt to harass her with prosecutions in relation to road traffic offences; applicant had sought to call State Solicitor as a witness; first named respondent had ruled that grounds for doing so were irrelevant and refused to allow witness to be called; following conviction, member of An Garda Síochána had mentioned a number of

previous convictions; before the complete list had been read by the garda, State Solicitor had indicated that he did not need any more; applicant declined to ask any questions of garda; High Court had granted leave to apply by way of judicial review for an order of *certiorari* quashing the convictions on ground that applicant not permitted to call evidence to effect that complete list of previous convictions had not been given; later, High Court granted leave to bring separate judicial review proceedings seeking, *inter alia,* order of *mandamus* ordering respondents to furnish applicant with list of all previous convictions against her; order provided that judicial review be heard with the judicial review proceedings in respect of which leave had already been granted; High Court had dismissed application in first set of proceedings; appeal to Supreme Court; applicant not represented by Counsel; whether High Court had erred in hearing judicial review applications separately; whether High Court had erred in refusing to extend grounds of review; whether applicant ought to have been notified in advance of delivery of judgment; whether judgment ought to have been delivered in presence of applicant; further grounds not included in Notice of Appeal considered by Supreme Court; whether all previous convictions ought to have been before District Court; whether applicant ought to have been permitted to call State Solicitor as a witness.
**Held:** Appeal dismissed.

**O' Gorman v The Minister for Justice, Equality and Law Reform**
High Court: **Murphy J.**
25/07/2000

Administrative; judicial review; dismissal from employment; natural justice; delay in application for leave to apply; applicant was a probationary prison officer; probationary period extended to a third year due to unsatisfactory punctuality record; applicant received injuries to his right hand from a hypodermic needle while on duty; suffered post traumatic stress disorder; dismissed immediately prior to termination of third year; applicant seeks order of *certiorari;* whether delay in application for leave to apply was justifiable; whether applicant was made aware of the reasons for his dismissal; whether decision to dismiss was made without notice to him; whether respondent was entitled to look at the health, conduct and efficiency of the applicant to ascertain whether the appointment should be terminated; whether natural justice was afforded to the applicant in relation to the decision to terminate; s. 7, Civil Service Regulation Act 1956, as amended.
**Held:** Application refused.

**Library Acquisition**

Murphy, Tim
Ireland's evolving constitution 1937-97 collected essays
Twomey, Patrick M
Oxford Hart Publishing 1998
M31.C5

## Agency

**In re an instrument creating an enduring power of attorney executed by Eileen Constance Booth**
High Court: **Morris J.**
20/05/1999

Agency; power of attorney; objection to registration of instrument which purported to create an enduring Power of Attorney; whether lack of business skill on part of proposed Attorney is a valid objection to registration; s. 10, Powers of Attorney Act, 1996.
**Held:** Objection not upheld; criticism of a proposed Attorney must, to constitute a ground for refusing to register an instrument, far exceed the corresponding test applied by the court in applications for the removal of a trustee; order made under section 9(1), Powers of Attorney Act, 1996, for the registration of the instrument creating the enduring Power of Attorney.

**Library Acquisition**

Christou, Richard
International agency, distribution and licensing agreements
3rd ed
London FT Law & Tax 1996
C231

## Agriculture

**Statutory Instrument**

Diseases of animals act, 1966 (section 54(2)) (exemption) order, 2000
SI 270/2000

## Animals

**Statutory Instrument**

Diseases of animals act, 1966 (section 54(2)) (exemption) order, 2000
SI 270/2000

## Bankruptcy

**Article**

Recent developments in insolvency law
O'Hanlon, Niall
2000 (2) P & P 13

## Children

**Article**

Breaking out of jail: generating non-custodial penalties for juveniles
Vaughan, Barry
2000 (3) ICLJ 14

**Library Acquisitions**

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The Hague convention on international child abduction
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Oxford University Press 1999
M543.4.Q11

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Child protection practices in Ireland a case study
Skehill, Caroline
O'Sullivan, Eoin
Dublin Oak Tree Press 1997
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## Commercial Law

**Articles**

Performance bonds and unconscionability
Chandran, Ravi
2000 CLP 170

Recent developments in insolvency law
O'Hanlon, Niall
2000 (2) P & P 13

Reform of the financial services sector in Ireland - an international model?
O'Sullivan, Patricia
2000 IBL 87

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Salinger, Freddy R
Factoring: the law and practice of invoice financing
3rd ed
London Sweet & Maxwell 1999
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## Company Law

**Articles**

Aspects of the liabilities of receivers
Downey, Conor
2000 IBL 12

Turnbull puts risk management at the top of corporate agendas
Brennan, Niamh
2000 IBL 57

**Library Acquisition**

Charlesworth and Morse company law
Morse, Geoffrey
Charlesworth His Honour Judge, John
16th ed
London Sweet & Maxwell 1999
N261

## Competition Law

**Articles**

Aspects of the liabilities of receivers
Downey, Conor
2000 IBL 12

Carrefour/Promodes and the question of buying power
Griffin, Patrick B
2000 IBL 26

The electricity regulation act 1999
Byrne, Raymond
2000 ILTR 202

## Constitutional Law

## Constitutional

**Farley v. Ireland**
Supreme Court; **Keane C.J.** (*ex tempore*), McGuinness J., Geoghegan J.
26/05/2000

Constitutional; challenge to constitutionality of Courts (Supplemental Provisions) (Amendment) Act, 1999; appeal by applicant from order of High Court striking out proceedings on ground that pleadings disclose no cause of action and that they are frivolous and vexatious; whether Courts (Supplemental Provisions) (Amendment) Act, 1999 is in breach of Art. 35 of the Constitution; whether the Act of Settlement, 1700, and the Act of Settlement in Ireland, 1830, are relevant to the proceedings.
**Held:** Proceedings disclose no cause of action; High Court order affirmed.

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Casey, James P
Constitutional law in Ireland
3rd ed
Dublin Round Hall Sweet & Maxwell 2000
M31.C5

Murphy, Tim
Ireland's evolving constitution 1937-97 collected essays
Murphy and Patrick Twomey
Twomey, Patrick M
Oxford Hart Publishing 1998
M31.C5

## Contempt

**Library Acquisition**

Miller, Christopher John
Contempt of court
3rd ed
Oxford Oxford University Press 2000
M563.3

## Contract

**Scanlon v. Ormonde Brick Limited**
High Court: **Barr J.**
21/07/2000

Contract; breach of special condition; bailment; limitation of damages; coal mines; plaintiff conveyed land to the defendant, reserving to himself coal deposits; plaintiff told that he was free to enter the lands and remove coal there in accordance with the contract; plaintiff informed that no further coal was to be taken from the site; unauthorised removal of coal by third parties, depriving plaintiff of practical benefits of contract; substantial financial loss suffered by plaintiff; whether "exposed" in special condition meant "available for removal"; whether plaintiff at all material times "owned" coal deposits; whether defendant had a duty to take reasonable steps to prevent loss to plaintiff through pilfering of his coal from defendant's lands; whether special condition limited defendant's liability in the matter of protecting coal; whether onus on defendant to show that it took reasonable care to secure coal on its land for benefit of plaintiff; whether loss sustained by plaintiff limited to that which occurred during the six years ending on date of issue of plenary summons;
**Held:** Damages awarded to plaintiff.

**Article**

The trend towards self-employed contractors - opportunities and pitfalls
Grogan, Richard
2000 CLP 159

**Library Acquisitions**

Clark, Robert W
Contract cases and materials
2nd ed
Dublin Gill & Macmillan 2000
N10.C5.Z2

Lawson, Richard
Exclusion clauses and unfair contract terms
6th ed
London Sweet & Maxwell 2000
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## Copyright, Patents & Design

**Articles**

Moral considerations need not inform law's response to biotechnology
Mills, Oliver
2000 ILTR 218

Moral rights of authors in the copyright and related rights bill 1999
Bridgeman, James
2000 IBL 50

Protection of designs - the current position and the future
McGovern, Patricia
2000 IBL 92

Protecting the mouse and the mousetrap
Brophy, David
2000 IBL 6

## Criminal Law

**Blanchfield v. Hartnett**
High Court: **O'Neill J.**
30/06/2000

Criminal; admissibility of evidence; judicial review; banking; applicant had been charged with fraudulent conversion and forgery; applicant seeks orders of *certiorari* quashing orders made by District Court judge enabling certain of the applicant's bank accounts to be examined; applicant seeks order of prohibition preventing second and third named respondents from proceeding with trial; whether delay was such that reliefs sought ought to be refused; whether Circuit Court judge as the trial judge in criminal proceedings has jurisdiction to determine the validity of a District Court order when dealing with an issue of admissibility of evidence obtained on foot of that order; whether the validity of such an order can only be challenged and determined by the High Court on an application for judicial review; Bankers Books Evidence Act, 1879, as amended.
**Held:** Application refused; Circuit Court trial judge has his own exclusive jurisdiction to determine issues as to admissibility of evidence; fact that he may be asked to try an issue of law for the purposes of adjudicating on the admissibility of evidence which in other circumstances might be a more appropriate issue for judicial review jurisdiction of High Court does not prevent Circuit Court trial judge from exercising his own exclusive jurisdiction in the course of a criminal trial.

**D.P.P. v. McDonagh**
Court of Criminal Appeal; **Barron J.,** Budd J., Kearns J.
19/05/2000

Criminal; sentencing; applicant applied pursuant to s.2, Criminal Justice Act, 1993, to review sentences imposed by the Special Criminal Court; respondents convicted and sentenced to six years on count of possession of explosive substances with intent to endanger life or cause serious injury to property contrary to s.3, Explosive Substances Act, 1883, as amended; whether sentence unduly lenient as compared with sentences for similar offences.
**Held:** Application granted.

**D.P.P. v. Lynch**
Court of Criminal Appeal: O'Donovan J., O'Higgins J., **Barron J.**
27/07/1999

Criminal; jurisdiction of the Court of Criminal Appeal; conduct of counsel; applicant had pleaded guilty to a charge of murder; applicant seeking leave to appeal on the basis that his decision to plead guilty was made as a result of improper pressure placed upon him by his legal advisors; whether the court had jurisdiction to hear the matter; whether the applicant had established his factual case on the balance of probabilities; whether it is fair to deny the applicant a trial on the merits; ss.30-34 Courts of Justice Act, 1924; s.12, Courts (Supplemental Provisions) Act, 1961.
**Held:** Leave to appeal refused.

**N.C. v. D.P.P.**
High Court: **Laffoy J.**
30/03/2000

Criminal; judicial review; prohibition; injunction; delay; applicant seeking an order of prohibtion and/or an injunction restraining the respondent from prosecuting criminal proceedings against him alleging indecent assault; whether the delay in making the complaints is referable to the applicant's own actions; whether the delay has resulted in such a degree of prejudice as to constitute a real or serious risk of an unfair trial; whether further prejudice will be incurred by loss of memory which was not reflected in the record; whether any weight should be given to the admissions of which the respondent contends there is evidence.
**Held:** Application dismissed.

**T.D.I. Metro Limited. v. Judge Delap**
Supreme Court: **Denham J.,** Murphy J., Barron J., Murray J., **Hardiman J.**
31/03/2000

Practice and procedure; judicial review; planning; joinder of Attorney General in proceedings; role of Attorney General; High Court had granted *certiorari* quashing the order of the respondent convicting the applicants of an indictable offence on the basis that the notice party lacked the statutory authority to prosecute indictable offences; notice party appealed to the Supreme Court; Attorney General had applied by way of motion seeking liberty to intervene in the appeal; whether the Attorney General has a role in the proceedings to present the view of the executive; whether there is a general public interest in the prosecution of offences; whether the Attorney General is an appropriate constitutional officer to be heard by the court having regard to his role representing the public interest; whether the Attorney General may be joined as a party to the proceedings at the appeal stage; whether the Attorney General has an entitlement to intervene in any proceedings he wishes; whether the Attorney General has a sufficient interest to warrant allowing him to be joined as a party in the proceedings; O. 15, r. 13, Rules of the Superior Courts; O. 84, r. 22(6), Rules of the Superior Courts; O. 84 r. 26(1), Rules of the Superior Courts; O. 60, r. 1&2, Rules of the Superior Courts.

**Held:** Application granted; the Attorney should confine himself to the issues raised by the facts and pleadings in the case.

**J.L. v. The D.P.P.**
Supreme Court; **Keane C.J., McGuinness J., Hardiman J.**
06/07/2000

Criminal law; judicial review; sexual abuse; delay; application to restrain applicant's trial because of delay which has ensued since time of alleged offences had been refused; whether real and serious risk of unfair trial.
**Held:** appeal allowed.

**Articles**

Breaking out of jail: generating non-custodial penalties for juveniles
Vaughan, Barry
2000 (3) ICLJ 14

Recorded sexual offences
Leon, Clare
2000 (3) ICLJ 3

Victims, victimology and victim impact statements
Carey, Gearoid
2000 (3) ICLJ 8

Voir dire: disrupting the jury
Goldberg, David
2000 (2) P & P 10

## Damages

**McHugh v. Cunningham**
High Court: **Laffoy J.**
12/05/1999

Damages; road traffic accident; leg, facial and dental injuries sustained by 9æ year old plaintiff; plaintiff hospitalised for two months and kept back for one year at school; plaintiff suffered much anxiety because his mother was injured in the accident and his parents were separating at the time.
**Held:** £6,205 allowed for third stage of dental treatment; £2,000 allowed for future maintenance of dental hygiene; £6,454 allowed for future replacement of dental restoration work; £50,000 allowed for pain and suffering to date; £30,000 allowed for future pain and suffering; total damages awarded are £105,241.81.

**An Blascaod Mór Teoranta v. The Commissioners of Public Works**
High Court: **Budd J.**
28/06/2000

Damages; plaintiffs had successfully challenged constitutionality of s.4 (2) An Blascaod Mór National Historic Park Act, 1989, on grounds that it unfairly discriminated against them in relation to their property rights; two preliminary issues agreed as evidence with regard to quantum of damages likely to be lengthy; whether damages can arise in respect of misfeasance in public office by the Minister from the manner in which the invalid Act came to be passed by the Oireachtas; whether the court can award damages against the State for the effects of the passing by the Oireachtas of an unconstitutional Act; whether costs in relation to the question of damages should be allowed to the plaintiffs against the defendants on a party and party basis to be taxed in default of agreement.
**Held:** No award in respect of misfeasance in public office; no damages to be awarded against the State; court has jurisdiction to give redress only for such damage as is proved to have flowed directly from the effects of the invalidity without intervening imponderables and events.

## Employment

**Articles**

Legislating against low pay: the national minimum wage act 2000: Part 1
Smith, Olivia
2000 ILTR 222

The trend towards self-employed contractors - opportunities and pitfalls
Grogan, Richard
2000 CLP 159

## Environmental Law

**Articles**

Swallows and fishes: the definition of waste in the waste management act 1996
Laurence, Dr Duncan
2000 IPELJ 43

The interface between statutory land use planning and environmental protection agency licensing - provisions of the local government (planning and development) bill 1999
Brassil, Declan
2000 IPELJ 56

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Stuart Bell and Donald McGillivray
London Blackstone Press 2000
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## European Union

**Article**

White paper offers confidence in food safety
Gallagher, Maree
2000 IBL 89

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Foster, Nigel G
11th ed / edited by Nigel G Foster
London Blackstone Press 2000
W4
Lenaerts, Koen
Procedural law of the European Union
Arts, Dirk
Bray, Robert
London Sweet & Maxwell 1999
W86

## Extradition

**Bolger v. O'Toole**
High Court: **O'Neill J.**
08/06/2000

Extradition; judicial review; *res judicata;* applicant had been tried and convicted in his absence in England of various offences; applicant arrested on certain extradition warrants obtained in Bow Street Magistrates Court; previous attempt to extradite applicant on foot of other extradition warrants had failed on grounds that warrants were defective; District Judge before whom

dispute in respect of the defective warrants had been litigated made an order under s.47(3), Extradition Act, 1965, discharging the applicant; errors in previous warrants addressed in present warrants; new warrants indorsed by first-named respondent and stated that, during course of his trial in London on certain charges, the respondent failed to surrender as required to the custody of the court; applicant granted leave to apply for judicial review on ground of *res judicata*; whether the issues which were sought to be tried and determined before the District Court in the intended extradition proceedings on foot of the present warrants were the same issues which were heard and determined by the District Judge in respect of the previous warrants; whether the indorsing by the first-named respondent of the warrants obtained from the Magistrates Court and the subsequent arrest of the applicant on foot thereof was permissible; whether the applicant's submission to the effect that there was an estoppel which prevented the re-initiation of failed extradition proceedings was correct; whether in view of the fact that it was not yet apparent what issues would arise in the District Court proceedings pursuant to s.45(2) it was premature to say whether any issue estoppel would arise.
**Held:** Applicant's claim dismissed.

**A.G. v. Judge McDonnell**
High Court: **Kearns J.**
29/03/2000

Extradition; costs; Attorney General's scheme; applicant had written a letter to the President of the District Court advising him on the applicability of the Attorney General's scheme to extradition matters in the District Court; respondent had issued a citation for contempt against the applicant in extradition proceedings pending before the respondent; applicant seeking *certiorari* quashing the decision of the respondent; whether it was part of the function of the District Judge to probe into the *vires* of the applicant; whether the respondent should have been satisfied to accept assurance from or on behalf of the applicant; whether the respondent had the power to issue a citation for contempt which was not in the face of the court; whether the letter sent by the applicant could be regarded as contempt; whether there was a justiciable issue which could have justified the respondent in making such an order; whether the order was one which no reasonable judge of the District Court could have made; s.9, Petty Sessions (Ireland) Act, 1851.
**Held:** Order granted.

## Family

**M. v. M.**
High Court: **McCracken J.**
23/05/2000

Family; judicial separation; divorce; maintenance; pension rights; whether wife entitled to all or part of the retirement benefits payable to the husband.
**Held:** Judicial separation and divorce proceedings consolidated; shop transferred to wife with stock-in-trade as going concern; property adjustment order in respect of transfer of wife's shares in company; husband ordered to pay 75% of retirement benefit accrued from commencement of private pension trust; benefit of five other polices transferred to wife; husband to retain benefit of one policy.

## Financial Services

**Article**

Reform of the financial services sector in Ireland - an international model?
O'Sullivan, Patricia
2000 IBL 87

## Fisheries

**Statutory Instrument**
Aquaculture (licence fees) regulations, 2000
SI 282/2000

## Health

**Article**

White paper offers confidence in food safety
Gallagher, Maree
2000 IBL 89

## Injunctions

**Dubsky v. Drogheda Port Company**
High Court: **O'Sullivan J.**
22/02/2000

Injunctions; environmental law; High Court order dated 10th September, 1999, requiring defendant inter alia mechanically to remove spartina from the vicinity of Drogheda port; refusal of further interlocutory relief sought at later date by applicant before High Court; Supreme Court allowed subsequent appeal by applicant in part and made order dated 17th November, 1999, restraining defendant from carrying out any excavation or other work pending the hearing of the action; matter was remitted to the High Court to determine the issue of whether the defendant was providing an alternative compensatory feeding ground in accordance with the terms of the High Court order; interpretation of High Court order; whether there was a breach of the requirement to use the "existing access" and of the terms of the order in that the existing access was widened without further reference to the court; whether the delay by the defendants was a breach of the order which would justify granting the plaintiff relief; whether the "exact boundaries" of the removal site referred to in the order had been determined; whether unsuitable vehicles had been used; whether vehicle tracks on salt marsh area amounted to a breach of the order; whether there had been unduly deep removal of the surface; whether the defendant was providing an alternative compensatory feeding ground; whether the breaches had impacted on the environment to a degree which was grossly disproportionate to the inevitable impact which the works were going to have even if carried out with punctilious observance of the order; whether defendant should continue to be restrained from carrying out or continuing the work referred to in the Supreme Court order until such time as a map was agreed by D'chas setting out the exact boundaries of the removal site referred to in the order.
**Held**: Defendant in breach of the order in a number of ways; defendant should continue to be restrained from carrying out or continuing the work referred to in

the Supreme Court order until map agreed by D'chas setting out the exact boundaries of the removal site referred to in the High Court order.

**Prins v. Sligo Corporation**
High Court: **Finnegan J.**
02/05/2000

Injunctions; application for interlocutory injunction; Sligo inner relief road project envisaged demolition of certain buildings; plaintiff applied for and obtained an interim injunction whereby defendant was restrained from demolishing or altering significantly the character of the buildings; plaintiff claiming that buildings are heritage buildings within the definition contained in s.2, Heritage Act, 1995, and that before proceeding with their demolition the defendant is obliged to comply with the provisions of s.10 of the Act of 1995; whether s.10 was a discrete portion of the Act and should be read as such; whether s.10(4) regulated the remainder of the section; whether compliance with s.10(2) only arose in respect of a heritage building which the Minister had designated by order; whether construction of s.10 contended for by plaintiff would lead to an unworkable and unpracticable result; whether ambiguous section should be interpreted in a way which causes the lesser interference with the vested rights of public authorities who would be affected by the section in relation to their own property; whether provisions of s.10 applied only to a heritage building which had been designated by the Minister for Arts, Culture and the Gaeltacht by order under s.10(4) of the Act; ss. 2, 5, 6(1), 6(3), 7, 8, 10, Heritage Act, 1995.
**Held**: Plaintiff not entitled to relief sought.

## Immigration

**Statutory Instrument**

Illegal immigrants (trafficking) act, 2000 (commencement) order, 2000
SI 266/2000

## Information Technology

**Articles**

E-commerce in Ireland: commercial legal and regulatory issues
Gaffney, John
Delany, Sandra
2000 IBL 78

Domain name developments
Rooney, Niall
2000 IBL 2

Legal aspects of internet security
Bohan, Anne-Marie
2000 IBL 43

## International Law

**Library Acquisitions**

Beaumont, Paul R
The Hague convention on international child abduction
Mceleavy, Peter E
Oxford University Press 1999
M543.4.Q11

Christou, Richard
International agency, distribution and licensing agreements
3rd ed
London FT Law & Tax 1996
C231

## Local Government

**Article**

Parks and open spaces
Bland, Peter
2000 CPLJ 58

## Negligence

**Article**

The Roundabout Tavern settlement: a reflection of American public liability?
Moore Walsh, Kathleen A
2000 ILTR 205

## Planning

**Murray v. An Bord Pleanála**
High Court: **Quirke J.**
28/01/2000

Planning; judicial review; applicant had been granted certain planning permissions by the planning authority in respect of the proposed development of a dwellinghouse; notice parties appealed against the decision of the planning authority; respondent refused applicant permission for the proposed development; applicant seeking judicial review of the respondent's decision; notice of motion and documentation required to ground the present proceedings had not been served upon the planning authority; whether application was time-barred, having regard to the provisions of s. 82(3A), Local Government (Planning and Development) Act, 1963, as amended by s. 19(3), Local Government (Planning and Development) Act, 1992; whether the interests of the planning authority were relevant to the proceedings; whether the proper construction of s.19(3) could accommodate or result in an investigation by the court into whether or not the interests of the planning authority may or may not be relevant to the issues which fall to be determined in the proceedings which the applicant wishes to commence; whether the planning authority came within the category of a party which is provided for mandatorily within s.19(3).
**Held:** Applicant barred from seeking the relief sought against the respondent.

**Ashbourne Holdings Limited. v. An Bord Pleanala**
High Court: **McCracken J.**
23/03/2000

Planning; judicial review; conditions attached to planning permission; applicant had been granted planning permission for a golf clubhouse with a number of conditions attached; applicant seeking leave to apply for, *inter alia*, *certiorari* quashing the decision of the first named respondent on appeal from decision of the second named respondent; whether there are substantial grounds for arguing that imposing a condition requiring the applicant to provide public access to the

land is ultra vires the powers of the respondents; whether there are substantial grounds for arguing that such a condition is unreasonable and irrational; whether there are substantial grounds for arguing that the condition enabling the planning authority to regulate charges made for access to property is ultra vires the powers of the respondents; whether there are substantial grounds for arguing that the condition requiring the applicant to carry a survey of the ruins on the land were relevant to the development authorised by the permission; s.19(3), Local Government (Planning and Development) Act, 1992; s.82, Local Government (Planning and Development) Act, 1963; s.26, Local Government (Planning and Development) Act, 1963.
**Held**: Leave to issue judicial review proceedings granted.

**Articles**

Swallows and fishes: the definition of waste in the waste management act 1996
Laurence, Dr Duncan
2000 IPELJ 43

The interface between statutory land use planning and environmental protection agency licensing - provisions of the local government (planning and development) bill 1999
Brassil, Declan
2000 IPELJ 56

## Practice & Procedure

**Bank of Ireland v. Gleeson**
Supreme Court: **Murphy J.**, Barron J., Geoghegan J.
06/04/2000

Practice and procedure; contract; settlor conveyed properties in freehold by indentures to the respondent bank in 1954 upon trust to sell the same provided that during life of settlor's wife such sale should be made only with her consent in writing and that trustee should hold the proceeds of trust for sale upon trust for settlor's wife and his children or remoter issue or some one or more of them upon and subject to the terms of the indentures; at date of conveyance trust property was subject to an indenture of lease from 1898; interest of lessee thereunder was assigned in 1971 to Commissioners of Public Works in Ireland for the residue of the term; on expiration of lease the Commissioners served a notice of intention on the respondent to acquire the fee simple in the premises pursuant to the provisions of the Landlord and Tenant (Ground Rents) (No.2) Act, 1978; by contract of sale the respondent, with consent of settlor's widow, agreed with the Commissioners for the sale to them of the fee simple; price agreed did not represent open market value of the property; appellant objected to respondent's completing the contract of sale; respondent instituted proceedings by way of special summons seeking directions of the High Court as to whether the respondent against the will of the appellant ought to proceed to complete the contract of sale; whether President of the High Court was correct in declining to answer the question posed by the summons.
**Held**: Appeal dismissed; judgment of President of the High Court affirmed.

**Lismore Homes Limited (In Receivership) v. Bank of Ireland**
High Court: **McCracken J.**
24/03/2000

Practice and procedure; security for costs; sufficient security; two orders of the High Court dated 2nd March, 1992, ordered that pursuant to s.390, Companies Act, 1963, plaintiff furnish security for the costs of the first and second named defendants in the action in such amount as should be determined by the Master of the High Court and that all further proceedings be stayed pending the furnishing of security; motion in present case to fix the amount of the security for costs to be given by the plaintiff to the first and second named defendants; meaning of "sufficient security" as contained in s.390; whether use of the word "may" in s.390 referred to the making of the order for security for costs rather than to the amount thereof; whether section meant that the security required had to be approximate to the probable costs of the defendant should he succeed.
**Held**: Plaintiff ordered to furnish security for costs in the sum of 50% of the estimated total to first and second named defendants.

**Rodgers v. Mangan**
High Court: **Geoghegan J.**
15/07/1996

Practice and procedure; costs; plaintiff sought injunction prohibiting defendant from operating a bus service along a particular route; interlocutory injunction granted to that effect; injunction no longer necessary at time of plenary hearing with the result that damages and costs were the only issues left which required to be tried; damages awarded to plaintiff with costs; defendant contends that costs for interlocutory injunction should be Circuit Court costs and that District Court costs ought to be awarded in relation to the plenary hearing having regard to the amount of damages awarded; whether plaintiff was granted a form of "relief" within the meaning of s. 17(1), Courts Act, 1981, as inserted by s. 14, Courts Act, 1991.
**Held**: Plaintiff entitled to the full costs of an injunction action taxed as High Court costs.

**Articles**

Recent developments in security for costs: (an analysis of the two related Supreme court decisions of Spin Communications Ltd
Lowe, Nicola
2000 (2) P & P 6

Voir dire: disrupting the jury
Goldberg, David
2000 (2) P & P 10

**Library Acquisition**

Manchester, Colin
Exploring the law the dynamics of precedent and statutory interpretation
Salter, David
Moodie, Peter
2nd ed
London Sweet & Maxwell 2000
L35

## Property

**Ulster Bank Limited v. Crawford**
High Court: **Laffoy J.**
20/12/1999

Land; practice and procedure; mortgage suit; primary order made which declared that the principal monies and interest

secured by an equitable mortgage were well-charged on the interests of the defendant in a parcel of land; judgment mortgage subsequently registered by the notice party against the defendant on foot of an affidavit; defendant discharged liability to plaintiff; application to discharge primary order; notice party seeks to take over carriage of the proceedings from plaintiff and a declaration that the sums secured by registration of the judgment mortgage are well-charged on the interests of the defendant; affidavit to register the judgment mortgage mistakenly referred to defendant as "proprietor" rather than "building contractor"; whether the affidavit leaves any doubt as to the identity of the persons against whom the judgment mortgage had been obtained; whether notice party has a valid judgment mortgage registered against the interests of the defendant in the said land; s. 6, Judgments (Ireland) Act, 1850.
**Held**: Order made substituting the notice party as plaintiff; declaration made that the sums due to the plaintiff under the judgment mortgage, plus interest, are well-charged on the interests of the defendant in the said land.

**Article**

Parks and open spaces
Bland, Peter
2000 CPLJ 58
Recent developments in conveyancing practice
Sweetman, Patrick
2000 IPELJ 71

Registration of title and overriding interests - another crack in the mirror?
Breen, Oonagh
2000 CPLJ 52

**Library Acquisitions**

Gannon, Fergus
VAT on property finance act 2000
Dublin Institute of Taxation 1999
Value-Added Tax: Ireland
M337.6.C5

Newsom, G L
Preston and Newsom's restrictive covenants affecting freehold land
9th ed
London Sweet & Maxwell 1998
N65.6

## Refugees

**Article**

Ireland and the European asylum debate
Lindenbauer, Michael
Fraser, Ursula
2000 (2) P & P 2

## Road Traffic

**Statutory Instrument**

Road traffic (public service vehicles) (amendment) (no.2) regulations, 2000
SI 255/2000

## Succession

**Doran, In re**
High Court: **Herbert J.**
24/07/2000

Succession; wills; probate; provision in will of testatrix appointing "*Provincial Superior or the Provincial Bursar of the Irish-English Province for the time being at the date of my death*" as executor; whether provision to be read as creating alternatives or a substitute; whether provision void for uncertainty; whether clause "the Irish-English Province" ambiguous; whether will uncertain due to part text and part handwriting composition; whether renunciation by person entitled before substitute executor necessary before probate could be granted; s.17, Succession Act, 1965.
**Held**: Executor sufficiently identified as whoever might be holder of one of two official positions at date of death of testatrix; clause not void for uncertainty.

## Taxation

**Library Acquisitions**

Brennan, Frank
Corporation tax finance act 2000
Moore, Paul
Clarke, Andrew
12th ed
Dublin Institute of Taxation 2000
M337.2.C5

Condon, John F
Capital acquisitions tax finance act 2000
Muddiman, Jim
13th ed
Dublin Institute of Taxation 2000
M337.16.C5

Connolly, Margaret
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Purcell, Brian
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Dublin Institute of Taxation 2000
M337.16C5

Cremins, Denis
Value added tax
O'Brien, Dermot
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M337.45.C5

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M337.6.C5

Haccius, Charles H
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M336.16.C5

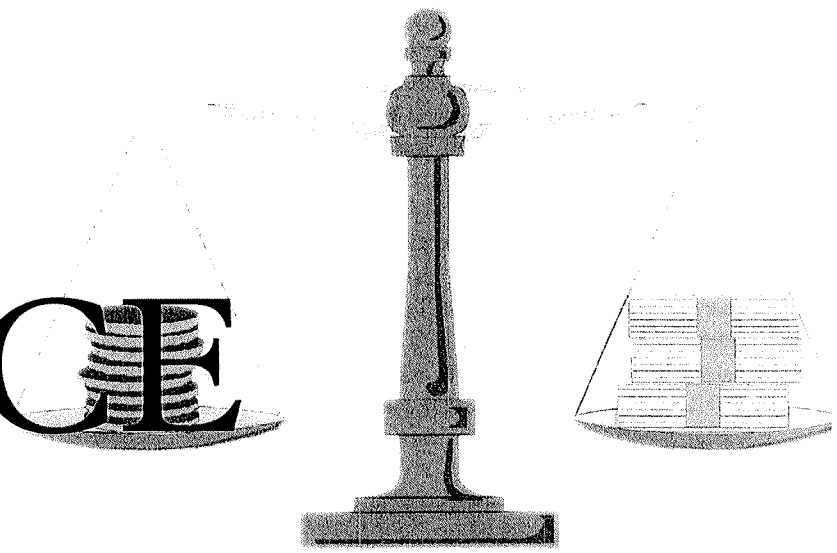
**Statutory Instruments**

Finance act, 2000 (section 48) (commencement) order, 2000
SI 258/2000

Value-added tax (apportionment) regulations, 2000
SI 254/2000

Value-added tax (cancellation of election of registration in respect of sixth schedule accommodation) regulations, 2000
SI 253/2000

# AT A GLANCE



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**Information compiled by Deidre Lambe, Law Library, Four Courts.**

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Mceleavy, Peter E
Oxford University Press 1999
M543.4.Q11

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5th ed
Stuart Bell and Donald McGillivray
London Blackstone Press 2000
N94

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Foster, Nigel G
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London Blackstone Press 2000
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Dublin Institute of Taxation 2000
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Buckley, Helen
Child protection practices in Ireland a case study
Skehill, Caroline
O'Sullivan, Eoin
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N176.C5

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Case law for the tax practitioner finance act 2000
O'Driscoll, Terry
Giblin, Bartholmew Herbert
4th ed
Dublin Institute of Taxation 2000
M335.C5.Z2

Casey, James P
Constitutional law in Ireland
3rd ed
Dublin Round Hall Sweet & Maxwell 2000
M31.C5

Charlesworth and Morse company law
Morse, Geoffrey
Charlesworth His Honour Judge, John
16th ed
London Sweet & Maxwell 1999
N261

Christou, Richard
International agency, distribution and licensing agreements
3rd ed
London FT Law & Tax 1996
C231

Clark, Robert W
Contract cases and materials
2nd ed
Dublin Gill & Macmillan 2000
N10.C5.Z2

Condon, John F
Capital acquisitions tax finance act 2000
13th ed
Dublin Institute of Taxation 2000
M337.16.C5

Connolly, Margaret
Capital allowances finance act 2000
Purcell, Brian
2nd ed
Dublin Institute of Taxation 2000
M337.16C5

Cremins, Denis
Value added tax
O'Brien, Dermot
8th ed
Dublin Institute of Taxation 2000
M337.45.C5

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VAT on property finance act 2000
Dublin Institute of Taxation 1999
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M337.6.C5

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Double taxation agreements
O'Brien, Pat
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Arts, Dirk
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M563.3

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Twomey, Patrick M
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N65.6

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London Sweet & Maxwell 1999
N305.8

Vinter, Graham
Project finance a legal guide
2nd ed
London Sweet & Maxwell 1998
N305.22

Walpole, Hilary E
Tax implications of marital breakdown
4th ed
Dublin Institute of Taxation 2000
M336.433.C5

## European Caselaw received in the Law Library up to 13/10/2000

**Information compiled by Lorraine Brien, Law Library, Four Courts.**

**C-147/96 Kingdom of the Netherlands V Commission of the European Communities**
Court of Justice of the European Communities
Judgement delivered 22/6/2000
(Action for annulment-Commission's refusal to include an overseas country in the provisional list of third countries established by Article 23 of Directive 92/46/EEC-Actionable measure)

**C-242/97 Kingdom of Belgium V Commission of the European Communities**
Court of Justice of the European Communities
Judgement delivered 18/5/2000
(EAGGF-Clearance of accounts-1993-Cereals,beef and veal)

**C-243/97 Hellenic Republic V Commission of the European Communities**
Court of Justice of the European Communities
Judgement delivered 13/7/2000
(Clearance of EAGGF accounts-1993 financial year)

**C276/97 Commission of the European Communities V French Republic**
Court of Justice of the European Communities
Judgement delivered 12/9/2000
(Failure to fulfil obligations-Article 4(5) of the Sixth VAT Directive-Access to roads on payment of a toll-Failure to levy VAT-Regulations (EEC, Euratom) Nos 1552/89-Own resources accruing from VAT).

**C-289/97 Eridania SpA V Azienda Agricola San Luca di Rumagnoli Viannj**
Court of Justice of the European Communities
Judgement delivered 6/7/2000
(Sugar-Price regime-Marketing year 1996/1997-Regionalisation-Deficit zones-
Classification of Italy - Validity of Regulations Nos 1580/96 and 1785/81)

**C-356/97 Wiedergltingen eG V Lindau**
Court of Justice of the European Communities
Judgement delivered 6/7/2000
(Additional levy on milk-Annual statement of quantities of milk delivered to purchaser-Late communication-Penalty - Validity of Article 3(2) of Regulation (EEC) No 536/93)

**C-408/97 Commission of the European Communities V Kingdom of the Netherlands**
Court of Justice of the European Communities
Judgment delivered 12/09/2000
(Failure to fulfill obligations - Article 4(5) of the Sixth VAT Directive- Access to roads on payment of a toll - Failure to levy VAT)

**C-424/97 Haim V Nordrhein Court of Justice of the European Communities**
Judgement delivered 4/8/2000
(Member State liability in the event of a breach of Community law-Breaches attributable to a public-law body of a Member State-Conditions for the liability of the Member State and of a public-law body of that State-Compatibility of a language requirement with freedom of establishment)

**C-260/98 Commission of the European Communities V Hellenic Republic**
Court of Justice of the European Communities
Judgement delivered 12/9/2000
(Failure to fulfil obligations-Article 4(5) of the Sixth VAT Directive-Access to roads on payment of a toll-Failure to levy VAT-Regulations (EEC, Euratom) Nos 1552/89 & 1553/89-Own resources accruing from VAT)

**C-343/98 Collino & Chiappero V Telecom Italia SpA**
Court of Justice of the European Communities
Judgement delivered 14/9/2000
(Directive 77/187/EEC-Safeguarding employees' rights in the event of transfers of undertakings-transfer of an entity managed by a public body forming part of the State administration to a private company whose capital is publicly owned-Definition of an employee-Taking into account of employees' total length of service by the transferee)

**C-348/98 Vitor Manuel Mendes Ferreira & Maria Clara Delgado Correia Ferreira V Companhia de Seguros Mundial Confianca SA**
Court of Justice of the European Communities
Judgement delivered 14/9/2000
(Compulsory insurance against civil liability in respect of motor vehicle s-Directives 84/5/EEC & 90/232/EEC-Minimum amounts of cover-Type of civil
liability-Injury caused to a member of the family of the insured person or driver)

**C-366/98 Geffroy V Casino France SNC**
Court of Justice of the European Communities
Judgement delivered 12/9/2000
(Free movement of goods-National legislation on the marketing of a product-Description and labeling - National legislation requiring use of the official language of the Member State-Directive 79/112/EEC)

**C-384/98 D V W (intervener Bundesschatz)**
Court of Justice of the European Communities
Judgement delivered 14/9/2000
(Sixth VAT Directive-Exemption for medical care provided in the exercise of the medical and paramedical professions-Supply by a doctor approved as a court expert of an opinion in a paternity dispute)

**C-396/98 SchloBstraBe GbR V Paderborn**
Court of Justice of the European Communities
Judgement delivered 8/6/2000
(Turnover taxes-Common system of value added tax-Article 17 of the Sixth Directive 77/388/EEC-Deduction of input tax-Deduction precluded by an amendment to national legislation removing the possibility of opting for taxation of the letting of immovable property)

**C-400/98 Goslar V Breitsohl**
Court of Justice of the European Communities
Judgement delivered 8/6/2000
(Turnover taxes-Common system of value added tax-Articles 4,17 and 28 of the Sixth Directive 77/388/EEC-Status as taxable person and exercise of t he right to deduct in the event of failure of the economic activity envisaged, prior to the first VAT determination-Supplies of buildings and the land on which they stand-Whether possible to limit the option for tax to buildings only, thereby excluding the land)

**C-402/98 Agricola Tabacchi Bonavicina Snc di Mercati Federica (ATB) and Ors V Mini**
stero per le Politiche Agricole and Ors
Court of Justice of the European Communities
Judgement delivered 6/7/2000
(Common organisation of the market-Raw tobacco-Validity of Council Regulation (EC)No 711/95 and of Commission Regulations (EC) Nos 1066/95 and 1067/95

**C-423/98 Albore V The Court (Sixth Chamber)**
Court of Justice of the European Communities
Judgement delivered 13/7/2000
(Freedom of establishment-Free movement of capital-Articles 52 of the EC
Treaty (now, after amendment, Article 43 EC) and 73b of the EC Treaty (now Article 56 EC)-Authorisation procedure for the purchase of immovable property-Areas of military importance-Discrimination on grounds of nationality )

**C91/99 Commission of the European Communities V Portuguese Republic**
Court of Justice of the European Communities
Judgement delivered 8/6/2000
(Failure by a Member State to fulfil its obligations-Directive 96/43/EC-Failure to transpose within the prescribed period)

**C-117/99 Union Nationale Interprofessionnelle des Legumes Transformes(Unilet) Gilles Le Bars V Association Comite Economique Regional Agricole Fruits et Le**
gumes de Bretague (Cerafel)
Court of Justice of the European Communities
Judgement delivered 13/7/2000
(Agriculture-Common organisation of the markets-Fruit and vegetables Producers' organisations -Imposition of fees on non-member producers of fresh products-Exemption for non-member producers of products intended for processing - Lawfulness of the exemption)

**C-136/99 Ministre du Budget & Anor V Socite Monte Dei Paschi Di Siena**
Court of Justice of the European Communities
Judgement delivered 13/7/2000
(Turnover tax-Common system of value added tax-Refund of the tax to taxable persons not established in the country-Article 17 of the Sixth Directive 77/388/EEC and articles 2 & 5 of the Eighth Directive 79/1072/EEC)

## European Directives

European Communities (marketing of coffee extracts and chicory extracts) regulations, 2000
SI 281/2000
[DIR 1999/4/EC]

## Acts of the Oireachtas 2000 (as of 04/10/2000)

**Information compiled by Damien Grenham, Law Library, Four Courts.**

**1/2000** Comhairle Act, 2000
*Signed 02/03/2000*

**2/2000** National Beef Assurance Scheme Act, 2000
*Signed 15/03/2000*
*SI 130/2000 = (Commencement)*

**3/2000** Finance Act, 2000
*Signed 23/03/2000*

**4/2000** Social Welfare Act, 2000
*Signed 29/03/2000*

**5/2000** National Minimum Wage Act, 2000
*Signed 31/03/2000*
**1.**SI 95/2000 / SI 201/2000 = (Rate Of Pay)
**2.**SI 96/2000 = (Commencement)
**3.**SI 99/2000 = (Courses/Training)

**6/2000** Local Government (Financial Provisions)
Act, 2000
*Signed 20/04/2000*

**7/2000** Commission to Inquire Into Child Abuse
Act, 2000
*Signed 26/04/2000*
*SI 149/2000 = (Establishment Day)*

**8/2000** Equal Status Act, 2000
*Signed 26/04/2000*
*SI 168/2000 (Section 47 Commencement)*

**9/2000** Human Rights Commission Act, 2000
*Signed 31/05/2000*

**10/2000** Mulilateral Investment Guarantee Agency
(Amendment) Act, 2000
*Signed 07/06/2000*

**11/2000** Criminal Justice (United Nations Convention Against Torture) Act, 2000
*Signed 14/06/2000*

**12/2000** International Development Association
(Amendment) Act, 2000
*Signed 20/06/2000*

**13/2000** Statute Of Limitations (Amendment) Act, 2000
14/2000 Merchant Shipping (Investigation Of Marine Casualities) Act, 2000
*Signed 27/06/2000*

**14/2000** Merchant Shipping (Investigation of Marine Casualties) Act
*Signed 27/06/2000*

**15/2000** Courts (Supplemental Provisions)
*(Amendment) Act, 2000*
*Signed 28/06/2000*

**16/2000** Criminal Justice (Safety Of United Nations Workers) Act, 2000
*Signed 28/06/2000*

**17/2000** Intoxicating Liquor Act, 2000
*Signed 30/06/2000*
*SI 207/2000 (Commencement Other Than S's 15, 17 & 27 (S27 = 02/10/'00) )*

**18/2000** Town Renewal Act, 2000
*Signed 04/07/2000*
*SI 226/2000 (Commencement)*

**19/2000** Finance (No.2) Act, 2000
*Signed 05/07/2000*

**20/2000** Firearms (Firearm Certificates For Non-Residents) Act, 2000
*Signed 05/07/2000*

**21/2000** Harbours (Amendment) Act, 2000
*Signed 05/07/2000*

**22/2000** Education (Welfare) Act, 2000
*Signed 05/07/2000*

**23/2000** Hospitals' Trust (1940) Limited (Payements To Former Employees) Act, 2000
*Signed 08/07/2000*

**24/2000** Medical Practitioners (Amendment) Act, 2000
*Signed 08/07/2000*

**25/2000** Local Government Act, 2000
*Signed 08/07/2000*

**26/2000** Gas (Amendment) Act, 2000
*Signed 10/07/2000*

**27/2000** Electronic Commerce Act, 2000
*Signed 10/07/2000*

**28/2000** Copyright And Related Rights Act, 2000
*Signed 10/07/2000*

**29/2000** Illegal Immigrants (Trafficking) Act, 2000
*Signed 28/08/2000*
*SI 266/2000 (Commencement)*

**30/2000** Planning And Development Act, 2000
*Signed 28/08/2000*

## Bills in progress up to 12/10/2000

**Information compiled by Damien Grenham, Law Library, Four Courts.**

Activity centres (young persons' water safety) bill, 1998
2nd stage - Dail **[p.m.b.]**

Aer Lingus bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Aviation regulation bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Broadcasting bill, 1999
Committee - Dail

Cement (repeal of enactments) bill, 1999
Committee - Dail *(Initiated in Seanad) (resumed)*

Censorship of publications (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Children bill, 1999
Committee - Dail

Children bill, 1996
Committee - Dail [re-introduced at this stage]

Companies (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

Companies (amendment) (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Company law enforcement bill, 2000
Committee - Dail

Containment of nuclear weapons bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Control of wildlife hunting & shooting (non-residents
firearm certificates) bill, 1998
2nd stage - Dail **[p.m.b]**

## Courts bill, 2000
## 2nd stage - Dail

Criminal justice (illicit traffic by sea) bill, 2000
1st stage - Dail

Criminal justice (theft and fraud offences) bill, 2000
1st stage -Dail

Criminal law (rape)(sexual experience of complainant) bill, 1998
2nd stage - Dail **[p.m.b.]**

Customs & excise (mutual assistance) bill, 2000
1st stage - Dail

Dumping at sea (amendment) bill, 2000
1st stage - Seanad

Eighteenth amendment of the Constitution bill, 1997
2nd stage - Dail **[p.m.b.]**

Electoral (amendment) (donations to parties and candidates) bill, 2000
2nd stage - Dail [p.m.b.] *(resumed)*

Employment rights protection bill, 1997
2nd stage - Dail **[p.m.b.]**

Energy conservation bill, 1998
2nd stage - Dail **[p.m.b.]**

Equal status bill, 1998
2nd stage - Dail **[p.m.b]**

Family law bill, 1998
2nd stage - Seanad

Fisheries (amendment) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Health (miscellaneous provisions) bill, 2000
1st stage - Dail

Health (miscellaneous provisions) (no.2) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Health insurance (amendment) bill, 2000
2nd stage - Dail
Harbours (amendment) bill, 2000
Committee - Seanad

Home purchasers (anti-gazumping) bill, 1999
1st stage - Seanad

Human rights bill, 1998
2nd stage - Dail **[p.m.b.]**

Industrial designs bill, 2000
1st stage - Dail

Industrial relations (amendment) bill,2000
2nd stage - Dail *(Initiated in Seanad)*

Insurance bill, 1999
Committee - Dail

Interpretation bill, 2000
1st stage - Dail

Irish film board (amendment) bill, 2000
1st stage - Seanad

Irish nationality and citizenship bill, 1999 Committee - Dail *(Initiated in Seanad)*

Landlord and tenant (ground rent abolition) bill, 2000
2nd stage - Dail **[p.m.b.]**

Licensed premises (opening hours) bill, 1999
2nd stage - Dail **[p.m.b.]**

Local government (no.2) bill, 2000
2nd stage - Seanad *(Initiated in Dail)*
Local Government (planning and development) (amendment) bill, 1999
Committee - Dail

Local Government (planning and development) (amendment) (No.2) bill, 1999
2nd stage - Seanad

Local government (Sligo) bill, 2000
2nd stage -Dail

Mental health bill, 1999
Committee - Dail

National pensions reserve fund bill, 2000
2nd stage - Dail

National treasury management agency (amendment) bill, 2000
1st stage - Dail
Nitrigin eireann teoranta bill, 2000
1st stage - Dail

Official secrets reform bill, 2000
2nd stage - Dail **[p.m.b.]**

Organic food and farming targets bill, 2000
2nd stage - Dail **[p.m.b]**

Partnership for peace (consultative plebiscite) bill, 1999
2nd stage - Dail **[p.m.b.]**

Patents (amendment) bill, 1999
2nd stage - Dail

Prevention of corruption (amendment) bill, 1999
1st stage - Dail

Prevention of corruption (amendment) bill, 2000
2nd stage - Dail

Prevention of corruption bill, 2000
2nd stage - Dail **[p.m.b.]**

Private security services bill, 1999
2nd stage- Dail **[p.m.b.]**

Proceeds of crime (amendment) bill, 1999
Committee - Dail

Prohibition of ticket touts bill, 1998
Committee - Dail **[p.m.b.]**

Protection of children (hague convention) bill, 1998
2nd stage - Seanad *(Initiated in Dail)*

Protection of patients and doctors in training bill, 1999
2nd stage - Dail **[p.m.b.]**

Protection of workers (shops)(no.2) bill, 1997
2nd stage - Seanad

Public representatives (provision of tax clearance certificates) bill, 2000
2nd stage - Dail **[p.m.b.]**

Radiological protection (amendment) bill, 1998
Committee- Dail *(Initiated in Seanad)*

Refugee (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Registration of lobbyists bill, 1999
1st stage - Seanad

Registration of lobbyists (no.2) bill 1999
2nd stage - Dail **[p.m.b.]**

Regulation of assisted human reproduction bill, 1999
1st stage - Seanad **[p.m.b.]**

Road traffic (Joyriding) bill, 2000
2nd stage - Dail **[p.m.b.]**

Road traffic reduction bill, 1998
2nd stage - Dail **[p.m.b.]**

Safety health and welfare at work (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Safety of united nations personnel & punishment of offenders bill, 1999
2nd stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1997
1st stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1998
1st stage - Seanad **[p.m.b.]**

Sea pollution (amendment) bill, 1998
Committee - Dail

Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000
1st stage - Dail

Sex offenders bill, 2000
Committee - Dail

Shannon river council bill, 1998
Committee - Seanad

Solicitors (amendment) bill, 1998
Committee - Dail **[p.m.b.]** *(Initiated in Seanad)*

Standards in public office bill, 2000
1st stage - Dail

Statute law (restatement) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Statute of limitations (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**
Succession bill, 2000

2nd stage - Dail **[p.m.b.]**

Teaching council bill, 2000
1st stage - Dail

Telecommunications (infrastructure) bill, 1999
1st stage - Seanad

Tobacco (health promotion and protection) (amendment) bill, 1999
Committee -Dail **[p.m.b.]**

Trade union recognition bill, 1999
1st stage - Seanad

Tribunals of inquiry (evidence)(amendment)(no.2) bill, 1998
2nd stage - Dail **[p.m.b.]**

Trinity college, Dublin and the University of Dublin (charters and letters patent amendment) bill, 1997
Report - Seanad **[p.m.b.]**

Twentieth amendment of the Constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty-first amendment of the constitution (no.2) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.3) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.5) bill, 1999
2nd stage - Dail **[p.m.b]**

Udaras na gaeltachta (amendment)(no.3) bill, 1999
Report - Dail

UNESCO national commission bill, 1999
2nd stage - Dail **[p.m.b.]**
Valuation bill, 2000
1st stage - Dail

Whistleblowers protection bill, 1999
Committee - Dail

Wildlife (amendment) bill, 1999
Committee - Dail (Resumed)
Youth work bill, 2000
1st stage - Dail

(P.S) Copies of the acts/bills can be obtained free from the internet & up to date information can be downloaded from website : www.irlgov.ie

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## ABBREVIATIONS

| | |
|---|---|
| BR | = Bar Review |
| CIILP | = Contemporary Issues in Irish Politics |
| CLP | = Commercial Law Practitioner |
| DULJ | = Dublin University Law Journal |
| GLSI | = Gazette Society of Ireland |
| IBL | = Irish Business Law |
| ICLJ | = Irish Criminal Law Journal |
| ICLR | = Irish Competition Law Reports |
| ICPLJ | = Irish Conveyancing & Property Law Journal |
| IFLR | = Irish Family Law Reports |
| IILR | = Irish Insurance Law Review |
| IIPR | = Irish Intellectual Property Review |
| IJEL | = Irish Journal of European Law |
| ILTR | = Irish Law Times Reports |
| IPELJ | = Irish Planning & Environmental Law Journal |
| ITR | = Irish Tax Review |
| JISLL | = Journal Irish Society Labour Law |
| MLJI | = Medico Legal Journal of Ireland |
| P & P | = Practice & Procedure |

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Author: Austen Morgan is a barrister in London and Belfast. He was involved in the negotiation and implementation of the Belfast Agreement, Ans advises a range of clients on its constitutional meaning.

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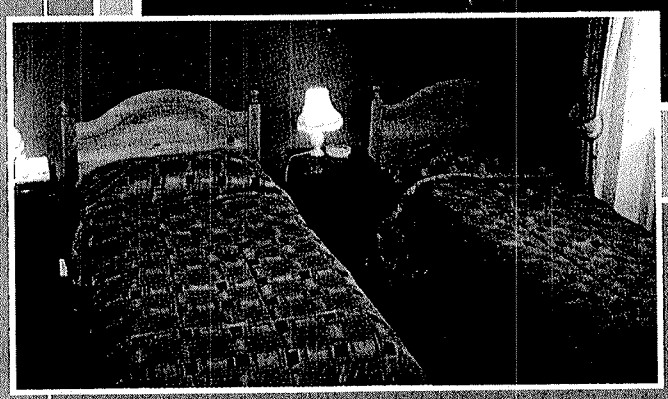

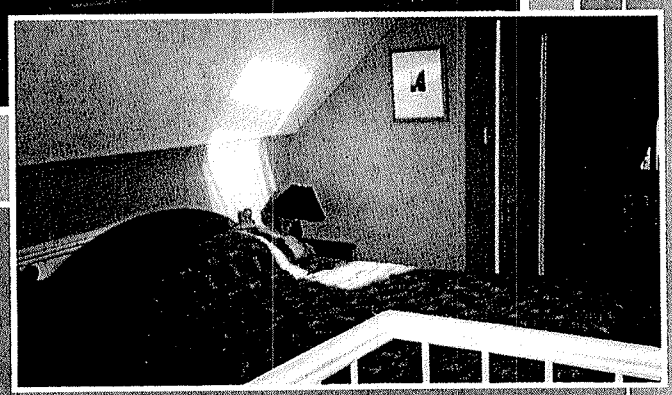

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# CONSTITUTIONAL ASPECTS OF NON-JURY COURTS

*In the first part of a two-part article,* ***Peter Charleton SC*** *and* ***Paul Anthony McDermott BL*** *examine the operation and continuing justification for the Diplock Courts and for the Special Criminal Court north and south of the border.*

## Introduction [1]

It is now over a quarter of a century since a commission headed by Lord Diplock recommended the abandonment of jury trials in Northern Ireland for certain types of terrorist case and its replacement by a tribunal consisting of a single judge.[2] A non-jury court also exists in Ireland, known as the Special Criminal Court. The purpose of this paper is to compare the workings of Diplock Courts and the Special Criminal Court and to see if there is anything to learn from their differences. The necessity for such a comparison is that the debate as to the future of the jury system, a debate which exists in every legal system, can be given new impetus by an assessment of the effects of the alternative, namely judicial fact finding, on the character of the criminal trial.[3] In the words of Jackson and Doran:

> "For many years now throughout the common law world, trial by jury has had to withstand sustained criticism from many varied quarters. Yet the would-be-dispensers of this near sacred institution have rarely given serious attention to the most obvious alternative of trial by judge alone. The Diplock court offers a unique opportunity for direct comparison of these two forms of trial."[4]

## The justification of special laws

At the outset it needs to be considered whether special laws against paramilitary violence can ever be justified in a liberal democracy. It is submitted that the answer is in the affirmative. Walker has argued that "[i]n principle, it is justifiable for liberal democracies to defend their existence and their values, even if this involves some temporary limitation of rights."[5] This viewpoint is reflected in the European Convention on Human Rights, which recognises that not all rights are absolute and which permits Member States to derogate on grounds of national emergency. In addition the Irish Supreme Court has recognised that constitutional rights must be balanced and that on occasion the public's interest in having a trial in the aftermath of a crime can justify the balancing of the rights of the accused; see *DPP v Special Criminal Court.*[6] Implicit in that judgment of the Supreme Court is the idea that the State has a duty to protect the life of its citizens. This concept was also recognised by the European Court of Human Rights in the *McCann*[7] case, where the threat to the lives of the population of Gibraltar was held to justify the decision of the English security forces not to attempt to arrest the IRA members at the Spanish border but rather to confront them later.

What sets subversive crime apart from ordinary crime is that it aims to terrorise and to destabilise political life. Terrorist groups are highly organised and it may be impossible to persuade members of the communities they operate in to place their lives at risk by giving evidence against them. Walker concludes :

> "From these factors, one can conceive it to be justifiable for a liberal democracy to design and to employ special laws against groups engaged in political or paramilitary violence. This conclusion does not, however, entail allowing liberal democracies *carte blanche* in response to how they react ...there must be limiting principles which reflect the value of constitutionalism and democratic accountability, which can be considered as universal moral goods and not simply autopoietic features of the British Constitution."[8]

The fact that special powers can be justified does not mean that one should not be vigilant in assessing their impact. As an editorial in the Bar Review recently noted, "[w]hen a democratic state takes swift and decisive action to protect its citizens and institutions there is always a danger that the frontier of fairness will be crossed and injustice may follow."[9] As a minimum it may be suggested that special laws should meet the following principles :

i) They should operate only in so far as is absolutely necessary;

ii) they should derogate as little as possible from the ordinary criminal law;

iii) they should be as clear as possible;

iv) they should be kept distinct from ordinary powers and should only be used against those for whom such laws are made necessary. The temptation to use special powers against other criminals should be resisted;

v) they should be reviewed at regular periods and should be repealed as soon as the conditions justifying their existence have ceased to exist: in other words 'no emergency, no emergency law.'

## Trial by jury

The jury as scapegoat?

Lord Devlin has suggested that we are too ready to dispense with the jury system in times of crisis of confidence in the criminal justice system:

> "There is in some minds a tendency to think that, if anything goes wrong or is thought likely to go wrong with the criminal process, the first thing to do is to get rid of the jury. Jury exclusion seems to have the same appeal as bleeding the patient had to the medicos of the 17th Century."[10]

The advantages of trial by jury

Blackstone described the jury in the following terms :

> "Trial by jury ever has been, and I trust ever will be, looked upon as the glory of English law...the liberties of England cannot but subsist so long as this palladium of liberty remains sacred and inviolate, not only from all open attacks (which none will be so hardy to make), but also from all secret machinations, which may sap and undermine it by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue and courts of conscience."[11]

The advantages of jury trial over the Diplock courts are as follows:[12]

i) Trial by jury bestows upon ordinary people the democratic right and duty to directly participate in decisions which gravely affect the rights of others.

ii) Trial by jury maintains contact between the criminal justice system and ordinary people and sustains their confidence in it.

iii) In a trial by judge alone the vital distinction between the admissibility of evidence and the weight which should be attributed to it is all but lost. In a jury trial the question of admissibility of evidence is decided in the absence of the jury. Thus, if the evidence is ruled to be inadmissible, the jury will never be exposed to it. However, in a Diplock trial, the judge cannot determine the question of admissibility without hearing or at least being aware of the evidence on which he has to rule. If he determines that the evidence is inadmissible, he must then attempt to put it out of his mind as he takes on the role of trier of fact. Greer and White have argued that, "[i]t would be very difficult for a judge genuinely not to be influenced by the fact that the accused had confessed, even though the circumstances of the confession rendered it inadmissible."[13] In addition, in a jury trial, even if the judge rules a confession to be admissible, it is still open to the defence to try to convince the jury that the circumstances in which it was taken render it untrustworthy. However, in a Diplock trial it will not be easy for a defendant to attempt "to persuade a judge who has already ruled that the circumstances of a confession do not render it inadmissible, that such circumstances nevertheless detract from its weight."[15]

iv) The separation of powers between judge and jury is particularly valuable in testing the credibility of witnesses. In the words of Greer and White, "[w]hereas a judge's legal training will lead him or her to concentrate on inconsistencies or the lack of them, a jury will take an overall view of a witness, bearing in mind his or her demeanour, attitude and so on."

v) Trial by jury could assist in solving the controversy surrounding the lethal use of firearms by the security forces in Northern Ireland.

vi) Through the contempt of court laws jury trial tends to reduce the latitude which the media and others might otherwise have to prejudice the outcome of criminal trials.

vii) Trial by jury provides a means by which each case is heard on its individual merits by a fresh tribunal of fact thereby avoiding the danger of case-hardening to which judges sitting alone may be prone.

## Non-jury courts in the Republic: background

Article 38 of the Constitution of Ireland provides:

> "1. Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.
>
> 2. The Constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law..."

It ill-behoves anyone from Ireland to criticise a non-jury criminal trial system. In offering some observations, we hope to expose the parallels that exist between the system in Northern Ireland and the system which prevails here. There are differences and, if it might be respectfully suggested, the adoption of some of the procedures and safeguards in place in the Republic might usefully be seen as a halfway house to a full return to what is regarded throughout the common law world as the ideal system of criminal trial, that of trial by jury. The largest common law jurisdiction, the United States of America, notwithstanding the presence of organised crime in its most vicious form for at least the greater part of the 20th century, has not abrogated the right to jury trial. That system shares with the Irish Constitution a division of crimes into minor and non-minor offences. For the latter one has an entitlement to jury trial, and for the former, in the United States by a judge-made rule, one may be tried by the equivalent of a magistrate. The basic underlying theory is clear: a citizen charged with a serious criminal offence has an entitlement to that safeguard which will ensure that he will not be convicted unless a randomly chosen group of his or her fellow citizens become convinced beyond any reasonable doubt that he or she committed the crime charged.

Perhaps in the United States of America, we do not know, government resources are such that jury trial may be maintained in the face of organised crime through the channelling of huge resources to the protection of jury members and the safeguarding of their families. It may also be that there is a fundamental difference between the two jurisdictions on this island and the United States. The revolution setting up fundamental democracy is two centuries old in the United States. The most extreme problems that remain are due to the remnants of segregation and racial discrimination. The revolution which re-established Ireland as

a nation is about eighty years old. The revolution was violent and established a division. Both violence and division remain with us to this day. In the result the Republic has its own equivalent of the Diplock Courts, the Special Criminal Court.

At the time of writing, the trial lists for the Special Criminal Court are booked until the end of 2001. The Court has no shortage of work. While it has not occasioned the degree of controversy that has been focused on the Diplock Courts in Northern Ireland, nor anything like the same degree of international attention, its continued existence is a cause for at least discussion.[16]

## The Special Criminal Court

From the founding of the Irish State special non-jury courts continued in operation, with short time gaps, in essence to allow the Government to suppress bodies of insurrectionists who refused to accept the division of this island into two jurisdictions. In the 1920's and 1930's these special criminal tribunals consisted of army officers. The Constitution of 1937 contemplated that special courts would continue to be provided for, in other words that on serious criminal charges certain accused persons would be deprived of the ordinary right to jury trial guaranteed by Article 34. Against a background of gathering war clouds in Europe, the government perhaps expected to be sucked into international strife or anticipated that the heroic British stand against the fascist menace (in which, notwithstanding neutrality, many of our countrymen joined) might occasion another insurrection similar to that of the civil war of 1921-1923.

Section 35 of the Offences Against the State Act 1939 provides that where the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, it may make and publish a proclamation bringing the Special Criminal Court into force. All offences scheduled in the Act must come before the Special Criminal Court for trial unless the Director of Public Prosecutions certifies that the ordinary courts are adequate in that regard. The list is similar to that contained in the Emergency Powers Act (Northern Ireland) 1972. It includes firearms and explosives offences under the 1939 Act. Until the Criminal Damage Act 1991, it also included all cases of criminal damage. Under the Act, where the Director of Public Prosecutions is satisfied as regards an ordinary offence, such as murder or robbery, that the ordinary courts are inadequate to secure the effective administration of justice, he may require that someone should be tried before the Special Criminal Court. The High Court has never set aside the Director's opinion either that the ordinary courts are adequate, or that they are inadequate. Unless an applicant can put forward a *prima facie* case of a serious irregularity which amounts to an impropriety he cannot obtain judicial review[18]. While the Court was set up to deal, in essence, with the threat of insurrection, it has been acknowledged many times by the Supreme Court that the Court can be legitimately used in other respects. Walsh J. has observed:

> "It is common knowledge...that what was envisaged were cases or situations of a political nature where juries could be open to intimidation or threats of various types. However, a similar situation could well arise in types of cases far removed from what one could call 'political type' offences. There could well be a grave situation in dealing with ordinary gangsterism or well financed...drug dealing or other situations where it might be believed or established that juries were for some corrupt reason, or by virtue of threats, or illegal interference, being prevented from doing justice." [19]

The use of referral to the Special Criminal Court has been exercised sparingly though it would be wrong to pretend that this is anything other than a significant power. The Director of Public Prosecutions does not give reasons as to why cases are referred to the Special Criminal Court. Juries are easy to intimidate. In April 1999 at the trial of Joe Delaney a jury spontaneously complained to Quirke J., sitting in the Central Criminal Court, that they felt themselves to be under threat and intimidation as a result of what was happening in court. The result was that the judge ordered the trial to be heard in camera subject only to the right of the press to remain. There is no doubt there have been instances of jury intimidation by parties who are utterly ruthless. Many readers will have seen the film 'The General' and it can be confirmed that the tactics of witness intimidation, of shooting the accused through the leg on the night before the commencement of his trial and (one tactic not mentioned in the film) having someone burst into court at the hearing of a robbery trial to roar at the accused that he was a child sex abuser, in the hope of securing the discharge of the jury on the grounds of prejudice, are more than the stuff of mere fiction. Organised crime has perhaps, in Ireland, had an easier soil in which to grow, be it for commercial or subversive motivation, because the division between the governed and those who govern still remains extremely strong in the Irish psyche.

The provisions of the Offences Against the State Act 1939 may be used against both subversive and non-subversive cases. In other words they may be used against persons who are suspected of involvement with the self-styled Irish Republican Army or persons who are suspected of involvement with commercial criminal organisations. The only test is whether the section giving power to the Garda Síochána draws a distinction between the types of crime targeted. Invariably, it does not. This means that the power to arrest and detain someone for up to forty eight hours in respect of a scheduled offence, for example possession of a firearm with intent to endanger life, is equally exercisable if the intent to endanger life is that of a woman who is suspected of murdering her husband, or a terrorist who is suspected of having murdered a soldier on this side of the border. In the result strong powers of arrest and detention have been available, and have been used, in non-subversive as well as in subversive cases.

Section 30 of the Offences Against the State Act 1939 constitutes the main arrest power. This provides not only that a person may be arrested on suspicion of having committed a scheduled offence, but also that any person who has any information in relation to the commission or intended commission of a scheduled offence may also be arrested, detained and questioned for forty eight hours. Hence, a person who returns from an armed robbery and has a chat about his whereabouts with his grandmother around a turf fire may be subject to such an arrest, but so can his grandmother. These powers are used and are the subject of huge legal debate as to the admissibility of evidence derived from them and, on occasion, have been the subject too of stringent judicial criticism.[22]

## Operation of the Special Criminal Court

Every Special Criminal Court has control of its own procedures, but in essence it models itself on the Central

Criminal Court. To be a member of the Special Criminal Court one has to meet the qualification requirement set out in section 39(3) of the 1939 Act:

> "No person shall be appointed to be a member of the Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant."

The above eligibility requirement includes former judges of the High Court and Circuit Court.[24] In law, therefore, one could be tried by an eighty year old former High Court judge sitting with two retired judges of the Circuit and District Courts. In practice, since 1986 the judges are all sitting judges. There must be three of them and they must be appointed by the government. In theory they hold office at the will of the government, but are, and always have been, utterly independent in the exercise of their judicial function, something with which no Irish government would dare to interfere. A decision is given by a majority and no dissent is to be disclosed.[25] The Court operates within an ethos of extreme legal formalism; for example errors in an indictment will destroy the validity of charges before it.[26]

## Safeguards

It seems to us that there are a number of important safeguards built into the Special Criminal Court system. The most important of them are intangible and difficult to articulate on the basis of legal rules. As Mr. Justice Kirby of the High Court of Australia has indicated, it is the human quality of individuals that make up a legal system as much as, or more than, their formal training and qualification that ensures its success in dispatching cases with a true regard for justice.[27] So, on a human basis it seems to us the points that tend to make the Special Criminal Court operate justly are as follows:

### Judicial experience of jury trial

The judges on the Special Criminal Court are drawn from all divisions of the courts in Ireland, but chaired by a High Court judge.[28] They have the advantage of sitting, as regards the High Court and Circuit Court judges, on a regular basis with juries. This provides them with a continuing insight into the methodology of juries and their propensity to convict and to acquit in certain types of cases. While this is intangible, an honest and earnest desire to apply the standards of a jury to the facts of the case before them at least continues to have that touchstone as a guiding principle in decision making.

### More than one judge

The judges on a Special Criminal Court sit as a panel of three and adjudicate as a panel of three. Thus there are at least the safeguards applicable to non-stipendiary magistrates in England with the additional safeguard of judicial training. We do not believe that anyone should be placed in the position of having to make a lonely decision as to the guilt or innocence of any citizen. Even under the old Soviet system of law a judge always sat in serious criminal cases with two lay assessors. The judges, when they retire, are at least not debating with themselves alone, but have some degree of pooling of resources, intelligence and common experience from which to draw. When one comes to the notion that has been unfairly ridiculed, of a judge "warning himself" of the dangers of relying on visual identification evidence or accomplice evidence,[29] there is at least the prospect of a genuine discussion between people on these issues and as to what dangers can be identified and perhaps the pooling of judicial experience as to problems with accomplices or visual identification in the past.

In addition to these two categories in Ireland, juries must be warned that they should have regard to the absence of corroboration when considering convicting someone on a confession, whether made to members of An Garda Síochána or otherwise.[30] A similar educated scepticism as to the vexed question of "dropped verbals" in the course of lengthy interviews might again usefully be pooled, and the warning, in that context, might have the advantage of a genuine human dynamic as opposed to the possibility that it may degenerate into a solo mind game.

The reasoning in the judgments of the Diplock Courts that we have read indicates the intellectual rigour of the individual judges employed on that court. However, if we might respectfully say so, there is a danger in a judge simply sitting alone. If one is to be deprived of a jury trial, surely something which does not simply rely on the good will and human qualities of a single individual is required. Some attempt must be made to gather at least some of the characteristics of a jury trial, in terms of a shared wealth of experience of a number of individuals, for such a system to command widespread trust. It seems to us to be off the point to argue that an individual lawyer has a wider depth of experience of the criminal justice system than a juror. He or she may well have very great experience and, as a result, he or she may well have deep seated views or a legalistic style of reasoning which can look upon the existence or non-existence of a reasonable doubt as being a legal formula instead of what it is, the judgment of ordinary people on a series of facts.

Furthermore, within a divided society it is surely incumbent to have a system of justice which, at a minimum, allows for the possibility of drawing from different strands within society and for their representation within the system of criminal adjudication. This is not to distrust any individual, but it is rather to attempt to set up a system in which an increasing number of citizens can have faith. What is seen to be done can be almost as significant as what is in fact done.

## Parallels between the Diplock Courts and the Special Criminal Court

So, let us look at the criticisms that are levelled against the Diplock Courts in Northern Ireland, as regards special rules of procedure, and see whether they find a parallel on this side of the border. The following emerges:

### Informers

It is alleged that informers are encouraged to give evidence through deals with the police, involving immunity from prosecution, reduced prison sentences in more comfortable conditions and new identities. The allegation is that this amounts to an inducement and, as such is (if the allegations are well founded) an alarming practice.[31] As a matter of fact, with

the growth of the international drug problem, courts in all common law jurisdictions are declaring that assistance to the police in putting away major offenders is to be taken into account to a significant degree in sentencing. For example, the New Zealand Court of Appeal in *Ulrick.*[32] stated:

> "The appellant gave all assistance he could in identifying his suppliers and disclosed to the police the whereabouts of the drugs he had abandoned. That in itself justified some reduction of the sentences that these very serious offences would have otherwise called for. The court wished to stress particularly that the revealing of suppliers can be crucial in suppressing the drugs trade. It is important that this should be recognised in a significant way on sentence."[33]

To stigmatise the Diplock Courts on the grounds that they seek to make use of co-operation from within criminal gangs is unfair. It also seems to us to be unfair to characterise the necessity to build a new life for a former offender, based on the imperative of preserving his life against well-founded threats, to be an inducement. Again, on the other side of the border we have, over the last couple of years, learnt of the necessity to implement a witness protection programme. There is no statutory requirement of corroboration before an accused can be convicted on accomplice evidence. Nor should there be. To introduce such a requirement is to pander to organised crime.[34] Instead, both jurisdictions require a warning on the dangers of convicting on such evidence.

Voir dire

It has been recommended that in order for justice to be seen to be done, pending the reinstatement of jury trials the issue on admissibility in cases where the admissibility of a confession is contested should be tried by a different judge to the one hearing the case. There are strong reasons for believing that this would not work. Firstly, and most importantly, it ignores the fundamental common law principle that the issue of admissibility is always ruled only on a preliminary basis. The accused is entitled to have that issue kept under review for the entire period of the trial. If at any stage a judge develops a reasonable doubt on admissibility the statement is then ruled out even though formerly it had been ruled to be admissible. Secondly, the idea of hearing cases in watertight compartments seems beyond practical necessity.

Recently, in a similar sense, this issue came for decision before the High Court and Supreme Court in Ireland. In *Director of Public Prosecutions v Special Criminal Court* and *Ward v Director of Public Prosecutions*, the prosecution had withheld the statements of about twenty witnesses on the grounds that these were either classic police informers or were persons in respect of whom the Gardaí had a well founded fear that the release of their names would lead to life threatening retaliatory measures. The accused argued that to have the court of trial reading prejudicial material would lessen his chances of receiving a fair trial. After a review of the authorities the Supreme Court held that since the Special Criminal Court was well used to dealing with the hearing of and exclusion of confession statements they would have no difficulty in following the prosecution's suggestion of reading the undisclosed material to see if any of it came within the innocence at stake exception, whereby it must then be disclosed to the accused. The Supreme Court reasoned that the presence of professional judges on the court was a sufficient safeguard for any risk of possible prejudice. In other words, the matter came back to a question of legal training and the integrity of the members of the court. In the end, we have to have faith in the personnel administering justice.[35] •

***To be continued.***

1. An earlier version of this paper was presented by the authors during the *Workshop of Experts on the Review of Criminal Justice in Northern Ireland* that was held in Belfast on 8th and 9th of June 1999 and which was organised, *inter alia*, by the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers. This earlier version of the paper was published at [2000] ILJ Yearbook 99 under the title iFrom Diplock Courts to Jury Courts?i
2. Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, Cmnd 5185 (1972). The Committee was chaired by Lord Diplock. In chapter 5, para 37 the Committee noted that iWhile the danger of perverse convictions by partisan juries can in practice be averted by the judge, though only at the risk of his assuming to himself the role of decider of fact, there is no corresponding safeguard in a jury trial against the danger of perverse acquittals.i Subsequently the Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland, Cmnd. 5847 (1975), chaired by Lord Gardiner, declared that trial by jury is the best form of trial for serious cases, and that it should be restored in Northern Ireland as soon as this becomes possible. However it went on to conclude that, for the present time, the Diplock courts should be maintained; see chapter 2, paras 24 to 33.
3. Jackson and Doran *'The Diplock Court : Time for Re-examination'* (1989) NLJ 464
4. Id. at p 466
5. Walker 'Anti-Terrorism Laws for the Future' (1996) NLJ 586. For a general discussion of the context of emergency law in *Ireland see Hadden, Boyle and Campbell Emergency Law In Northern Ireland : The Context* printed as chapter 1 of Jennings - Justice Under Fire (Pluto Press, 1988).
6. [1998] 2 ILRM 493
7. *McCann v UK*, Appl No 18984/91, Vol 324
8. Walker *Anti-Terrorism Laws for the Future* (1996) NLJ 586 at 587
9. (1998) 4 *Bar Review* 5
10. Foreword to Greer and White *Abolishing the Diplock Courts* (1986 ,The Cobden Trust)
11. *Commentaries* Book IV, p 350
12. The list that follows is drawn from Greer and White - Abolishing the *Diplock Courts* pp 11-12
13. "A Return to Trial by Jury", in Jennings, *Justice Under Fire* 52 (Pluto Press, 1988).
14. "A Return to Trial by Jury", in Jennings, *Justice Under Fire* 53 (Pluto Press, 1988).
15. "A Return to Trial by Jury", in Jennings,- *Justice Under Fire* 54 (Pluto Press, 1988).
16. See the short pamphlet by Robinson, The *Special Criminal Court* (Dublin, 1974); and Hogan and Walker, *Political Violence and the Law in Ireland* (Manchester, 1989) 227-244.
17. *O'Reilly v DPP* [1984] ILRM 224.
18. *Foley v DPP*, Irish Times Law Reports, September 25th, 1989.
19. *The People (DPP) v Quilligan and O'Reilly* (No. 1) [1986] IR 485.
20. See the judgement of the Special Criminal Court in the case of *The People (DPP) v Paul Ward*, 27 November, 1998, Unreported.
21. *The People (DPP) v Quilligan* (No. 1) [1986] IR 495. See the possibility of a further twenty four hours detention (three days in all) provided for in s 10 of the Offences Against the State (Amendment) Act 1998.
22. See the original judgment of Barr J. which led to the Quilligan case, cited above and the judgment of the Special Criminal Court in The People (DPP) v Paul Ward, 27 November, 1998, Unreported.
23. Offences Against the State Act, 1939, section 41, section 44.
24. *The State (Gallagher) v The Governor of Portlaoise Prison*, Unreported, 27 July, 1983; McGlinchey v Governor of Portlaoise Prison [1988] IR 671.
25. Offences Against the State Act, 1939, section 40.
26. *The State (DPP) v Special Criminal Court*, High Court, 19 May, 1983, Unreported.
28. Kirby ;*Modes of Appointment an Training of Judges - Common Law Perspective* (2000) CJJL Yearbook 81
29. As to the worth of this system see Robinson, *The Special Criminal Court* (Dublin, 1974) 28.
30. *No Emergency, No Emergency Law*, C.A.J., March, 1995, 58-70.
31. Criminal Justice Act, 1994, section 12.
32. [1981] 1 NZLR 310.
33. For a list of further authorities see Charleton and McDermott 'Drugs: The Judicial Response', (1998) 3 *Bar Review* 347 & 370.
34. *Director of Public Prosecutions v Special Criminal Court*; See the remarks of Carney J. in *DPP v Special Criminal Court*, High Court, Unreported, 13 March, 1998.
35. *Ward v Special Criminal Court* [1998] 2 ILRM 493.

# CONSENT TO TREATMENT BY PATIENTS - DISCLOSURE REVISITED

***Ciaran Craven BL*** *concludes his analysis of the recent decision of Kearns J in Geoghegan v Harris, and assesses its significance for the law relating to consent to medical treatment.*

## Standard of Disclosure (continued)

Thus, the duty of disclosure being self-evident, in assessing the standard of disclosure the threshold question was whether or not the chronic neuropathic pain suffered by the plaintiff was a "known complication" of the procedure. It was argued that what had occurred was unique, not just rare - the complication was unknown to the experts called on behalf of both the plaintiff and defendant. Kearns J found that (a) chronic neuropathic pain may result from trauma to any nerve, (b) such pain is not unknown within the facial innervation, (c) nerve damage of some description was eminently foreseeable, if not certain and (d) at the time this procedure was carried out, there was only "a retrievable archive of short duration" in respect of its complications. Accordingly, he concluded that nerve damage must be considered a "known complication" of the procedure that the plaintiff underwent and that the particular symptom of neuropathic pain was a subdivision, not in a different species of risk or unrelated risk. It was a foreseeable consequence of damage to the nerves in the relevant area of the chin. Once foreseeable, it was irrelevant that the particular manifestation of the nerve damage was very remote and unusual. It was within the range of what is known or can or should be known by a clinician - a complication of a generic type.[1]

Was there, then, an obligation to warn the plaintiff of this complication in this case? Applying and considering himself bound by the decision in Walsh, Kearns J considered that even though the views of the medical experts were all to the effect that no warning of the remote risk of neuropathic pain was necessary, there was, nevertheless, an obligation to warn. Having regard to the severity of the complication, that it was reasonably foreseeable, and also to the elective nature of the procedure,2 the conclusion might be considered to be one that would have been reached irrespective of which of the two approaches adopted in Walsh was applied. It will be recalled that the Supreme Court had effectively divided equally in Walsh. But, in the line of cases that followed, Farrell, Reid and Bolton (both in the High and in the Supreme Court), there was no critical analysis of the competing views expressed in Walsh. In Farrell, Walsh was not cited in the judgment at all. In Reid, the approaches of Finlay CJ (with whom McCarthy J agreed) - the Dunne principles - were applied without reference to the different views of O'Flaherty and Hederman JJ. Furthermore, although a unanimous Supreme Court in Bolton also applied the Dunne principles to that case, given that this was without reference to, or consideration of, the basis upon which the standard of disclosure had been determined at first instance - on ordinary negligence principles - it can hardly be regarded as having authoritatively determined the standard of care governing disclosure generally. In Geoghegan, for the first time in such a case, the relative merits of the competing approaches in Walsh were subject to judicial scrutiny and the professional negligence standard was found wanting. Finlay CJ, in *Walsh*, had applied the third Dunne principle (inherent defects) to the standard of disclosure as follows:

> "[I]f a medical practitioner charged with negligence consisting of a failure to give sufficient warning of the possible consequences of an operation, defends his conduct by establishing that he followed a practice which was general, ... it may be, certainly in relation to very clearly elective surgery, that the court might more readily reach a conclusion that the extent of warning given or omitted contained inherent defects which ought to have been obvious to any person giving the matter due consideration than it could do in a case of complicated medical or surgical procedures, and an allegation that, although generally adopted, they were inherently unsafe."[3]

Kearns J was of the view, '[w]ith considerable diffidence' that there was an 'unreality in relating or contrasting the duty of disclosure to or with complicated medical treatment which is a separate and quite different function.' He was also critical of the failure to elaborate on the criteria for intervention, other

than to indicate that a lower threshold might exist in such circumstances, and continued:

> "Where the medical professional standard is adopted, subject to a caveat or saver, then ... it makes no great sense to oust from any meaningful role the views of the self-same medical practitioners as to the materiality of a risk or the need for a warning ... Who else can supply evidence of inherent defects? To substitute its own view, effectively in opposition to the experts on whose views, at least in the first instance, it purports to rely, the court sets at nought the professional standard test and the result in the instant case is that the defendant must be found to be in breach of duty when not a single expert from either side believes a warning to be necessary."

Although the court has such a power (in reliance on *Roche v Peilow*) Kearns J concluded that the exception exists to address an 'obvious lacuna in professional practice usually arising from a residual adherence to out-of-date ideas'. It was, in his view,

> " ... an inappropriate mechanism to find fault with medical practitioners for failing to warn of very remote risks which for that very quality cannot be regarded as obvious or 'clear and present dangers' even on due consideration. ... the more remote the risk, the harder it is to judge any practice of not disclosing it to be 'blind, lax or inherently negligent'."

However, a lacuna in professional practice may arise other than from adherence to outmoded ideas. In *O'Donovan v Cork County Council*[5] upon which the decision in *Roche* was effectively premised, the practice of the defendant anaesthetist was not so much one that was out-of-date as that he failed to consider using a drug that was available to him. In *Dunne*, the practice of only monitoring one foetal heart in a twin labour was not alone not out-of-date, in the colloquial sense, but it was underpinned by a considered (albeit incorrect) assessment of its value and the difficulties of monitoring both hearts, by some of the most experienced obstetricians in the state. In addition, it was a near universal practice in this jurisdiction at the time. Insofar as a risk of a procedure might be remote, even remote risks are clear and, of course, they are always present. To characterise them as not being obvious is merely an alternative expression of their rarity. In this sense, remote risks and unforeseeable risks are not synonymous. They are eminently foreseeable, albeit rare. Insofar as it might be difficult to stigmatise the non-disclosure of very remote risks, Kearns J had already conceded that the 'ease or otherwise of the court's task is hardly an appropriate marker for intervention.'

Ultimately, Kearns J concluded that that the application of the reasonable patient test seemed more logical in respect of disclosure than the professional standard. Thus:

> " ... as a general principle, the patient has the right to know and the practitioner a duty to advise of all material risks associated with a proposed form of treatment. The court must ultimately decide what is material. 'Materiality' includes consideration of both (a) the severity of the consequences and (b) statistical frequency of the risk."

These two factors, of course, comprise half of the determinants of the standard of reasonableness in negligence. Cost of prevention can hardly be of significance. The social utility of non-disclosure could readily be subsumed into the so-called 'therapeutic privilege'. *Geoghegan*, in effect, is maintaining that ordinary negligence principles should apply to non-disclosure of risks - a finding not inconsistent with *Walsh*. However appealing and patient-oriented such an approach is, its application displaces the symmetry and coherence that would otherwise exist by adoption of the professional negligence standard. Thus, if Kearns J's analysis is approved by the Supreme Court, there will be a duty of care in diagnosis and treatment, and an antecedent duty of care in disclosure, but two different standards of care will apply. There is, of course, nothing impermissible or fundamentally undesirable in such a result. The effect of *Bolitho* on *Sidaway* (which was not cited in *Walsh*), as noted earlier, suggests a different conclusion.

**"If Kearns J's analysis is approved by the Supreme Court, there will be a duty of care in diagnosis and treatment, and an antecedent duty of care in disclosure, but two different standards of care will apply. There is, of course, nothing impermissible or fundamentally undesirable in such a result."**

In practical terms, however, Kearns J was not imposing an absolute standard. Although noting that *Walsh* (and *Bolton*) was solely concerned with materiality in the sense of severity of consequences only (without reference to statistical frequency),[6] a pragmatic approach was called for. Any absolute requirement to ignore frequency seemed, in his view, to be bordering on the unreasonable:

> "Each case ... should be considered in the light of its own particular facts ... to see if the reasonable patient in the plaintiff's position would have required a warning of the particular risk."

In a mix of risk assessment (involving such frequency), and, perhaps, therapeutic privilege, he noted:

> "The reasonable man, entitled as he must be to full information of material risks, does not have impossible expectations nor does he seek to impose impossible standards. He does not invoke only the wisdom of hindsight if things go wrong. He must be taken as needing medical practitioners to deliver on their medical expertise without excessive restraint or gross limitation on their ability to do so...[A]t times a risk may become so remote, in relation at any rate to the less than most serious consequences, that a reasonable man may not retard it as material or significant. While such cases may be few in number, they do suggest that an absolute requirement of disclosure in every case is unduly onerous, and perhaps in the end counterproductive if it needlessly deters patients from undergoing operations which are in their best interests to have."

It might be observed that, in the final analysis, a clear conceptual line between this approach and that favoured by Finlay CJ in *Walsh* is difficult to discern.

## Causation

In *Walsh, Varian, Bolton* and *Reid* the plaintiff - patients all failed on the facts - the trial court found, in all cases, that an adequate warning had, in fact, been given. No such findings were overturned on appeal. Accordingly, there is a dearth of Irish authority on how causation should be assessed in non-

disclosure cases, save a few *obiter* comments in *Walsh*. In *Bolton*, in relation to the alleged non-disclosure of the risks of the second operation, during which the plaintiff suffered damage to her laryngeal nerve - the risk of damage was 0.5 to 1% - and which it was admitted had not been disclosed, Geoghegan J noted:

> " ... the risk of this happening was small and I do not think that every conceivable contingency has to be explained to a patient. It was absolutely essential that the plaintiff should undergo a complete pneumonectomy and ... it [is] inconceivable that any additional information would have had the effect that she would have refused to have the operation."

The Supreme Court agreed that it was open to the trial judge to so find, in a manner that suggests that this judicial beneficence is predicated primarily upon a 'therapeutic privilege' that is recognised irrespective of how the standard of care in disclosure should be determined. However, the reality is that, on the facts of that case, this is a matter that goes to causation rather than assessment of the standard of disclosure. Furthermore, the test applicable was clearly objective.

However, on the issue of causation the authorities considered by Kearns J were noted to favour the application of both an objective test,[7] i.e. what would a reasonable patient have decided if the relevant risk had been properly disclosed, and a subjective test,[8] i.e. what would the particular plaintiff have decided had a proper warning been given. In Geoghegan, the High Court considered that the problem should be considered, in the first instance, from an objective point of view:

> "What would a reasonable person, properly informed, have done in the plaintiff's position? That is the yardstick against which the particular plaintiff's assertion must be tested. 'In the plaintiff's position' can be taken as meaning the plaintiff's age, pre-existing health, family and financial circumstances, the nature of the surgery - in short, anything that can be objectively assessed, though personal to the plaintiff. Purely subjective factors would include ... the dialogue between the particular patient and the medical practitioner, information to be gleaned from contemporaneous notes or correspondence, admissions to third parties (particularly contemporaneous admissions), and, perhaps most importantly, evidence of the actual conduct of the patient prior to surgery, given that actions generally speak louder than words."

In addition, where a shortfall of subjective information exists, the matter would also have to be decided on the court's own assessment of the objective probabilities. However, in the court's view an objective assessment alone was not sufficient:

" ... any objective test must sometimes yield to a subjective test when, but only when, credible evidence, and not necessarily that of the plaintiff, in the particular case so demands."

'If this dual and combined' approach smacks of pragmatism, Kearns J noted: 'so be it'. He stated:

> "It is in my view well justified if it achieves a better result in terms of deciding what probably would have occurred. At the end of the day it seems to me that the different approaches are more about methodology than any legal principle. It is an exercise in 'fact construction'. In any such hypothetical though necessary exercise there are dangers in dogmatically adopting one approach to the exclusion of the other, and certain aides to analysis would be forsaken by doing so."

Thus, in any fact-finding exercise as to what a plaintiff-patient would have done had he been properly informed of a particular risk, the first step is to enquire what a reasonable patient would have done in all of the circumstances. In this regard, the statistical risk is 'extremely important'. As Kearns J observed, there must be a point where certain risks are so remote that a reasonable person would be unlikely to be deterred by it. This, of course, accords with common sense, as the court noted, instancing the remote risks of various forms of travel. But the court also noted that risk frequency is hardly the sole factor - the magnitude of the risk must also be included in the analysis and both must also be balanced against potential benefit.

In *Walsh*, whether or not a procedure was 'elective' was regarded as going to the issue of the standard of disclosure (although it was expressed in terms of duty). Kearns J, however, considered its significance lay in causation: 'it is obvious common sense to hold that a person may forego surgery when he has a real choice in the matter.'[9] Perhaps the Supreme Court was being impliedly more paternalistic in *Walsh* when the elective nature of an intervention was seen as going to duty. It certainly raises a shadow of justifiable non-disclosure when the proposed treatment is clinically 'necessary' and 'urgent' and the medical practitioner forms the view that limited disclosure would be more beneficial than what would otherwise be required. 'Elective', in the clinical context, is generally used in contradistinction to 'emergency', with all its colloquial connotations. Kearns J did not consider that it could be supposed that 'elective surgery is an option to be declined at the slightest suggestion of a remote risk or danger.' However, in the final analysis all interventions are elective in the sense that every patient has a choice whether to undergo or to refuse a proposed treatment, even treatment that is urgently necessary.

**"While the court's inclusion of consideration, in *Geoghegan*, of the elective nature of a treatment in its analysis of causation is undoubtedly correct, that, too, is potentially paternalistic and merely shifts the source of that paternalism from the bedside to the bench."**

Arguably, *Walsh* goes no further than to deny a role for the therapeutic privilege in treatment that may be foregone without therapeutic detriment, e.g. taking part in clinical research or undergoing purely cosmetic interventions or those that are only minimally therapeutic, in the sense in which that word is conventionally understood. While the court's inclusion of consideration, in *Geoghegan*, of the elective nature of a treatment in its analysis of causation is undoubtedly correct, that, too, is potentially paternalistic and merely shifts the source of that paternalism from the bedside to the bench. By way of example, in the High Court in *Bolton*, as noted, Geoghegan J in

finding against the plaintiff on causation, observed it was 'absolutely essential' that she undergo the surgery. In that case, an objective test, although not expressed as such, was clearly applied. Applying an objective-subjective hybrid, as Kearns J suggests, is arguably capable of similar paternalism.

*Geoghegan*, while eschewing any hind of paternalism insofar as the standard of disclosure is concerned in the application of the 'reasonable patient' test, does not, however, consider the existence (or applicability) of the 'therapeutic privilege'.[10] In the circumstances of the case, it must be conceded, the matter would not ordinarily have arisen for consideration. Absent express judicial condemnation of the 'therapeutic privilege', as a matter of practicality, the elective nature of a procedure might usefully be considered a factor to be applied in analysis of both the standard of disclosure and causation. In any event, the application of the 'reasonable patient' test probably fails to sound the death knell for any such privilege. Insofar as that standard is preferred to the professional standard of disclosure, and as the elective nature of a treatment is considered to go to causation and not the standard of care, the source of the paternalism seems merely to have been displaced.

Where, on the scale between urgently necessary and purely elective (in the clinical sense), did the treatment in *Geoghegan* come? It had obvious cosmetic effects, but it also conferred real therapeutic benefit. However, applying the principles that he had set out, Kearns J found against the plaintiff on the issue of causation.

## Misrepresentation

Kearns J similarly found against the plaintiff on the issue of alleged misrepresentation (that the plaintiff would have no pain 'whatsoever') although he rejected the defendant's claim that a case in negligence for failure to disclose could not be pursued if, in reality, it was one of misrepresentation. Any such representation, if made,

> " ... would have to be seen and understood as limited to the context of the procedure itself. It had nothing to do with the long term extremely unusual condition ... suffered as a result of damage to his incisive nerve."

## The Inquisitive Patient

The accepted position appears to be that when a patient asks specific questions, in general he is entitled to accurate and full answers, insofar as the treating practitioner is able to give them. In essence, this may reflect no more than an aspect of the trust basis of clinician-patient relationships. The question as to whether failure to answer questions fully and truthfully when asked should more properly give rise to a cause of action in negligent non-disclosure or breach of some other legal right is, perhaps, academic. It might be noted that the breach is the same irrespective of whether the failure to give such answers is pre-operative in the case of operative risks or otherwise, e.g. in the context of the non-disclosure of a terminal illness.

In the case of the former, having regard to the heavy obligation imposed on medical practitioners by *Walsh*, Kearns J was of the view that any consideration of the so-called 'inquisitive patient'[12] is 'subsumed by the onerous obligations of disclosure set down by the Supreme Court [in *Walsh*].' On the facts of the case, he was not satisfied that that the plaintiff had made out any case that he had asked a question that could reasonably be construed as putting him into the category of an 'inquisitive patient'.

## Conclusion

In the circumstances, although he succeeded on breach of duty, the plaintiff in *Geoghegan* ultimately failed on causation, and in misrepresentation. The next part of Kearns J's judgment will address negligence in the carrying out of the procedure itself. As John Healy observes in his *Medical Negligence: Common Law Perspectives*[13] the North American experience is that claims in non-disclosure are frequently ancillary, appended to malpractice cases. Nevertheless, such cases raise issues of fundamental importance that may greatly vex many medical and other practitioners, especially those with highly interventionist practices. The importance of *Geoghegan* is that it subjects the applicable principles to very close judicial scrutiny for the first time since *Walsh*, eight years ago. Kearns J's reasoned preference for the 'reasonable patient' test over the professional standard raises the prospect for a definitive resolution of the unsatisfactory state of the law in this area left in the wake of Walsh. The preponderant judicial approach, since 1995 at least, is in the direction of patient autonomy.[14] It remains to be seen if this provides any panacea for either patients or clinicians. nature of the surgery was more relevant to the issue of causation than to assessment of the standard of disclosure. ●

1. Although logically appealing, clinically such a conclusion could be considered strained and echoes the approach of the Supreme Court in *Reeves v Carthy & O'Kelly* [1984] 348 to determining whether the damage suffered was of a kind that was reasonably foreseeable.
2. However, Kearns J was also of the view that the elective 3. [1992] 496 at 511.
4. [1986] ILRM 189.
5. [1967] IR 173.
6. [1992] IR 496 at 510 per Finlay CJ and *Bolton v Blackrock Clinic & ors* Supreme Court Unreported Judgment January 23, 1997 per Hamilton CJ: an obligation to 'inform [the patient] of any possible harmful consequence'.
7. *Canterbury v Spence* (1972) 464 F 2d 772 (DC) and *Reibl v Hughes* (1980) 114 DLR (3d) 1.
8. *Ellis v Wallsend District Hospital* [1989] 17 NSWLR 553, *Bustos v Hair Transplant Pty Limited & anor* (Unreported Judgment, Court of Appeal, New South Wales, April 15, 1997), *O'Brien v Wheeler* (Unreported Judgment, New South Wales, May 23, 1997), Chatterton v Gerson [1981] 1 QB 432, *Hills v Potter* [1984] 1 WLR 4, *Smith v Barking* HA [1995] 5 Med LR 285.
9. In this, Kearns J cited with approval from J White (1996) *Medical Negligence Actions*, Oak Tree Press, Dublin, page 190.
10. Other than in a passing quotation in the context of the 'inquisitive patient'.
11. See, for example, the passages from *Sidaway v Bethlem Royal Hospital Governors & ors* [1985] 1 All ER 643 cited by Kearns J.
12. Kearns J considered that the doctrine ëif such it can be called' arose out of the limited duties imposed by *Bolam*.
13. (1999) Sweet & Maxwell, London, page 104.
14. In this regard, *Ewing v North Western Health Board & anor* High Court, Unreported Judgment, December 2, 1998 (O'Donovan J) seems unusual.

# URE ECONOMIC LOSS - CAN DEFENDANTS AVOID PAYING FOR IT?

***Byron Wade BL** considers the arguments for limiting legal liability for pure economic loss in the Irish law of negligence.*

## Introduction

The aim of this article is to examine the bounds of legal liability for pure economic loss in the Irish law of negligence, more specifically in instances where loss is alleged that is not consequent on physical injury to person or property.

There are two reasons for discussing this area. Firstly, if, as appears, the Irish courts are likely to adopt a liberal approach to the question of who may claim for pure economic loss, this may result in an increase in the number of plaintiffs with a valid cause of action in negligence. Secondly, whereas liability for pure economic loss has long been recognised only in cases of express or implied negligent misstatement, which forms a special exception within this area,[1] there are tentative signs that the Irish courts may be prepared to clarify this otherwise uncertain aspect of the law of damages[2] by reference to first principles, i.e., that a defendant is liable for reasonably foreseeable loss, of whatever nature, arising from his commission of a tort. If so, and allowing always for the reduced force of precedents in the law of damages,[3] it may be anticipated that the degree of unpredictability and variability arising from this area's extensive reliance on policy considerations,[4] frequently coloured by the consideration that liability for pure economic loss is a "discovered" concept rather than a long-established duty,[5] may be reduced.

**'If, as appears, the Irish courts are likely to adopt a liberal approach to the question of who may claim for pure economic loss, this may result in an increase in the number of plaintiffs with a valid cause of action in negligence".**

Before turning to consider the present and former law on the subject, it is appropriate to define the terms that will be variously used in this article, as follows: "economic loss" is defined as financial loss other than the loss that is personal injury or physical damage to property;[6] a "pure economic loss" is a financial loss which is not causally consequent upon physical injury to the plaintiff or the plaintiff's property.[7] Pure economic loss can be inflicted on a plaintiff directly or indirectly. An example of "directly inflicted pure economic loss" is where D negligently cuts off the electricity supply to P's place of business, without causing any physical damage to the property or person of P. An example of "indirectly inflicted pure economic loss" is where D damages T's bridge over a river (T being a third party), thereby denying use of the bridge to P's haulage business, leading to increased costs for P.[8] This is also called "relational economic loss."

## Present Irish Law

Historically, defendants could not be made liable for pure economic loss suffered by plaintiffs.[9] Whereas it was acknowledged that this position could lead to injustice to plaintiffs, such instances of injustice were, as a matter of practicality, outweighed by the advantage of avoiding a potential multitude of remote and sometimes doubtful claims from a much wider range of plaintiffs. Thus, economic loss had to be consequent on personal injury or physical damage to property in order to be recoverable. In Ireland, this historic common-law position changed only in 1964 when the High Court made an exception for cases of negligent misstatement.[10]

The present Irish position on whether pure economic loss is generally recoverable is not clear. The tenor of the Irish judgments suggest that it is recoverable, but there may be situations in which it is not, or at least where such loss is not fully recoverable. However, as a tentative statement of the applicable Irish law, it may be said that defendants can generally be liable for pure economic loss. Such liability derives as a matter of first principle from a duty of care established

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upon proof of sufficient proximity and foreseeability, subject to any compelling exemption based on public policy. In other words, the law relating to pure economic loss is the same as that applicable to loss generally. This conclusion receives strong support from a dictum of Flood J. in the recent case of *McShane Wholesale Fruit & Vegetables Ltd. v. Johnston Haulage Co. Ltd,*[11] to the effect that an action "will fail not because the damage is of a particular type" but because of a lack of proximity or foreseeability between the parties. However, as appears from the analysis which follows, it is arguable that the position in Ireland after *McShane* is still unclear because of the particular context of that case.

In fact, it appears that there may never have been a reported case of pure economic loss simpliciter in Ireland. In particular, it seems that there is no reported Irish case about pure economic loss, as I define it, outside of the exceptional area of negligent misstatement referred to above. *Siney v. Dublin Corporation*[12] involved the established exception for negligent misstatement. *Colgan v. Connolly Construction Co (Ireland) Ltd.*[13] involved a physical defect in property (though this case might arguably involve pure economic loss).[14] *William Egan & Sons Ltd. v. John Sisk & Son Ltd. & Another*[15] involved economic loss consequent on water damage to premises. *Ward v. McMaster & Ors.*[16] also involved the exception for negligent misstatement. *Sweeney v. Duggan*[17] involved economic loss consequent on personal injury, and *McShane* itself was concerned with economic loss consequent on fire damage to premises.

## The English Position

Although it must be conceded that some recent developments in England do not favour defendants, such as the expansion of their potential liability under the "negligent misstatement" exception (there called the "Hedley Byrne doctrine"),[18] on balance England remains a good source of persuasive authorities supporting arguments that defendants should not have to pay for pure economic loss. Even where the rules against recoverability have on occasion been relaxed, the English experience demonstrates a distinct unease with allowing liability for pure economic loss.

Thus, in *Junior Books Co. Ltd. v. Veitchi Co. Ltd.*[19] the House of Lords allowed a claim for pure economic loss in a negligence action where there was no contractual relationship between the parties but where, according to the Court, "the relationship between the parties was as close as it could be short of actual privity of contract." Because of its particular facts, this decision was distinguished in a succession of cases over the following years[20] until, eventually, it was definitively confined to its own facts for other reasons.[21] More recently, in *Van Oppen v. Clerk to the Bedford Charity Trustees,*[22] Balcombe LJ formulated a comparatively liberal three-step test[23] for establishing liability for pure economic loss, namely, (i) foreseeability of harm; (ii) proximity; and (iii) that it be just and reasonable to impose such liability. However, Balcombe LJ's application of his own test led to a finding that such liability could only be imposed "in the exceptional case." [24]

Another example demonstrates a change in judicial thinking on the subject which the Irish courts might choose to adopt. In *Anns v. Merton London Borough Council*[25] (1978), the House of Lords discovered an exception to the old rule and held that a local authority could be liable in pure economic loss to its tenant. This new exception was stated to be based on proximity factors and the surrounding statutory regime. After an initial period of expansiveness[26], the English courts began to retrench from this new generosity to plaintiffs in 1986 when they denied that a defendant could be liable for relational economic loss.[27] In 1988[28] the House of Lords voiced doubt about the *Anns* judgment and in 1990[29] their lordships overruled it as being wrongly decided. Since then, it seems that there is in England no exception to the general non-recoverability of pure economic loss in "local authority" cases.[30]

## Other Common Law Jurisdictions

On looking at other distant common law jurisdictions, a mixed picture emerges which contains about an even number of liberal and strict approaches to the recoverability of pure economic loss.[31] Australia appears strict on public authorities' liability but liberal on relational economic loss; New Zealand is liberal, whereas Canada has different tests for defendants according to whether they are public authorities or private persons. All in all, the comparative balance is probably tipped in favour of defendants by the position in the United States where there is no general entitlement to recover pure economic loss and only a limited number of narrow exceptions wherein plaintiffs may recover such loss.[32]

## Avoiding Liability for Economic Loss in Ireland

As indicated above, the judicial trend in Ireland seems to be towards making the test of liability for pure economic loss the same as for all other kinds of loss. Flood J.'s judgment in *McShane* relies upon the Supreme Court decision in *Ward v. McMaster* in order to identify the present standard for recoverability of pure economic loss in the law of negligence, as follows:

(a) a sufficient relationship of proximity between the parties, and
(b) "reasonable contemplation of likely damage" [foreseeability], subject always to
(c) any compelling exemption based on public policy.

However, a special discussion of this test is still warranted

because of the exceptional indefinability of pure economic loss, the confused precedents and the scope for policy in that test. "Proximity" especially, but also "foreseeability", are hurdles which plaintiffs frequently fail to clear. For example, in the area of relational economic loss, parties who are not directly injured by the defendant's alleged negligence face a plethora of problems in establishing sufficient proximity to the defendant. Defendants might also expect to benefit from a narrow definition of proximity. The Supreme Court has twice held that sufficient proximity was established in Siney and Ward only because of the statutory duty imposed on the defendants in those cases to house the plaintiffs: such proximity did not extend to persons inconvenienced by works licensed by local authorities.[33]

In other cases, it may be that plaintiffs have to prove that the defendant did a conscious and positive act such that he 'assumed responsibility' to them for his actions. In England, the House of Lords has reaffirmed that that is the principle governing 'proximity' in this area,[34] and it arguably governs the two relevant Supreme Court cases.

On the other hand, McCarthy J. in one of the majority judgments in Ward explicitly refused to adopt another step protecting defendants, namely the English requirement that it be "fair and reasonable" to impose liability.[35] Furthermore, even if Irish courts decide to follow suit in adopting the assumption of responsibility test, it has been observed that the English courts frequently refuse to insist rigidly on this element.[36]

## "Compelling Exemptions"

Flood J. in *McShane* gave no example of a "compelling exemption based on public policy", and neither did McCarthy J. in Ward. McCarthy J. did state that it must be "very powerful" in order to exempt defendants from liability. However, one is basically free to speculate on what a "compelling exemption" might be. Two factors may favour a defendant in establishing a "compelling exemption". This area of law is exceptionally dependent on public policy considerations, leaving a necessarily wide scope for them. No court can conceivably ignore the degree of remoteness of loss or plaintiff (otherwise, defendants might have open-ended liability) so the policy underlying the cut-off point must be addressed.

It is submitted that the most obvious candidate for a "compelling exemption" (and the one most useful to defendants) is some variation of the old "floodgates" argument. It is conceded that McCarthy J. in *Ward* seemed to be unimpressed by it, but the need to avoid a situation of "liability in an indeterminate amount for an indeterminate time for an indeterminate class"[37] is logically inescapable. The Irish courts may view this argument unfavourably, seeing it as a means for defendants to return to the historic Irish position. However, the courts will have regard to their duty to administer justice and will (it is contended) adopt at least as much of the "floodgates" policy as is needed to stop abuse of the courts' process by multitudes of plaintiffs' claims clogging the system.

For this reason, it may be anticipated that defendants will continue to have a good chance of escaping liability for certain types of very remote relational economic loss, based on a suitably crafted "compelling exemption". There may even be scope to widen such an exemption based on a policy against bankrupting people and enterprises from multiple claims.[38] Furthermore, other "compelling exemptions" may be discovered, e.g., in so-called 'wrongful birth' cases where policy may well prevent the cost of rearing a child from being treated as an item of special damage.[39]

## The Scope of McShane

For defendants, the historic Irish position is both better in substance and less unpredictable in application than the position which appears to apply at present. If the decision in *McShane* is correct, Irish law threatens a general imposition of liability for pure economic loss by reference to a test which is vague and prone to be policy-driven. However, there are good reasons for doubting whether the statement in *McShane* has general application or, alternatively, for questioning its authority and correctness. One argument is to the effect that the *McShane* case cannot be a binding precedent because the judgment is almost wholly obiter, arising on a trial of a preliminary issue as to "whether economic loss consequent on a negligent act is recoverable as damages within this jurisdiction".

The answer is unarguably "yes", because it is recoverable under at least some circumstances no matter what interpretation of the authorities is taken. On this view, any elaboration on the "yes" would be *obiter* and so potentially non-binding on inferior courts. A less artificial argument is to the effect that the McShane case was not about pure economic loss at all. The case arose out of a fire that started in the defendant's premises which adjoined the plaintiff's premises. The fire caused the electricity supply to the plaintiff's fruit and vegetable business to be cut off, causing economic loss. As Flood J. recited, the plaintiffs claimed that the fire damaged their premises. If the electricity cut-off was caused by the damage to the plaintiff's premises, then the loss sustained thereby was not pure but consequent economic loss, which has always been recoverable. On this analysis, Flood J.'s development of the *Ward* test for liability could validly be described as *obiter*.

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## The Nature of the Authorities

Another argument is to the effect that none of the recent Irish cases apply generally to situations of pure economic loss. As stated above, it is arguable that the two Supreme Court cases, *Siney* and *Ward*, can validly be described as

applying only to situations of negligent misstatement. Dicta in the four High Court cases which go beyond those situations, in *Colgan, Egan, Sweeney and McShane,* could therefore be validly described as being unsupported by clear Supreme Court authority. Furthermore, *Egan, Sweeney and McShane* appear to involve consequent economic loss, not pure economic loss. It is true that a dictum of Henchy J. in Siney is to the effect that pure economic loss may be recoverable generally against builders and local authorities in like cases.[40] However, given that *Siney* fell within the "negligent misstatement" exception, that *dictum* could arguably be obiter. In other words, a reasonably strong argument may be made that the *McShane* decision was based on a mistaken view of the applicable law, and that in the absence of clear authority the general and historic common law rule that defendants are not liable for pure economic loss must continue to apply.

There are several reasons why an Irish court might limit liability along these lines. First, the above two Supreme Court cases come within a recognised exception to the historically more strict position. Secondly, persuasive comparative authorities favour incremental development of the historic position rather than a clean break with it.[41] Thirdly, the weight of academic opinion supports keeping liability for pure economic loss within recognised exceptions.[42] In addition, the historic position can be said to have a good foundation in policy in that pure economic loss is rarely imposed in circumstances which could be regarded as fair from the standpoint of plaintiffs.[43] Thus, as a matter of policy, the occasional injustice in denying recovery to a plaintiff could well be outweighed by the benefit of avoiding situations of indeterminate liability to numerous, remotely connected plaintiffs.

## Conclusion

At present, it appears that defendants enjoy no particular protection from claims for pure economic loss in the Irish law of negligence. On the other hand, as outlined in this article, there may be good grounds for advising and arguing that the broad approach of Flood J in the *McShane* case does not represent a definitive statement of Irish law. In an appropriate case, it may be left to the Supreme Court to consider whether, as in England, liability for pure economic loss even outside the area of negligent misstatement should not be predicated on an assumption of responsibility in all the circumstances of the case. ●

1. McMahon & Binchy, op. cit. No exception for 'product liability' cases would seem to exist in Ireland, despite suggestions to the contrary. Dicta in the leading Irish and English cases on negligence for defective products makes it clear that they concern not pure but consequent economic loss: cf. Power v. Bedford Motor Co. [1959] I.R. 391 at 408 (Sup. Ct.) and Donoghue v. Stevenson [1932] A.C. 562 at 599 (HL).
2. McMahon & Binchy, Irish Law of Torts (2nd ed., 1990), p. 145.
3. See infra, 'The Nature of the Authorities'.
4. Gerber Garment Technology Inc. v. Lectra Systems Ltd., The Times, 17 January 1997, per Staughton LJ.
5. Cf. Halsbury's Laws of England (4th ed., 1998 reissue), vol. 12, para. 822, fn. 1.
6. Feldthusen, Economic Negligence (3rd ed., 1994), p. 1.
7. Feldthusen, op. cit., p. 1.
8. Bernstein, Economic Loss, (1st ed, 1993), p. 131.
9. Cf. Dublin Port & Docks Board v. Bank of Ireland [1976] IR 118 at 141 (Sup. Ct.)
10. Cf. Securities Trust Ltd. v. Hugh Moore & Alexander Ltd. [1964] IR 417
11. [1997] 1 ILRM 86 (Flood J.)
12. [1980] IR 400 (Sup. Ct.). In this case, the defendant corporation negligently misrepresented, by implication, that a flat was not unfit for human habitation.
13. [1980] ILRM 33 (McMahon J.)
14. It is established that a defect in an object, which has been in the object since it was made, cannot be equated to 'physical damage' to the object. Hence, damages for repair of an inherent defect, that has itself caused no injury to person or property, appear to be damages for pure economic loss. This point is considered in the Junior Books case (infra, note 19), per Lords Fraser, Roskill and Russell.
15. [1986] ILRM 283 (Costello J.)
16. [1988] IR 337 (Sup. Ct.), in which the defendant county council was found to have negligently misstated that one of its houses was free from structural defects.
17. [1991] 2 IR 274 (Barron J.)
18. cf. Henderson v. Merrett Syndicates Ltd. [1994] 3 All ER 506 (HL), and White v. Jones [1995] 1 All ER 691 (HL)
19. [1983] A.C. 520 (HL)
20. O'Sullivan (1991) vol. 1 Irish Student Law Review 114
21. cf. Murphy v. Brentwood District Council [1991] 1 AC 398 (HL) at pp. 472, 491 et seq.
22. [1990] 1 WLR 235 at 251.
23. I.e., the test in Caparo Industries plc v. Dickman [1990] 2 WLR 358 at 365.
24. See also McFarlane v. Tayside Health Board [1999] 4 All ER (HL) 990-991, in which the House of Lords identified a new policy reason, besides the "floodgates" argument, to restrict such liability, i.e. the impossibility of knowing whether a child, born after a sterilisation operation, will bring the plaintiff parents more joy or sorrow.
25. [1977] 2 All ER 492 (HL)
26. Culminating in the Junior Books case, op. cit., note 19.
27. Cf. Leigh & Sillavan v. Aliakmon Shipping Co. [1986] AC 785
28. Cf. D & F Estates v. Church Commissioners [1988] 2 All ER 992 (HL) at pp. 1003 & 1013.
29. Murphy v. Brentwood District Council, op. cit. note 23.
30. Feldthusen, op. cit., note 1, p. 275.
31. Cf. Feldthusen, op. cit., note 1, p. 4 and Bernstein, op. cit. note 3, pp. 367-371.
32. Feldthusen, op. cit., note 1, p. 5 and Bernstein, op. cit., note 3, p. 371.
33. Cf. Sunderland v. Louth County Council [1990] ILRM 658 at 662, affirmed in Convery v. Dublin County Council [1996] 3 IR 161.
34. Per Lord Goff in Henderson v. Merrett Syndicates Ltd., op. cit., note 27, pp. 518-526.
35. Part of the Caparo Industries test, op. cit., note 18.
36. Bernstein, op. cit., note 3, pp. 29-30.
37. Per Cardozo CJ. in Ultramares Corp. v. Touche (1931) 255 NY 170 at 179.
38. Perhaps along the lines of the policy behind the concept of limited liability companies, i.e. the fostering of risk-taking and entrepreneurialism.
39. See note 24 above.
40. Op. cit., note 11, p. 421.
41. Cf. White v. Jones, op. cit., note 27, per Lords Browne-Wilkinson and Nolan.
42. Feldthusen, op. cit., note 1, pp. 16-21.
43. It has been very rare in Ireland, if this article's view of the facts in the quoted cases is right - see 'The Nature of the Authorities' ante.

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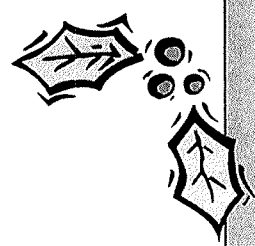

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# MPLOYERS' LIABILITY IN THE ELECTRONIC WORKPLACE

*In concluding her examination of legal issues arising from the use and abuse of e-mail and Internet communications in the workplace,* ***Ann Power BL*** *outlines the privacy, copyright and discovery issues that these technologies are likely to raise. The author also identifies certain elements which an employer's IT policy statement might contain.*

## Restricting Employees' Access to the Internet

Employees may defame and/or cause injury to third parties by transmitting nasty or vulgar material that has been downloaded from particularly offensive web sites. The Internet is a world-wide, global computer network. No one person is responsible for its management and, all things considered, it operates with few, if any, controls. Enormous data transfers take place on the Internet each day. The Internet allows employers and their employees to connect with others around the world to exchange ideas and information for very little cost. However, in the course of their employment, employees may be in a position to access a myriad of non job-related sites through the Internet, including news and entertainment pages as well as pornographic and other inappropriate sites.

Employees may not realise that Internet "surfing" leaves a digital trail. For example, an Internet provider may automatically record each individual's use of Web sites, news groups and e-mails. This record of the sites visited by employees may be used in litigation against the employer. In one case, evidence of repeated employee visits to sexually explicit web sites was used to show that the employer maintained a sexually permissive work environment.[1]

Employers may wish to obtain software that denies access to any sites containing potentially offensive images. Such software can also be used to maintain employee productivity by denying access to other non work-related sites. However, it is still possible for employees with modems to install their own Internet access software. Employers may, therefore, wish to consider purchasing software to alert them to any Internet access software.

A court of appeals found a Virginia law prohibiting state employees from accessing sexually explicit material over state-owned computer networks constitutional.[2] The employees argued that the law was an unconstitutional restriction on protected speech in violation of the First Amendment. However, the court held that the law regulated speech of individuals speaking in their capacity as public employees rather than as citizens. Thus, the state's interest in banning sexual material from its networks outweighed the public employees' interest in expression on sexually explicit matters. Although this ruling applies specifically to public employees and public employers, the decision may encourage private employers to ban sexual materials from their networks as well.

## E-mail/Internet Usage and the Employee's Privacy Rights

The developing doctrine of employee privacy, in the United States, and the dramatic expansion of the electronic workplace have combined to create a fertile source for litigation in that jurisdiction. The development of information technology, which greatly expands the amount of information that can be obtained about an employee, taken together with the mass availability of such information, has the potential to eclipse an employee's right to privacy in the workplace. Theoretically, the electronic manager has the ability to monitor an employee's every move. The manager has the power at her fingertips to monitor an employee's conversations, computer keystrokes, performance standards and whereabouts on a minute-by-minute basis.

An increasing number of employers are starting to take advantage of new technologies for surveillance and electronic monitoring of employees. According to a report by the American Management Association, sixty-three percent of midsize to large companies conducted some form of electronic surveillance as of January 1999. The *Wall Street Journal* reported that a 1993 survey of three hundred and one employers found that twenty-two percent of the employers surveyed admitted to monitoring employee voicemail, e-mail or computer files.[3] Moreover, many of those employers engaged in the monitoring without obtaining employee consent, and in many cases without any employee knowledge of the monitoring whatsoever. Smaller employers are no exception, with some parents who work outside the home installing electronic surveillance techniques to monitor the employment practices of their nannies and child minders.

A survey conducted by one research group disclosed that the vast majority of British companies check which web sites their employees have visited.[4] The survey came one week after the so-called "Love Bug" virus first hit computer screens and e-mail attachments, wreaking chaos within networks and costing damage estimate at $7bn. The survey found nearly two thirds of British businesses limited the use of personal e-mail and time spent surfing the web. Companies also used firewalls and keyword searches to prevent staff from accessing pornographic and other potentially offensive material. Downloading infected software was the biggest fear for large firms, and was mentioned in eight per cent of company Internet policies. Arguably, this could be characterised as a legitimate business purpose.

The critical question raised by the power of electronic monitoring is how to balance an employee's right of privacy against the availability of information that may be of tremendous value to an employer. An employer must address this balance and establish rules and regulations regarding its formation. A number of American cases indicate how the courts in that jurisdiction deal with the delicate balancing of rights. In a class action suit, *Flanagan v. Epson Am.*,[5] an American employer was charged with violating several of its employees' privacy rights by eaves-dropping and intercepting the employees' e-mail messages. In another case, proceedings filed in a federal court in Rochester, New York, provide a good example of the kind of problems employers can expect if they do not address the monitoring issue. The court's judgment, when delivered, may help define the scope of an employer's right to monitor employee voicemail. The action, taken by a former manager of a McDonald's restaurant, alleged that McDonald's violated various statutory provisions protecting employees' privacy by monitoring and seizing his voicemail. The facts of the case were that the manager was having a relationship with another employee of McDonald's, during which both left each other private "aural" messages on each other's voicemail. A co-employee accessed the two employees' voicemail boxes and transmitted the sexually explicit messages to the voicemail of the owner of the restaurant. The co-employee also made tape recordings of the messages and re-played them to the manager's wife. In the suit, the former manager alleged he was told his voicemail was private and that only he had the code to access the voicemail. He also alleged that he was told the use of voicemail was not limited to work-related messages. The manager further alleged he was fired when he complained to this boss about the "invasion of privacy" and sought punitive damages.[6] The outcome of those proceedings is awaited.

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In February of this year an American court found that an employee did not have a reasonable expectation of privacy with regard to any of his Internet activity at work. In *United States v. Simons*[7] the court found that the complainant's rights were not violated when his employer searched his computer workstation and found illegal pornographic images. It held that the employee had no expectation of privacy because the employer had a policy that clearly stated the employer would monitor Internet use. This case illustrates the importance to employers who use IT facilities of drafting, promulgating, and enforcing a clear Internet policy. In the States, many such policies explicitly state that the employer has the right to monitor all computer and Internet use and that the employee has no expectation of privacy with regard to his or her computer use or computer communications at work. The policies are then disseminated to employees and many employers have training and development programmes explaining the policy content and reminding employees that the employer has the right to access e-mail and Internet files.

Some employers in the United States are also providing staff with Voicemail Policy Statements explicitly confirming that voicemail is the property of the employer and is not to be used for personal matters. However, even with such policies in place, American employers tend to be advised by their lawyers not to electronically monitor or record employee conversations without advance notice to and consent of all parties involved, or without a strong, legitimate business purpose for such activity and the advice of counsel. The potential civil and criminal penalties for violations are quite serious and appear to reflect an overall orientation against surveillance and recording activities.

## Customer Service Monitoring

Employers may also argue that they must, at times, monitor their employees in order to maintain and improve productivity. For instance, some airline employers may monitor telephone conversations of airline reservation clerks, customer service personnel, and telephone operators in order to improve overall performance. Employers may monitor these calls in different ways, including telephone call accounting monitoring (where the number of calls per hour and the length of each call are recorded), and service observation monitoring (where supervisors listen in on calls).

In the United States, the rules on monitoring telephone conversations vary from state to state. For example, under California law telephone monitoring is prohibited unless *both* parties consent.[8] Generally, the non employee user is advised at the beginning of each telephone call that the call may be monitored. In other states, however, telephone monitoring is legal as long as the monitoring is done for a legitimate business purpose. One case upheld an employer's right to monitor, by extension phone, an employee's business-related calls as the employer offered a legitimate business reason that justified such monitoring. In *James v. Newspaper Agency Corp.*[9] an employer had the telephone company install a monitoring and recording device on the business line so that a manager could monitor business calls made by employees. The court was told that the purpose was to address the concern, by management, over abusive language used by irate customers when called upon to pay their bills and to ascertain the possible need to give further training and supervision to employees dealing with the public. The court found that the monitoring was legal, partly because both the employees and the customers were aware that

their calls were monitored, and partly because the monitoring was done for a legitimate business purpose. Although the *James* case dealt primarily with extension monitoring by supervisors, the practice of recording employees' conversations with customers in the United States is now generally determined to be within the bounds of accepted business practice.[10] When customers complain about a possible invasion of privacy, courts have noted that even though it may be more difficult to justify recording a customer's response, it would be extremely difficult for a business to gauge the performance of its employees without hearing both sides of a conversation. Additionally, courts in the States tend to be more sympathetic to employers' arguments when the access to monitoring is strictly limited to quality management supervisors.

The relationship between technology and individual privacy was well illustrated by a recent federal court case in Pennsylvania, where the court found that terminating an employee for "inappropriate and unprofessional comments over the company's e-mail system" constituted fair and proper grounds for dismissal. In *Smyth v. Pillsbury Co.*[12] an employee sent an e-mail to his supervisor that contained offensive references and threats concerning the company's sales managers. Specifically, the plaintiff threatened to "kill the back-stabbing bastards" and made insulting comments about the annual company holiday party. The supervisor forwarded the e-mail to company executives who, in turn, read all of the plaintiff's e-mail messages and terminated the plaintiff's employment. The employee sued alleging that the interception of his e-mail messages violated his right to privacy. The court disagreed and concluded that an employee has no reasonable expectation of privacy in e-mail communications voluntarily made to a supervisor over a company e-mail system, regardless of any assurances from the employer that e-mail messages would remain confidential and privileged. Furthermore, the court noted that "the company's interest in preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system outweighed any privacy interest the employee may have in his comments."

A similar result was reached in connection with an employee's unauthorised access into his supervisor's computer. In *In re Press Democratic Publ'g.*[13] a newspaper reporter was suspended after he entered his supervisor's personal computer without permission and made both a printout and a computer copy of a draft disciplinary letter regarding a co-worker. The reporter, a union steward, claimed that he logged on to the supervisor's computer in order to get his work schedule for the upcoming week. Once he saw the disciplinary letter, however, he copied it because the co-worker had contacted him earlier about impending discipline. The newspaper suspended the reporter for two weeks for invading his supervisor's privacy. The newspaper likened the supervisor's personal desktop computer to the 'modern-day equivalent of [a] private office and private files.' As no employee or union official had the right to enter a supervisor's unlocked office and rifle through papers, the arbitrator held that the same rule should apply to a private, unlocked desktop. A labour arbitrator agreed with the employer that 'a supervisor has a right to expect privacy in his own office' and that "an employer should be able to discipline an employee who rifles through his supervisor's private desk without permission." The arbitrator then upheld the newspaper's decision to suspend the employee for misusing his supervisor's computer.

## Searches in the Electronic Workplace

One major concern in the electronic workplace involves efforts to search and retrieve voicemail, e-mail, and similar electronically stored messages. The case of *Borland Int'l Inc. v. Gordon Eubanks*[14] established that employers often have a legitimate need to search an employee's e-mail or voicemail messages. For example, one company in California searched an employee's e-mail messages for evidence of trade secret violations. The search was prompted by the employee's defection to a major competitor. The company suspected that the former employee had been using the company's e-mail system to transmit trade secret information to the CEO of the major competitor. The company's search allegedly confirmed their suspicion.

## Irish Approach to Privacy at Work

Numerous cases have come before the Irish courts attempting to assert, albeit in different contexts, a right to privacy as a 'personal right' under Article 40.3.1 of the Constitution.[15] In 1987 a general right to privacy was successfully invoked before the High Court. In *Kennedy v Ireland*[16] the Plaintiffs complained of unjustifiable tapping of their telephones by the State and, in particular, sought damages for this breach of their right to privacy. Hamilton P. found for the Plaintiffs, saying:-

> "The right to privacy is not an issue, the issue is the extent of that right or the extent of the right ito be let aloneî. Though not specifically guaranteed in the Constitution, the right to privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others or by the requirements of the common good. . . . .[A]n individual must accept the risk of accidental interference with his communications and the fact that in certain circumstances the common good may require and justify such intrusion and interference."

Whether or not the constitutional rights of an employer would permit restricted surveillance of employees is a question that has not, as yet, troubled the Irish courts. One would be foolhardy to think that Irish courts would always uphold an employee's right to privacy at work in that legitimate business purposes may require a certain degree of monitoring. However, Irish employers should exercise extreme caution and take legal advice prior to implementing surveillance and monitoring techniques of employees.

## Copyright Infringement

Most countries recognise computer software as being covered by copyright. The EU, in adopting the Directive on the Protection of Databases [96/9/EC 11 March 1996], has recognised that as long as sufficient skill and creativity has gone into its creation, a database can acquire copyright protection. [Database in this context includes a digital multimedia work, including several elements such as sound, graphics, text and moving images.] If any product which has taken significant time and investment to create is let loose on the Internet, it can be intercepted and copied thousands of times in a second, each copy as perfect as the original, and dispersed to computers all over the world. This will almost certainly be a multiple infringement of copyright.

An employer may be liable for copyright infringement even if an employer did not actually perform the copying or distributing. Under what has become known in the States as the

theory of contributory infringement, an employer may be liable for infringement committed by an employee if the employer had knowledge of the infringing activity and induced or materially contributed to the infringing conduct. Under the theory of vicarious liability, an employer may also be liable for an employee's infringement if the employer negligently failed to supervise the employee's activity and/or had a financial interest in the exploitation of the copyrighted materials.

**"More and more, courts around the world are finding that a promise made in an e-mail message is just as binding as one made in a letter and that discriminatory or harassing comments are improper in any form, whether verbal, written on paper, or posted in an e-mail message."**

An employer in possession of improperly obtained software may be accused of copyright infringement. A copy of a software program that cannot be validated by purchasing records might result in an allegation of copyright infringement. This can be caused by software that was brought in from an employee's home, or indeed by software created by a conscientious employee trying to get a job done more efficiently. Or, perhaps the software is an unauthorised copy created by a well-meaning but misguided cost-conscious manager. Employers should take legal advice when formulating clear guidelines for downloading software and data from on-line services and the Internet. It would also be prudent to keep a catalogue of all software licences.

## E-Mail As Discovery Material

Courts in most jurisdictions are approaching electronic data in much the same way as any other data which becomes the subject of discovery orders. As outlined in Part 1 of this article, the *Norwich Union* case in Britain in 1997 saw the court order the preservation of e-mail material and the discovery and the inspection thereof to the Plaintiff. Thus, employees may need to be reminded that e-mail communications should be treated in the same way as any other form of written and permanent communication. In fact, e-mail lasts longer than most users realise. Whenever an employee sends a message over the company's network, two or three copies of the message are stored on file servers before being transferred to archive tapes. Ironically, e-mail is more permanent than a paper communication. Paper documents can be shredded or discarded, but it is far more difficult to destroy e-mail messages. Even after hitting the delete key, most e-mail systems store messages on a centralised backup file for an indefinite period of time. Mainframe backups also make retrieving e-mail records much easier than retrieving lost paper records.

Many users of e-mail mistakenly believe that once they hit the 'delete' button the message has, in fact, been deleted. When a user sends an e-mail message the user is creating an electronic file that is stored on the computer's hard drive. The information on the hard drive may be stored for months, or even years. The information remains on the hard drive until the computer runs out of "new" (*i.e.*, unused) space, at which time the computer system will start to fill in the spaces where the deleted files formerly existed. This can take months, or even years.

The increased role of e-mail in litigation presents a number of problems. Firstly, e-mail messages are easier to falsify than hand written or signed documents. For example, it is possible to construct an electronic mail communication so that it appears to be from someone else. In cyber-speak this is called "spoofing". Thus, employers investigating incidents of alleged e-mail harassment should be mindful of the fact that the actual harasser may not be the person who supposedly sent the harassing message. Secondly, lawyers' requests for electronic evidence have made the already burdensome discovery process even more onerous for companies. When this process involves retrieving millions of pages of e-mail stored on hard drives or optical disks, the costs can be phenomenal.

In the United States an increasing amount of employment law cases turn on some form of e-mail evidence. In *Aviles v. McKenzie,*[17] the plaintiff, a lab technician, used an e-mail message to show that he was wrongfully discharged for his "whistle-blowing" activities. To establish his status as a whistle-blower, the plaintiff introduced e-mail messages in which he reported "unsafe and illegal practices" to his superiors. The court found that the e-mail messages, coupled with other evidence, provided persuasive proof of wrongful discharge. In another case, *Strauss v. Microsoft,*[18] a case alleging sexual discrimination, the plaintiff produced as evidence four separate e-mail messages sent by her supervisor, each containing sexually suggestive remarks.

Finally, it appears that, on US authority, there even exists the possibility that one's private personal computer can be *subpoenaed* by the courts. In a recent case that received widespread coverage, Northwest Airlines effectively succeeded in such an application in a case in which it suspected that its flight attendant trade union had used the Internet to run an illegal call-in-sick campaign to disrupt the airline. The airline obtained a court order directing the search of over twenty hard drives at flight attendants' homes and union offices. Swamped by the files unearthed from just the first few computers in its search, Northwest complained to one judge that printing each document found inside the workers' PCs would amass a paper pile five times as tall as the Washington Monument, which stands at 555 feet.

Following this precedent, it appears that federal courts are increasingly approving searches of home PCs for evidence in civil cases. Such discovery orders have raised the issue of how discovery should operate in respect of non-related and private material stored upon a person's hard drive. Thus, in the Northwest Airlines case, two flight attendants have sought to reverse the computer-search order and direct the immediate destruction of the CD replicas of their hard drives. The dispute continues and a hearing date for the appeal has been obtained.

## IT policy statements

Many employers are now furnishing employees not just with Safety Statements but with IT Policy Statements. In consultation with their legal advisers, employers who furnish IT Policy Statements may wish to consider communicating to their employees some of the following points:-

- The employer maintains as part of its technology platform an electronic-mail system, commonly known as [insert carrier of e-mail]. This system is provided to assist in the conduct of business within the company.

- The employer reserves the right to retrieve and read any message composed, sent, or received. Even when a message is erased, it is still possible to recreate the message. The ultimate privacy of messages cannot be guaranteed.
- Any electronic message may be kept in _____ location as outlined in the employer's policy statement.
- Messages should be limited to the conduct of the business of the employer. Electronic mail may not be used for the conduct of personal business.
- While electronic mail may accommodate the use of passwords for security, the reliability of such for maintaining confidentiality cannot be guaranteed. Employees should assume that any and all messages may be read by someone other than the intended or designated recipient. Moreover, all passwords must be made known to the employer. Passwords not known to the employer may not be used. A system may need to be accessed by the employer when an employee is absent.
- Save as provided for herein, all messages sent via electronic mail are considered to be confidential and as such are to be read only by the addressed recipient or at the direction of the addressed recipient.
- Employees learning of any misuse of the electronic-mail system or violations of this policy shall notify [insert name of the person responsible for the electronic mail].
- E-mail messages may not contain content that may be reasonably considered offensive or disruptive to any employee. Offensive content would include, but would not be limited to, sexual comments or images, racial slurs, gender-specific comments, or any comments that would offend someone on the basis of his or her age, sexual orientation, religious or political beliefs, national origin or disability.

## Conclusion

Employers should warn employees to use the same care in communicating electronically as in writing a letter on paper. More and more, courts around the world are finding that a promise made in an e-mail message is just as binding as one made in a letter and that discriminatory or harassing comments are improper in any form, whether verbal, written on paper, or posted in an e-mail message. This article has hoped to demonstrate that, in the employment context, the virtual world must be regarded as the real world, because it is.

> "The truth is that, as individuals, we are responsible for what we do. Since there's no reason to believe that the rate of technological change will slow down or the law will catch up, as users we must become attuned to the legal, social, and ethical ramifications of what we do on-line. We can lose money in an unenforceable contract. We can hurt and defame people and possibly become legally liable. We can have our privacy breached or our words censored, taken out of context, twisted, or falsified. The solution is to treat the virtual world like the real world, because it is. To believe otherwise makes the likelihood of encountering virtual legality a virtual certainty."[20] ●

1. The case is unreported but referred to in Mathiason and Barrett, *The Electronic Workplace,* op. cit.
2. See *Urofsky v. Gilmore,* 167 F.3d 191 (4th Cir. 1999).
3. 28 February 1995.
4. Conducted by the Industrial Relations Services (IRS) and published at http://news.ft.com/ft/gx,cgi/ftc.
5. Case No. BC-0670-36 (L.A. Super. Ct.).
6. Reported by Mendels, *$2M Suit in Sweet Nuthin Eavesdrop,* N.Y. Newsday, 20 January 1995, cited in Mathiason, *Digital Workplace* 2000.
7. 2000 U.S. App. LEXIS 2877 [4th Cir. Feb.28, 2000].
8. CAL. PENAL CODE § 631.
9. 591 F.2d 579 (10th Cir. 1979).
10. *Briggs v. American Air Filter Co.* 630 F.2d 414, 418 (5th Cir. 1980).
11. See, for example, *O'Sullivan v. NYNEX* Corp., 426 Mass. 261 (1997).
12. 914 F. Supp. 97, 101 (E.D. Pa.1996).
13. 93 Lab. Arb. Rep. (BNA) 969 (1989).
14. Santa Cruz Super. Ct. (No. 123059)
15. *McGee v Attorney General* [1974 IR 284]; *Murphy v Attorney General* [1982 IR 241]; *Murphy v PMPA Insurance Co. Ltd.* [1978 ILRM 136]; *Norris v Attorney General* [1984 IR 26]; *Kennedy v Ireland* [1987 IR 587]; and *Desmond v Glackin* (No. 2), Supreme Court, 30 July 1992.
16. [1987] IR 587.
17. 1992 WL 715248 (N.D. Cal. Mar. 7, 1992).
18. 856 F. Supp. 821 (S.D.N.Y. 1994).
19. www.zdnet.com/zdnn/news/0,4586,2576340,00.html
20. Victor J. Consentino, *Virtual Legality,* BYTE, March 1994.

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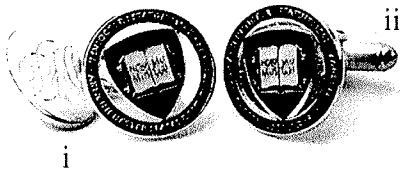
**A**



i ii

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i ii

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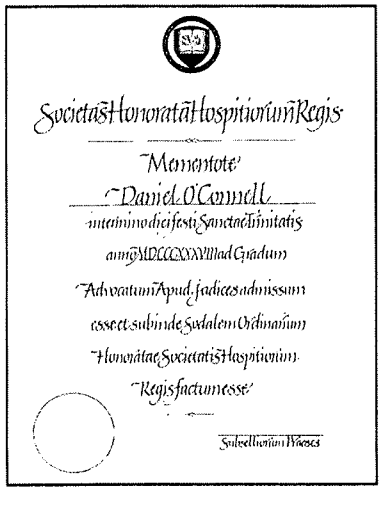


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