The Bar Review

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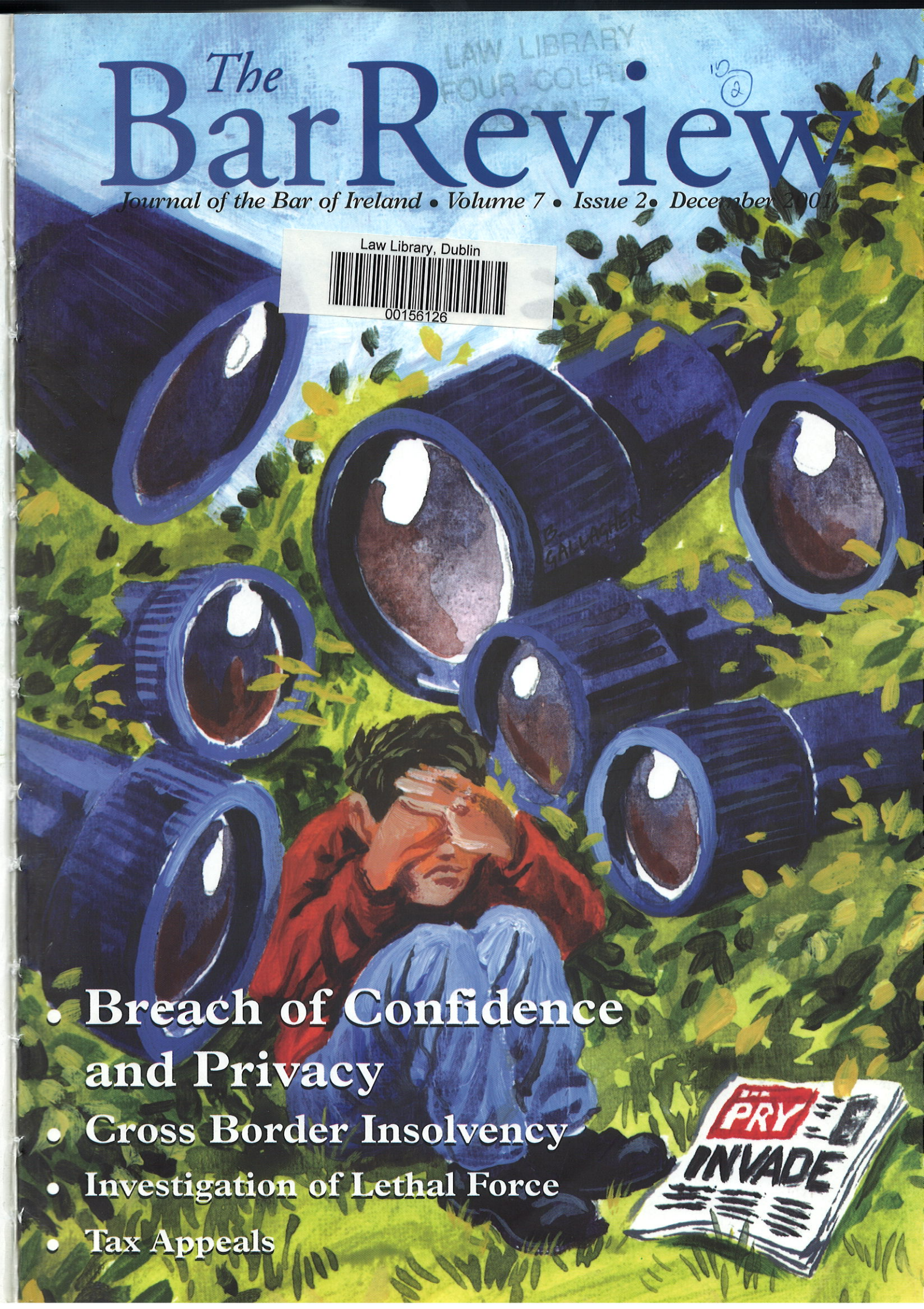

- **Breach of Confidence and Privacy**
- **Cross Border Insolvency**
- **Investigation of Lethal Force**
- **Tax Appeals**

The Bar Review

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Contents

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NEWS
& King's Inns News

Pictured at the Kings Inns Graduation Ceremony 2001, Padraic Lyons, Tom O'Malley, Jeananne McGovern, DeKelly, Aine Clancy, and Matt Nyland.

Staff Appointment to International Association

Jennefer Aston was elected to the Board of Directors of the International Association of Law Libraries and has become the first Irish person to hold such office.

IALL was founded in 1959 and has over five hundred members in more than fifty countries on five continents. The libraries represented vary from academic libraries to corporate libraries or special libraries and from National and Parliamentary libraries to administrative agency libraries.

Jennefer is also the Irish representative on the Copyright Committee of the European Bureau for Libraries and Documentalist Associations (EBLIDA).

COMMUNITY LIAISON

SCHOOL PLAYS

On the 17th of December, the Taoiseach, Bertie Ahern TD, opened the local children's play in the Distillery Building. The first night saw pupils from George's Hill National School and CBS North Brunswick Street performing. The following night featured St Audoen's National School. Patrick McEntee SC introduced the players in front of an audience of parents, teachers and barristers.

Pictured at the awarding of the Councl bursaries for students from local schools, Rory Brady SC, Mark Moloney, Paddy Hunt SC, Michelle Cleary, Jeanne McDonagh

CHRISTMAS PARTY

The annual schools Christmas Party was held in Church Street on Wednesday 12th December and the usual mayhem ensued. Luckily the innocent member of the Bar who agreed to dress up as Santa was rescued from the melee and will hopefully agree to go through the endurance test again next year. Over 30 children from St Audoen's National School and George's Hill Primary School attended, along with their teachers.The Children and were entranced by a magician, sang, danced, ate chocolate and generally had a good time. The organisers are still in recovery.

Many thanks to Eugene McKeever of Musgraves Cash and Carry who kindly donated towards the cost of the presents.

TAX APPEAL HEARINGS

Aoife Goodman BL provides a step by step guide to hearings before the Appeal Commissioners.

Jurisdiction in Tax Appeals

Tax appeals are heard in the first instance by the Appeal Commissioners. A taxpayer who is unsuccessful before the Appeal Commissioners can appeal to a judge of the Circuit Court (the Revenue can only do this in relation to a CAT appeal): this is a rehearing *de novo*, in which the Circuit Court judge hearing the case has the same powers as an Appeal Commissioner.

Either party can appeal from the Appeal Commissioners or from the Circuit Court judge to the High Court by way of a case stated procedure: this does not involve a re-hearing of the case; it is purely an appeal on a point of law.

There have been a number of additions over the past ten years or so to the taxes with which the Appeal Commissioners can deal, which now include stamp duty and customs and excise duties as well as income tax, corporation tax, CGT, CAT and VAT.

The Appeal Commissioners are independent of the Revenue Commissioners, although the similarity in their title to that of the Revenue Commissioners sometimes leads to confusion about this. The main function of the Appeal Commissioners is to deal with appeals against tax assessments. They are a specialised tax forum, and there is a lot of merit in having tax appeals dealt with by real experts in tax law. The statutory framework for tax appeals is currently set out in Part 40 of the Taxes Consolidation Act 1997 ("TCA").

Pre-hearing

The usual procedure is that an Inspector of Taxes issues an assessment, the taxpayer appeals it within the time allowed (generally 30 days), and the appeal is set down before the Appeal Commissioners.

Under section 957 TCA, the taxpayer is required to specify the parts of the assessment with which he is aggrieved, and to state in detail the grounds of the appeal. He is not entitled to rely on any ground of appeal which is not specified in the notice, unless the Appeal Commissioner or the Circuit Court judge is satisfied that the ground could not reasonably have been stated in the notice. This means that it is important to identify all possible grounds of appeal at an early stage.

It is usual for the parties to fill out a form AH1 setting out brief details of the matters in dispute. The normal practice is for the Inspector to fill out the form and send it to the taxpayer for his input. The taxpayer sends back the completed form and the Inspector forwards it to the Appeal Commissioner.

The Appeal Commissioners have developed a practice of asking both sides to make written submissions in advance. These vary in practice from the very cursory to something similar to legal submissions in a High Court case. In general, submissions summarise the legal points and arguments to be made, and refer to any case law to be cited. As a rule, the submissions are put in at least a fortnight before the hearing, but in some cases the Appeal Commissioners will not list the case until they receive the submissions. When both sides have put in their submissions, submissions are exchanged. There is no formal basis for the practice of requiring legal submissions. It has certain advantages, although there seems to be some resistance to it among tax practitioners. If you put in submissions, it means that the Appeal Commissioner will usually have read them in advance, so he has an idea of what to expect at the hearing. He is also likely to review the submissions before making his determination, so it is an extra opportunity to put one's case. It also means that a legal representative of one or other party, has an idea in advance of the case required to meet and can prepare accordingly. However, one is not confined to the argument that has been made in the submissions, and it is possible to introduce new arguments or new material at the actual hearing.

The hearing

At the moment there are no set procedures or rules for the conduct of an appeal hearing. Hearings are *in camera* (this is also the case with re-hearings in the Circuit Court). Most cases are heard by one of the two Appeal Commissioners, although occasionally both may sit together. In Dublin, appeals are heard in the purpose-designed premises in Fitzwilton House, but in other parts of the country the setting may vary, and it is not unusual to find both parties, their representatives and the Appeal Commissioner all sitting around one table for the hearing.

At the hearing, it is usual for the appellants (i.e. the taxpayers) to present their case first, then the Revenue present theirs, and finally the appellants have a chance to respond to the Revenue arguments. Usually whoever is representing the appellants will make brief opening submissions, then call any witnesses they may have. The Revenue are entitled to cross-examine any witnesses called by the taxpayer, following which the taxpayer (or his representative) may re-examine them.

The Revenue will then open their case and call any witnesses they may have. The taxpayer can cross-examine the Revenue witnesses, and the Revenue are entitled to re-examine them afterwards.

Once all the witnesses have given their evidence, the taxpayer makes more detailed legal submissions. The Revenue then make their closing submissions, to which the taxpayer can reply.

It is up to the parties whether they wish to call any witnesses in a particular case. The decision will usually depend on the nature of the case. Not infrequently, there may be cases where there are no witnesses and the entire hearing may be taken up with legal argument.

Once the evidence and submissions are concluded, the hearing is over. The Appeal Commissioner does not usually give the decision (called a "determination" in the legislation) right away: it may take some months. It is important for both parties to be present or represented when the decision is given, so that the losing party can formally express dissatisfaction. If a party wishes to appeal by way of case stated to the High Court, they have to express dissatisfaction immediately after the determination of the appeal. (For an appeal to the Circuit Court, it is sufficient to give notice in writing within 10 days of the determination.) Costs are not awarded by the Appeal Commissioners: each side pays its own (this is also the norm in the Circuit Court, but in the High Court costs are generally awarded to the successful party).

One or both sides may be represented by counsel, but there are other professionals who have an equal right of audience : solicitors, accountants, and members of the Institute of Taxation. Thus, a barrister appearing before the Appeal Commissioners will not necessarily be opposed by Counsel - the person opposite is just as likely to be an accountant or a tax adviser as another lawyer.

Often a stenographer is present to provide a transcript of the appeal proceedings. If there is a transcript, a copy will be given to the Appeal Commissioner, and he will usually wait until it becomes available before issuing his determination. The transcript is useful if a case stated has to be prepared.

The hearing itself is often relatively informal, compared to a court hearing, and even compared to many other tribunals such as the Employment Appeals Tribunal or the Refugee Appeals Tribunal. (However, this is not true of Criminal Assets Bureau cases, which are generally fiercely fought and quite different in character from other appeals.) The Public Accounts Committee report describes the Appeal Commissioners as operating "in a quasi-judicial environment". The rules of evidence are not always strictly adhered to, for example hearsay evidence may be admitted. It is unusual for witnesses to be sworn in (although the Appeal Commissioners have power to take evidence on oath). Documents submitted need not necessarily be originals. The Appeal Commissioner himself may ask questions of either party or of any of the witnesses in the course of the hearing. It even seems that the Appeal Commissioner would have power to introduce technical points which neither of the parties has raised.

Functions and Powers of the Appeal Commissioners

The function of the Appeal Commissioners when hearing an appeal is not so much to adjudicate on a dispute between the taxpayer and the Revenue as to come to a correct determination of the amount of tax payable, if any. In *R v Special Commissioners of Income Tax (ex parte Elmhurst),* Lord Wright MR said that the Commissioners :

> "are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgement on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case *inter partes,* they are assessing or estimating the amount on which, in the interest of the country at large, the taxpayer ought to be taxed...".[1]

This passage was quoted with approval by O'Byrne J in the Irish case of *The State (at the prosecution of Patrick J Whelan v Smidic (Special Commissioners of Income Tax).*[2]

The onus of proof at an appeal hearing is on the appellant (the taxpayer): he must show reason why the assessment should be reduced or cancelled. The standard of proof is the usual civil standard, on the balance of probabilities.

Specific powers given to the Appeal Commissioners include:

- power to increase an assessment, as well as power to confirm or reduce it ;[3]
- Power to subpoena witnesses and to take evidence on oath ; [4]
- Power to issue a "precept" requiring the taxpayer to deliver particulars relating to:
- His property
- His trade, profession or employment
- The amount of his profits, and the individual sources thereof
- Any tax deductions claimed.

The Inspector of Taxes is entitled to inspect any information submitted (section 935) and to object formally to it (section 936).

Matters where the Appeal Commissioners do not have jurisdiction include:

- Dealing with interest and penalties
- Reviewing the administration of the tax system: the Appeal Commissioners jurisdiction is confined to the application of statute; they are not entitled to consider matters such as the application of extra-statutory concessions, arguments in relation to legitimate expectation, or whether a Revenue audit had been conducted fairly: these would be matters for judicial review.

The Appeal Commissioners are primarily a fact-finding tribunal, but to reach a determination they must also interpret and apply the law. In *Mara v Hummingbird* [5] Kenny J set out the circumstances in which their decision could be overturned by the High Court on an appeal by way of case stated:

1. Findings of 'primary facts' should not be set aside unless there was no evidence whatever to support them.
2. Conclusions or inferences from the 'primary facts' were mixed findings of fact and law. If the conclusions were one which no reasonable Appeal Commissioner (or Circuit Court judge) could draw, the High Court should set aside the finding.
3. If the conclusions showed that the Appeal Commissioner had misdirected himself in law, they should be set aside. But if they were not based on a mistaken view of the law, they should only be set aside if the inferences drawn from the primary facts were ones which no reasonable Commissioner (or Circuit Court judge) should draw.

The case stated procedure is only available after a case has been determined by the Appeal Commissioner. There is no procedure whereby the Commissioner can seek the guidance of the courts on a legal point prior to making a decision, although he can make a reference to the European Court of Justice in an appropriate case.

The future of the Appeal Commissioners

Historically, the office of the Appeal Commissioners goes back to pre-Independence days. Their powers are similar to those of the UK General and Special Commissioners. The statutory framework for the office goes back to the period before self-assessment (introduced in the 1980s), when virtually every company and every self-employed individual got an assessment from the Revenue every year, and large numbers of these assessments were routinely appealed. At that time there were often long delays in submitting accounts and returns, and listing cases for appeal was a way of putting pressure on taxpayers to get returns in. Many of these appeals were struck out without a hearing once figures were agreed between the taxpayer and the Revenue, or were determined after a brief hearing dealing mainly with the facts of the case. Only a small number of the appeals were "argument appeals" i.e., appeals in which there was a significant point of law at issue between the Revenue and the taxpayer. Now there is a smaller number of appeals lodged, but most of them involve legal argument. So the Appeal Commissioners now have to deal with a much greater level of legal argument than the system was designed to deal with. In addition, tax law is becoming more and more complex - for example, there are an estimated 8 to 12 appeals in relation to Revenue opinions under section 811 TCA general anti-avoidance legislation) currently in the pipeline, each of which can be expected to give rise to lengthy and complicated argument.

A review of the statutory framework within which the Appeal Commissioners operate is overdue, but is currently under way. Earlier this year the Department of Finance invited submissions from interested parties. The review arises out of the report of the Public Accounts Committee on the DIRT inquiry. The report made a number of recommendations in relation to the Appeal Commissioners, including in relation to their appointment and their obligation to prepare an annual report, and these are considered here by way of conclusion.

At present the Appeal Commissioners are appointed by the Minister for Finance. The Public Accounts Committee recommended that this be changed, and a more "transparent" method of appointment put in place, involving the post being advertised and an open competition held. The Committee said that minimum/desirable qualifications for appointment should be specified, and that ideally the Commissioners collectively should have expertise in all relevant areas, which the Committee identified as accountancy, taxation (including Customs and Excise), public administration and the law.
The Committee also recommended:

- a mechanism for removing an Appeal Commissioner
- The appointment of a third commissioner (at present there are only two)
- That one of the three commissioners act as a Chairman, with a "casting vote" on decisions when necessary

An increase in the number of Commissioners and a new system of appointment might open the way for individual Commissioners to specialise in particular taxes. In view of the increasing complexity of tax law, it might make a lot of sense for a Commissioner to specialise in, for example, indirect taxes or capital taxes.

The Committee recommended that the Appeal Commissioners' resources be improved to enable them to publish an annual report. At present the Appeal Commissioners have almost no publications. Whereas the TCA allows the Appeal Commissioners to publish details of their decisions, and in April 2000 they published a short summary of about 24 cases on their website, unfortunately this site is not updated regularly. The Appeal Commissioners deal with an estimated 250 cases each year. Many of these never go any further, and the results are never generally known. Although the doctrine of precedent does not apply to Appeal Commissioners' decisions, if you are taking a case to appeal it is useful to know if there has been a previous decision on a similar point.

If you are acting for Revenue in an appeal, they will of course know of any previous decision on a similar issue, because they will have been a party to the case, but the taxpayer may not know about it unless something has been published. The taxpayer and his representatives currently have to rely on an erratic system of informal networking among practitioners for information about previous cases. This is unfair. It is desirable from everybody's point of view that details of previous decisions should be available.

The PAC also discussed whether the Annual Report should be used as a forum for the Appeal Commissioners "to comment on areas of tax legislation on the basis of their first hand experience of interpreting them". The sub-committee thought this was "an interesting concept", but said that the Appeal Commissioners would not be able to do this without much greater resources than they have at present. The proposal should therefore be examined further and "the examination should extend to a right to comment also on administrative acts by the Revenue Commissioners which come within the ambit of appeal."

Many administrative acts are not within the ambit of the appeal system at present, and it is not clear what the PAC here had in mind here. But it is likely that the next few years will see significant changes in how the Appeal Commissioners operate as a result of the PAC inquiry and its recommendations.●

1. 20 TC 381, 387
2. 1 ITR 571
3. Section 934(3) to (5), TCA 1997
4. Section 939
5. [1982] ILRM 421

EQUALITY DISABILITY (PART II)

Cliona Kimber BL completes her examination of the legal framework governing disability discrimination law in Ireland following recent legislative intervention and the Supreme Court decision in Sinnott v Minister for Education and Others.

Introduction

In part I of this article the Employment Equality Act 1998 and the rights of people with disabilities in the workplace was examined. This part will look at the world outside the workplace and the provisions of the Equal Status Act 2000. It will also consider the constitutional protection of the rights of persons with disabilities.

The Equal Status Act 2000

The Equal Status Act 2000 was adopted in order to comply more fully with Ireland's international obligations under human rights legislation.[1] This far reaching piece of legislation in essence applies the principle of non-discrimination which is now so familiar in the field of employment law to the provision of goods, services and accommodation, to the disposal of premises, to education and to the membership of clubs. It applies to a number of grounds of discrimination of which disability is only one.[2] The Equal Status Act is a significant departure in that it is the first time in Irish law that the concept of non-discrimination has been extended to the world outside the workplace. What is particularly noteworthy about this legislation is the fact that it was not a reluctant addition to the corpus of national equality law adopted largely in the face of pressure from the European Community; the momentum for the enactment of the Equal Status Act was purely Irish. It is fair to say that its adoption is a courageous and welcome development in Irish equality law.

The Prohibition of Discrimination

Discrimination is defined in section 3 as occurring where, on any of the discriminatory grounds, including disability, 'a person is treated less favourably than another person is, has been or would be treated'. A further gloss is placed on this definition with regard to disability discrimination by section 4(1) which provides as follows:

> For the purposes of this act discrimination includes a refusal or failure ... to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.

Whilst the Act does not expressly refer to the concept of direct and indirect discrimination, it is clear from section 3(c) that as with the Employment Equality Act 1998, the legislation is designed to prohibit both forms of discrimination. Discrimination by association is also prohibited, that is where a person is treated less favourably because of their association with a person who has a disability. Furthermore, the obligation not to discriminate cannot be avoided by not charging for the goods or services or by limiting their provision to a certain section of the public.

'Nominal Cost' Exception

The prohibition of discrimination on grounds of disability is overshadowed, however, by the so called 'nominal cost' exception in section 4(2). This provides that a refusal or failure to provide the special treatment or facilities referred to in section 4(1) will not be deemed unreasonable if the provision of that special treatment would give rise to more than a nominal cost. The Equal Status Bill 1997 contained entirely different provisions on this point and required service providers to take all reasonable steps to accommodate the needs of persons with a disability by providing special treatment or facilities, unless to do so would cause undue hardship. However, as discussed in Part I of this article, the reference to the Supreme Court of the Employment Equality Bill 1996 resulted in a similar provision in that Bill being struck down as unconstitutional.[3] Thus the Equal Status Bill was amended to provide for nominal costs. The nominal cost exception in the Equal Status Act gives rise to the same difficulties which were discussed in Part I in relation to the Employment Equality Act 1998. Consequently, the effect of the principle of equal treatment is weakened considerably. As Power points out:

> 'Almost any worthwhile accommodation, from widening an entrance or providing ramp to installing a lift, would involve some expenditure and thus would not have to be carried out. This is a serious flaw in our equality law.'[4]

However, there are still some forms of special treatment which will not involve more than a nominal cost, as is demonstrated

by the U.S. case of *Marie C. D'Amico v. New York* State Board of Law Examiners.[5] The US Americans With Disabilities Act 1990 (ADA) contains similar provision to Irish law in respect of the requirement to make 'reasonable modifications' to make services available to individuals with disabilities. In the *Marie C. D'Amico* case the plaintiff suffered from a severe visual disability which required her to take a break from prolonged reading or writing. Her law school had accommodated her in taking exams by allowing her to take breaks and giving her extra time to sit the papers. She sought an injunction to compel the defendants to allow her this special treatment while sitting the New York Bar exams. Her application for an injunction was successful.

'Harm' exception

Where a person has a disability that in certain circumstances could cause harm to the person or to others, section 4(4) of the Act provides that treating the person differently to the extent reasonably necessary in order to prevent that harm will not constitute discrimination. It is difficult to know how widely this provision will be interpreted by the Equality Officers, but it is likely that there will be many attempts to use it to justify discrimination. Health and safety considerations have long been argued as a reason for the exclusion of people with disabilities from premises or places of work. The US ADA requires that safety requirements must be based on actual risks and not on mere speculations, stereotypes or generalisations about people with disabilities. Thus in Lawrence O Anderson v. Little League Baseball Inc Dr Creighton J. Hale6 the requirement that little league baseball coaches in wheelchairs coach from the dugout rather than from the field because these coaches were a danger to others, was successfully challenged on the basis that the restriction had been imposed without any real analysis as to risk or reality of danger. These sorts of considerations might perhaps be imported into Irish law through the proviso *to the extent reasonably necessary*.

The Scottish case of *Rose v. Bouchet*[7] also gives some indication of the types of cases which may arise in Ireland. A similar provision in the UK legislation allowing discrimination to be justified if it was made on grounds of health and safety arose for consideration. In that case Mr Rose, who was blind contended that the landlord had discriminated against him by refusing to let certain premises to him. The landlord had informed Mr Rose that he could not let the premises to him because in the absence of a handrail on each side of the entrance step, they were dangerous to him as there were unprotected drops of several feet on each side. The landlords conduct was held to be justified as based on a genuine concern for Mr Rose's safety.

Definition of Disability

The definition of disability in section 2(1) is very wide and is almost identical to that in the Employment Equality Act. Thus the discussion of the definition in Part I is also relevant here.[8] The one difference is that the Equal Status Act does not contain the proviso that disability shall be taken to include a disability which exists at present, or which existed previously but no longer exists or which may exist in the future or which is imputed to a person. It is unclear why there is a difference in the definition of disability between both pieces of legislation, but the effect is that the Equal Status Act only applies if a person is discriminated against on grounds of an actual disability which a person has at the moment in time that they suffer the discrimination.

Scope of the Legislation

The Equal Status Act 1990 is of wide application and applies the principle of non-discrimination to the following areas;

- the provision of goods and services,
- the disposal of premises and the provision of accommodation,
- activities of educational establishments,
- clubs
- advertising.

There are also provisions allowing the Minister to make regulations in relation to transport and the construction of roadways and pathways. It is clear from a reading of the Act that in certain areas the legislation is open to a number of interpretations. As yet there has been little litigation to give any guidance as how it might be applied. Each of these areas will now be considered in turn

Provision of Goods and Services

Section 5(1) provides that a person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise, and whether the service provided can be availed of only by a section of the public. A service is defined broadly as a facility of any nature which is available to the pubic generally or a section of the public, including access to and the use of any place, facilities for banking, insurance, or financing, entertainment and recreation, cultural activities, and transport or travel.[9] It also includes services or facility provided by a club and a professional or trade service. Pension rights or any service or facility in relation to which the Employment Equality Act, 1998 applies are expressly excluded from that definition of service. The definition of services is wide enough to cover services provided by the State, whether provided for consideration or otherwise. However, the House of Lords did rule in *R v. Entry Clearance Officer, Bombay ex parte Amin*[10] that the expression 'provisions of goods and facilities and services' in its equality legislation applied only to state activities analogous to those provided by public undertakings. Thus many government activities such as prisons and immigration were excluded from the ambit of the legislation.

As regards the private sector, it was clear early on in the UK that the application of these provisions to it presented few problems. Thus in *Gill v. El Vino Co. Ltd.* [11] the refusal of a wine club to serve women at the bar, where they were only served at tables, while men could served at the bar, was clearly contrary to the prohibition against non-discrimination in the Sex Discrimination Act. It is likely, that this approach will be followed in Ireland, and that refusal to serve people with disabilities in areas of public entertainment would be contrary to the equal treatment principle.

Exceptions

The obligation placed on service providers to treat people equally is not without its exceptions. In relation to the disability ground, section 5 of the Act provides that discrimination can be permitted in relation to the following areas;

- Pensions and Insurance
- Drama and Entertainment
- Sport

These will now be discussed in turn.

Pensions and Insurance

Discrimination in relation to the provision of pensions and insurance is permitted if the difference in treatment results from the use of actuarial or statistical data or other relevant underwriting or commercial factors.[12] Thus, it is permissible to charge a person with a disability more for a pension or for insurance if their disability is such that it costs a service provider more to provide them with these services.

Exception Relating to Sport

Section 5(2)(f) provides for an exception to the general principle of non-discrimination in relation to the disposal of goods or the provision of service in respect of:

> "(f) differences in the treatment of persons on ... disability ground or ... in relation to the provision or organisation of a sporting facility or sporting event to the extent that the differences are reasonably necessary having regard to the nature of the facility or event and are relevant to the purpose of the facility or event."

Many people with disabilities are excluded from taking part in sporting events on the basis of perceptions and assumptions about their abilities. The phrases 'reasonably necessary having regard to the nature of the facility or event' and 'relevant to the purpose of the facility or event' are designed to ensure that such an exclusion is proportional and related to the needs of a particular sporting event. Nevertheless, the phrases are open-ended and ambiguous. As a result, until some case law is built up interpreting this provision, it will be difficult to say whether a difference in treatment in relation to a sporting event or facility is or is not reasonable or relevant.

Exception Relating to Drama and Entertainment

Section 5(2)(i) permits differences in the treatment of persons on the disability ground that are 'reasonably required for reasons of authenticity, aesthetics, tradition or custom in connection with the dramatic performance or other entertainment'. This exception is one which is familiar in the context of employment discrimination, but its application in regard to the provision of goods and services is somewhat puzzling. It remains to be seen how this section will be interpreted in practice.

Purchase or rental of premises.

Section 6 of the Equal Status Act applies the principle of non-discrimination to the disposal of premises and the provision of accommodation, including the sale and rental of premises and the provision of any services or amenities in relation to accommodation. The requirement of equal treatment is subject to a number of exceptions. First, there is a 'small premises' exception so that where the person providing the accommodation or a near relative of that person intends to continue to live there and the premises are small[13] the principle of non-discrimination does not apply.[14] Second, there is an exception where the accommodation in question is not generally available to the public.[15] Finally, it is permissible to keep places open for those with disabilities in special housing or in a refuge, retirement or nursing home, and it is permissible for housing authorities to treat people differently, *inter alia* on grounds of disability.

The guarantee of equal treatment in the purchase or rental of premises is also subject to the harm exception and the nominal cost exception, discussed above. It is interesting to note that in one of the few decided cases in the UK in which discrimination in the letting of premises was alleged, *Rose v. Bouchet*[16] the discrimination was held to be justified as necessary to prevent harm to the complainant.

Education

Section 7 of the Equal Status Act extends the principle of discrimination to educational establishments in relation to the admission to, access to, participation in and expulsion from an educational establishment. Educational establishments are defined quite widely to all types of services from pre-school groups to third level and continuing education. The Act applies equally to private colleges and institutions in receipt of public funds.

There are particular provisions concerning students with disabilities in section 7(4). Educational institutions may treat students with disabilities differently in relation to the provision or organisation of sporting facilities or sporting events, to the extent that this difference of treatment is reasonably necessary having regard to the nature of the facilities or event. Difference of treatment is also permitted where by virtue of the disability of the student, equal treatment would make it impossible or would have a seriously detrimental effect on the ability of an educational establishment to provide its services to other students. As is evidenced by the Dáil and Seanad debates on this provision[17] this exception was intended to allow schools and colleges to exclude students where because of their disability their presence would prove disruptive to other students and jeopardise their education. Nevertheless, it is very widely drawn and could perhaps be used by a school which felt that the time taken to provide for the special educational needs of a disabled student took away from the time available to other students and thus disrupted their education.

The whole question of the educational needs and rights of students with disabilities is a complex and challenging one, particularly in terms of the cost of providing such education and the State's obligation to provide for such education. The rights of children with disabilities to free primary education was litigation to Supreme Court level in the *Sinnott* case,[18] discussed below. The Education Act 1998 also places obligations on the State to provide appropriate education. It is likely that more litigation is to be expected in this area as the provision for the education of children with disabilities is inadequate at present.

Discriminating clubs

Section 8 of the Equal Status Act establishes the concept of "discriminating clubs". Any club that has applied for or holds a certificate of registration comes under the scope of the legislation. Apart from that, clubs are not defined. The relevance of having a certificate of registration is that such a certificate is necessary for the club to be permitted to sell intoxicating drink. Section 10 provides that where an order is made determining that a club is a discriminating club then no certificate of registration under the Registration of Clubs Act shall be granted or shall be renewed for the benefit of the club. The net effect of this is that a discriminating club shall be deprived of the opportunity to sell alcohol and thereby what may be a

significant source of their revenue.

There are exceptions, however for clubs whose principal purpose is to cater for the needs of persons of inter alia a particular disability. Such clubs are permitted to treat people differently in terms of their becoming members of the club and in terms of their role within a club. A club is also permitted to treat members with a disability differently than other members in relation to sporting facilities or events where the different treatment is relevant to the purpose of the facilities or events and is reasonably necessary.[19]

Finally with regard to clubs, it is worth noting that the definition of a service in section 2 of the Act includes services or facilities provided by clubs, whether or not they are registered clubs, which are available to the public generally or a section of the public, whether on payment or without payment. Thus unregistered clubs are still subject to the non-discrimination provisions which apply to the provision of goods and services.

Advertising

The Equal Status Act also applies the principle of non-discrimination to advertising. Section 12(1) provides that a person shall not publish or display an advertisement which indicates an intention to engage in 'prohibited conduct' in contravention of the Equal Status Act. Advertisement is very widely defined and includes every form of advertisement, whether to the public or not, in newspapers or other publications, on television or radio or by way of display of a notice.[20] The area application of this provision is clearly very wide. The provision as a whole is puzzling, however. It does not prohibit advertising which is in itself discriminatory or which portrays conduct which might be construed as sexual harassment, rather it prohibits an advertisement which indicates an intention to discriminate. It is difficult to envisage the kinds of advertisements that might fall into this category. Thus it would be surprising if section 12 is widely used.

Transport and Infrastructure

The U.S. ADA provides that individuals shall not be discriminated against on the basis of disability in the full and equal enjoyment of transportation services provided to the public.[21] Irish law does not go so far as to provide for equal treatment in transport facilities. The Equal Status Act does, however, provide in sections 17 and 18 that the Minister may make regulations requiring that new road or rail passenger vehicles and existing bus and rail stations, respectively, must be usable by people with disabilities. Section 17 is limited in its operation, however. It does not permit the Minister to require the retro-fitting of vehicles already in operation, nor does it apply to taxis or hackneys.[22] Thus the extent to which bus and rail services become disabled accessible depends on how quickly the rolling stock is renewed. It is clear that this may take some time. Finally, section 19 requires road authorities when constructing new footpaths or altering existing ones to provide ramps, dished kerbs and other facilities to make them more accessible to disabled pedestrians. Again, such changes will in no way be immediate. People with disabilities have been dissatisfied with these provisions on transport and infrastructure, regarding them as inadequate, and have campaigned strongly for greater rights in this area.

Vicarious Liability

Express provision is made in section 42 of the Equal Status Act for the vicarious liability of an employer and agents in respect of the conduct of an employee that leads to proceedings being brought under the Act. It is defence, however, for the employer to prove that he or she took such steps as were reasonably practicable to prevent the employee from engaging in discriminatory acts.

This provision clearly places a duty on employers to train their staff to be sensitive to issues of discrimination and equality if the employer wishes to escape being fixed with responsibility for the unlawful actions of the employee. It may also be necessary to have policies and practices in the workplace with regard to dealing with members of the public, or with students so as to ensure that they are dealt with in a non-discriminatory manner.

Harassment

Although sexual harassment in the workplace has been prohibited in Irish law since 1977, the Equal Status Act is the first to explicitly prohibit harassment outside the workplace. Harassment on any of the discriminatory grounds, including disability is prohibited by Section 11(5). It is defined as taking place:

> "where a person subjects another person "(the victim") to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of the victim is based on any discriminatory ground and which could reasonably be regarded as offensive, humiliating or intimidating to him or her."

Given the newness of this provision it is uncertain as yet how it will be applied by the Director of Equality Investigations in dealing with allegations of sexual harassment experienced by the disabled recipients of goods or services, by students with disabilities or by people with disabilities to whom accommodation is provided. What is clear is that the provision is wide enough to cover mocking or making fun of a person because of their disability.

The Equal Status Act also introduces in section 11(2) the new concept of a "responsible person", a sort of loose vicarious liability, in regard to the prevention of harassment. This is a person who is responsible for the operation of any place that is an educational establishment or at which goods, services or accommodation facilities are offered to the public. Such a person shall not permit another person who has a right to be present in that place or to avail themselves of those facilities, goods or services to suffer either sexual harassment or harassment at that place. This provision places a potentially wide liability on those involved in running an educational establishment to prevent harassment of one student by another and on those who run places where goods or services are offered to the public, or who provides accommodation or accommodation services. It may be, for example, that publicans would be liable if they failed to intervene if customers with disabilities were subjected to abuse by other customers. However, it is a defence for such a person where they can prove that they took such steps as are "reasonably practicable" to prevent the sexual harassment or harassment in question.

It remains to be seen what steps might be regarded by the Director of Equality Investigations as satisfying this test of "reasonably practicable". The attitude adopted by the Equality Officers and Labour Court under the law on sexual harassment in the work place was that an employer who could show that she or he had an effective sexual policy that was being actively and meaningfully applied in the work place might be able to avoid liability where an employees suffered sexual harassment. It may be that a similar approach might be adopted under the Equal Status Act. In addition the basic principles of notice and reasonable foreseeability that have long been part of the law of torts may be relevant in establishing whether what was done was or was not "reasonably practicable" to prevent either sexual harassment or harassment.

Positive Measures

Affirmative action and positive discrimination are controversial methods of achieving an accelerated equality. While positive action is sometimes seen as going to far, others take the view that it is a necessary tool for the concretisation of substantive equality.[23] As with the Employment Equality Act 1998, positive action is permitted but not required by the Equal Status Act. It is only lawful in certain well-defined contexts. Section 14 (b) contains a general permission for "preferential treatment or the taking of positive measures which are *bona fide* intended to-

(i) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons"

In addition more specific types of special treatment are permitted by the Act. Section 5 (h) allows for differences in treatment in relation to services provided where the principal purpose is to promote the special interests of *inter alia* persons with disabilities. Section 5(l) permits difference of treatment in respect of the disposal of goods or the provision of a service which are suitable only to the needs of certain persons. It remains to be seen what measures of positive action, if any, will be taken in the specific fields covered by the Equal Status Act.

Enforcement

Unlike the Employment Equality Act, 1998 which provides a complainant with a number of options in respect of lodging a complaint, the Equal Status Act obliges a complainant to refer their complaint, in the first instance, to the Director of Equality Investigations. The procedures governing making a complaint are set out in section 21 of the Act. Thus an ordinary member of the public, if she feels she has been discriminated against, can simply make a direct complaint to the Director. However, before that person can do so they must notify the respondent in writing of the nature of the allegation. The complainant must also notify the respondent of their intention, if they are not satisfied with the response to the allegation, to seek redress by referring the case to the Director. This must be done within two months after the conduction in question is alleged to have occurred or within two months from the time when the last incident of the conduct in question is alleged to have occurred. Where "exceptional circumstances" exist which prevented the complainant from notifying the respondent and where it is "just and equitable", having regard to the nature of the alleged conduct and to any other relevant circumstances", that time limit of two months may be extended by the Director to not more than four months. In this written notification to the respondent, the complainant is permitted to question the respondent so as to obtain "material information"[24] The complainant is not entitled to look for confidential information.[25] The respondent may, if they so wish, reply to the questions raised by the complainant but where the respondent fails to reply to the notification or to the questions asked or supplies false or misleading information or supplies information that would not assist a person in deciding whether or not to refer the case to the Director, the Director may draw such inferences, if any, as seem appropriate.

The Director will not proceed to investigate a case referred to her unless she is satisfied that either the respondent has replied to the notification or that at least one month has elapsed after the notification was sent to the respondent.[26] The claim for redress to the Director must be made within six months from the date of the occurrence of the prohibited conduct or from the date of its most recent occurrence.[27] This time limit of six months may be extended to a period not exceeding twelve months in exceptional circumstances.[28]

It is not only an individual member of the public who has the power to make a complaint, it is also open to the Equality Authority to refer a case to the Director where it believes that discrimination is taking place or has taken place and it is not reasonable to expect the person discriminated against to make a claim under the Act.[29] This might be because the person discriminated against fears recriminations or victimisation. If the Authority makes the complaint, it too must go through the procedure of notifying the respondent, described above. The Equality Authority is also empowered to apply either to the High Court or the Circuit Court for injunctive or such other relief as is deemed necessary to prevent the further occurrence of prohibited conduct or the further contravention by a person who has been found by the Director to have engaged in prohibited conduct or contravened the provisions in the legislation relating to discriminatory advertisement.[30]

Having received the complaint, and being satisfied that notification requirements have been complied with, the Director then proceeds to investigate the complaint. If the Director finds that the complaint can be upheld she can either make an order of compensation for the effects of discrimination or an order that a person take a specified course of action. The maximum amount of compensation is the maximum amount that could be awarded by the District Court in civil cases in contract,[31] currently £5,000. A decision of the Director under Section 25 can be appealed to the Circuit Court within forty-two days of the Director's decision. The only other appeal is to the High Court on a point of law only[32]. Either party to the case is entitled to request that the decision of the Director should include a statement of the reasons why she reached the decision. In practice, the Office of the Director of Equality Investigations has been giving written decisions in the same way as it does with complaints under the Employment Equality Act and has established a website which contains all of its decisions.33 These decisions will be very helpful in building up a picture of how the Act is being applied and will enable practitioners to give appropriate advice.

Section 24 of the Equal Status Act also provides for mediation in a manner similar to that under the Employment Equality Act, 1998. Where a case has been referred to the Director and it appears that it is one that could be resolved by mediation then

the Director must refer the case for mediation to an equality mediation officer unless either party to the proceedings objects. Such an investigation is held in private. If there is any objection to mediation then the case falls to be dealt with in the usual way by the Director. These options for alternative settlement of the dispute are very welcome but it remains to be seen how they operate in practice.

Constitutional Rights of People with Disabilities

Article 40.1 of the Constitution provides that 'all citizens shall, as human persons, be held equal before the law'. The Courts have also been willing to find a right to equality implicit in the unenumerated personal rights of Article 40.3. 1 and 40.3.2,[34] Despite these guarantees of equality in the Constitution, constitutional litigation for those with disabilities has to date largely arisen in the context of the right to education of people with disabilities, rather than their right to equality.[35]

It was the case of *O'Donoghue v. Minister for Health* in which the education rights of those with disabilities was first considered in detail. In that case, a profoundly mentally handicapped boy brought against the State seeking an order of mandamus to compel the State to provide for free primary education for him and a declaration that in failing to provide for free primary education for the him and in discriminating against him as compared with other children, the State had deprived him of his constitutional rights under Articles 40 and 42. He also sought damages for breach of those rights.

O'Hanlon J in the High Court found for the applicant, and ruled that the State had a constitutional obligation imposed on it by virtue of Article 42.4 to provide for free basic elementary education of all children. In coming to this decision, O'Hanlon adopted the broader concept of education outlined by _' *Dálaigh C.J in Ryan v. Attorney General*[36] that 'education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.' This approach expanded the definition of education beyond the simple notion of a scholastic training. O'Hanlon J. found that basic elementary education for children;

> 'involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be.'[37]

This was an important expansion, because the State had argued that because of the applicants profound disabilities, he was in fact 'ineducable' in the context of the conventional type of primary education. The wider definition of education as a process going beyond what was ordinarily available in primary schools meant that the obligations of the State were correspondingly greater. Thus in failing to provide for such education for the applicant and in discriminating against him as compared with other children, the State had deprived him of his rights under Article 42. An award of £7,600 was made which O'Hanlon acknowledged was modest in the circumstances. The State appealed to the Supreme Court, which affirmed the order of O'Hanlon J.

In *O'Donoghue* the applicant had been eight years old when his case came on for hearing. Thus the ruling did apply to the continuing education rights of people with disabilities who were no longer infants. The question of the existence of such rights came up for consideration in *Sinnott v. Minister for Education, Ireland and the Attorney General.*[38] This case consisted in fact of two actions, the first brought by a severely autistic and mentally handicapped plaintiff, Jamie Sinnott, and the second brought by his mother, Kathryn Sinnott.

Jamie Sinnott, who was born in 1977, was 23 years of age by the time his action received the Supreme Court. The basis of his claim was the despite having had severe autism since the age of four months he had received very little appropriate education and that as such he had been deprived of his constitutional rights under Article 40 and 42. In particular, he claimed that the Minister of Education had failed to provide free education for him, had discriminated against him in the provision of free education facilities, had failed to vindicate his right to education and had failed to give any reasonable aid to private educational initiatives for the provision of educational facilities for the plaintiff. He sought declaration that he had been deprived of his constitutional rights and a mandatory injunction directing the Minister to provide for free primary education for him appropriate to his needs *for as long as he was capable of benefiting from it.* Damages were claimed for breaches of constitutional rights, for negligence and breach of duty.

In the second proceedings, Mrs Sinnott claimed that the defendants had failed to vindicate her constitutional rights as mother of the plaintiff by failing to provide education appropriate to him and violating his constitutional rights, and that this failure had imposed inordinate burdens on her. She claimed similar reliefs to those claimed by her son, and claimed in addition special damages in respect of treatment provided by her.

The action was at hearing in the High Court for 29 days. In his judgment, Barr J found for both plaintiffs. He accepted the definition of education adopted by O'Dalaigh CJ in *Ryan v. Attorney General*[39] and cited with approval the conclusions of O'Hanlon J in O'Donoghue. In particular Barr J approved the conclusion of O'Hanlon J. that with regard to the education of children with disabilities, the process of primary education should continue 'as long as the ability for further development is discernible'. He concluded that, in the light of the facts, the plaintiff, Jamie Sinnott, was in need of continuous education which was not age related.

> 'I am satisfied that the constitutional obligation under Article 42.4 to provide and continue to provide for primary education and related ancillary services for Jamie Sinnott is open-ended and will continue as long as such education and services are reasonably required by him'.

Barr J held that as a result both plaintiffs were entitled to the declarations and mandatory injunction which they had claimed and to damages for breach of their constitutional rights. He awarded a total of £222,500 to Jamie Sinnott and £55,000 to Mrs Sinnott.

Unsurprisingly, this far reaching judgment was appealed to the Supreme Court. The State indicated to the plaintiffs, however, that the sum awarded in damages to Jamie Sinnott would not be challenged. The State also conceded that Jamie Sinnott had a constitutional right to free primary education up to the age of 18 and that this right had been violated by them. The central

issue of the appeal, therefore, was whether the rights of beneficiaries of free primary education in Article 42.4 ceases when a child reaches a particular age, in other words, whether the right continued as long as some benefit was discernible. [40]

A majority of the judges, Keane C.J. and Murphy J dissenting, while accepting the broader definition of education as advanced in *Ryan* and *O'Donoghue* and applied by Barr J in the High Court, had no difficulty in finding that the guarantee of primary education applied to children only and ended when a person became 18.[41] Hardiman J., who gave the leading judgment for the majority in interpreting Article 42, found that

> 'It is thus manifest that, whether one reads the Constitution in its Irish or English text, the primary provider of education is seen as the parent, and the recipient as a child of such parent. This appears to me plainly to involve the consequence that the recipient of primary education would be a person who is not an adult ...'

His reasoning was based on an analysis and consideration of Article 42 as a whole, which contains many uses of the word 'child' and 'children', rather than a consideration of article 42.4 in isolation, which places the duty on the State to provide for free primary education and does not contain any reference to children. In this context he found that to interpret 'child' as referring to a person of any age who has an ongoing need for education would be to do violence to the ordinary meaning of the word.

Keane C.J. in his dissent adopted a different approach to the interpretation of the duty of the State in Article 42.4. Having accepted this broad definition of education, Keane C.J. took the view that Article 42.4 obliged the State to provide for free primary education for the plaintiff appropriate to his needs for as long as he was capable of benefiting from the same. He confined his interpretation of Article 42 to Article 42.4 alone and noted that it contained no reference to 'children'. In his view the kind of education which Jamie Sinnott was receiving was properly described as primary education and there was no principled basis for imposing a cut off date of 18.[42]

With regard to Mrs Sinnott's claim, the majority, Denham J dissenting, ruled that she had no cause of action. Denham J, the only female judge on the panel, based her reasoning on the constitutional protections given to the family and to the position of women within the home. She found that the recognition by the constitution that the work performed by women in the home was not just for the particular home, family and children, but for the common good, gives women an acknowledged status. Thus Mrs Sinnott also had constitutional rights which had been violated.

It is undeniable that the *Sinnott* case is a difficult one and throws up many issues concerning the rights of people with disabilities in our society. While it is clear that this group have continuing rights to appropriate facilities for their needs, there is a sense in the *Sinnott* judgments that the Supreme Court was reluctant to place these needs under the ambit of the duty to provide free primary education in Article 42.4. These reservations were expressed most clearly in the judgment of Hardiman J. who specifically asks whether the plaintiff's claim in respect of future services might not be put in other ways. Hardiman J. refers in particular to provisions of the Education Act 1998 which place duties on the Minister for Education with regard to adult education and the provision of support services, including education to persons with disabilities, and observes that'It appears that these provisions, together with those of the Equal Status Act, 2000 and the Education (Welfare) Act, 2000 impose duties on public authorities which may be relevant to a person in the position of the Plaintiff, or to a child afflicted with the disabilities which have afflicted the Plaintiff in one degree or another.'

It would also appear that the reluctance of the Supreme Court to recognise a continuing and open-ended constitutionally based right to free primary education was also due to the enormous cost implications such a decision would have had. Indeed much of the judgments are taken up with the question of the appropriateness of the courts, in the context of the doctrine of the separation of powers, making decisions regarding the allocation of funds to a particular project. Article 42.2 places an absolute and unqualified duty on the State to provide free primary education which is not capable of being limited by other competing rights. To find, in effect, that this duty encompassed an unbounded duty to provide educational services for people with disabilities would seem to involve the courts in the activity of mandating that such services be funded irrespective of other demands on the public purse. The statutory obligations to provide services referred to by Hardiman J, are, by contrast, bounded by the requirement to have regard to other needs and to competing demands. At the end of the day, it may be that these issues are best decided in the political rather than the judicial arena.

In any event the *Sinnott* case would appear to close the avenue to the use of the Constitution as a tool for achieving further rights for people with disabilities. The Supreme Court in that case revealed a reluctance to intervene in matters which it sees as the responsibility of the Oireachtas. Judicial activism in the interpretation of the equality guarantees has also been absent for many years. [43] It would appear that it is in legislation alone that the basic rights of people with disabilities will be formulated.

Education Act 1998

The Education Act 1998 contains many provision which may prove of use to people with disabilities seeking continuing services and facilities of an educational kind which are appropriate to their needs. Section 6 sets out the objectives of the Act which include 'to give practical effect to the constitutional rights of children, including children who have a disability or other special educational needs, ...' and 'to promote opportunities for adults .. to avail of educational opportunity to adult and continuing education.' Section 7(1) provides that the Minister is obliged to ensure, subject to the provisions of the Act, that there is made available to each person resident in the state, including a person with a disability or who had other special educational needs, support services and a level and quality of education appropriate to meeting the needs and abilities of that person. Furthermore, one of the functions of a school, stated in section 9 is to 'ensure that the educational needs of all students, including those with a disability or other special educational needs, are identified and provided for.'

It is clear that these provisions require adequate and appropriate attention to be provided for children with disabilities. The definition of disability in section 2 is quite wide, and thus an large number of people will be included within the ambit of the act. It is also clear, however, that the Education act 1998 goes beyond simply providing education to

children, and also include an obligation to make facilities available to adults. The obligation under section 7(1) to provide appropriate education and support services could include vocational and job training for those with disabilities, and as Hardiman J hinted in the *Sinnott* case, would appear to include ongoing basic educational support for those with very severe disabilities. The effective implementation of these sections will require considerable resource input into schools, both in terms of monies made available and the provision of specialised training and trained teachers. It would appear, however, from dicta in the *Sinnott* case, that these statutory provisions will be enforceable in the Courts.

Conclusions

The Equal Status Act 2000 marks a significant change in the law relating to persons with disabilities. It is an innovative departure in that for the first time it extends the principle of non-discrimination beyond the world of work and aims to achieve equality for Irish people with disabilities in all aspects of their lives, in both the public and the private fields. The fact that it is such a new departure will give rise to some initial difficulties however, in interpreting and applying the Act, as there is no established body of law to give guidance in this regard. The drafting of the provisions of the legislation do not help matters. In many respects they are vague and ambiguous, a fact which is surprising given the length of time which the Act has took to reach the statute books. In the meantime it will be difficult for practitioners to advise clients either bringing or defending claims under this Act.

The Equal Status Act discussed in this Part together with the Employment Equality Act discussed in Part I, now provide a considerable body of law guaranteeing equal treatment to persons with disabilities. It is fair to say that they are likely to give rise to much litigation in the coming years and as such disability discrimination law is now an area which will become of increasing importance to practitioners. It may also be that further new legislation concerning the rights of those with disabilities will be enacted in the future. People with disabilities are disappointed with the existing legislation, and take the view that it does not go far enough to protect their rights. They have been campaigning for specific legislation to deal with their concerns. It will also be the case that following the introduction of the EU Framework Directive, amendments will be required to the Employment Equality Act. In the face of so many potential developments, the only certainty is the inevitability of change.●

1. For a detailed discussion of this Act in the context of sex discrimination see Bolger M., and Kimber C., *Sex Discrimination Law* (2000)
2. The other grounds are marital status, family status, sexual orientation, religion, age, disability, race and membership of the travelling community.
3. Kimber C., 'Equality and Disability - Part I' (2001) 6 *Bar Review* 494 at 498.
4. Power, C., 'The Equal Status Bill, 1999- Equal to the Task' (2000) 5 Bar Review 267 at 270.
5. 813 F.Supp. 217 (1993), cited in Quinn G., 'Disability Discrimination Law in the United States in Quinn, G., McDonagh M., and Kimber C., *disability Discrimination Law in the United States, Australia and Canada* (1992) at 101.
6. 749 F. Supp 342 (1992) as cited in Quinn, op cit.
7. [1999] I.R.L.R. 463, 2000 S.L.T. (Sh Ct) 170.
8. *Op cit*, at 497.
9. Services are defined in section 2 of the Act.
10. [1983] 2 A.C. 818. For a more detailed discussion of the meaning of 'goods, facilities and services' in the UK disability legislation see Gooding, C., *Disability Discrimination Act 1995* (1996) at chapter 4.
11. [1983] Q.B. 425
12. Section 5(2)(d).
13. As defined in section 6(4).
14. Section 6(2)(d). Small premises are further defined in Section 6(4).
15. Section 6(2)(c).
16. *Op cit.*
17. 513 *Dáil Debates* Cols. 958-964 and 162 Seanad Debates Cols. 1677-1678 discussed in the annotation to the Equal Status Act 2000 by McIntyre, T., in the Irish Current Law Statutes Annotated.
18. Unreported, Supreme Court, 12th July 2001.
19. Section 9(1)(e)
20. Section 12(3).
21. Titles II and III of that Act.
22. The power to make general regulations in respect of taxis and hackneys contained in the Road Traffic Act 1961 has been used to licence wheelchair accessible taxis.
23. For a good analysis of positive action in the context of sex discrimination see Fredman, 'Reversing Discrimination' (1997) L.Q.R. 575.
24. Defined in Section 21(8).
25 Defined in section 21(9)
26. Section 21(4).
27. Section 21(6).
28. Section 21(7).
29. Section 23(1).
30. Section 12(1); Section 23(3).
31. Section 27.
32. Section 28. A decision of the Director that has not been appealed can be enforced by the Circuit Court; section 31.(2).
33. The webaddress is www.odei.ie.
34. In *Lowth v. Minister for Social Welfare* [1999] 1 ILRM 5, Denham J took the view that 'this right of equality is one of the personal rights of citizens'.
35. For a more detailed discussion of the constitutional litigation with regard to children with disabilities see Glendenning, D., *Education and the Law* (1999) at 147-161.
36. [1965] I.R. 294
37. *Op cit*, at p65
38. Unreported, Supreme Court, 12th July 2001.
39. [1965] I.R. 294
40. In regard to the second proceedings brought by Mrs Sinnott, the entire judgment was being appealed, apart from the award of special damages.
41. The case was heard by Keane C.J.' Denham J., Murphy J., Murray J., Hardiman J., Geoghegan J., and Fennelly J. all of whom delivered written judgments.
42. Only Murphy J. took the view that primary education is that which is provided by teachers in classrooms and refers to a basic scholastic education, very clearly distinct from secondary and third level education. On that basis, Murphy J would have set a lower age on primary education, limiting it to the age limits determined historically by the Education (Ireland) Act, 1892, that is between 6 and 14 years.
43. For a consideration of judicial interpretation of the equality guarantee in the field of sex discrimination, see Bolger and Kimber, *op cit*, at Chapter 2.

ARBITRATION CLAUSES AND THE INFANT PLAINTIFF

Derek Sheahan BL considers the recent High Court decision in Brenton Dewick (A Minor) v Falcon Group Overseas Ltd, which may have some significance for infant plaintiffs faced with applications to stay proceedings on arbitration grounds.

In *Brenton Dewick (A Minor) v Falcon Group Overseas Ltd,* a Motion was heard before Mr Justice Johnson on 22 October 2001 to stay High Court proceedings pursuant to Section 5 of the Arbitration act 1980. The plaintiff was a 6 year old at the time of the incident giving rise to the main proceedings. He was on holidays with his parents in Santa Ponza and received substantial and disfiguring injuries when he fell through plate glass. The substantive claim was one of damages for breach of contract and the negligence of the defendants arising out of alleged representations made by the defendant in respect of the fitness and/or suitability of the apartments in question for young children.

Amongst the issues raised on affidavit at the hearing of the motion were:

- Whether, by requesting a copy of the statement of claim after having entered an appearance (albeit under protest), the defendants could be said to have taken a step in the proceedings and were thereby not entitled to the stay sought pursuant to the terms of Section 5 of the 1980 Act.

- Whether an arbitration clause is an unusual contractual term inserted solely for the benefit of one contracting party. Further to that and pursuant to the Sale of Goods and Supply of Services Act 1980, whether the clause varied the terms implied by section 39 of that Act that such services be provided with skill care and diligence, in that it ousted the jurisdiction of the court to determine compliance with such a term. Therefore, inasmuch as it varied the said clause, whether it was a term/condition which should have been brought specifically to the attention of the party signing the agreement in their capacity as a consumer. Authority for the proposition that the clause required to be brought specifically to the attention of the plaintiff in this instance was cited in the form of Interfoto Picture Library Ltd V Stilletto Visual Programmes Ltd [1989]QB 433. Although not involving a consumer the court in that case was prepared to hold that the clause was so onerous and unusual that the party seeking to enforce it had to show that it had been brought fairly and reasonably to the attention of the other party.

- Whether the court had an inherent jurisdiction pursuant to Order 22 Rule 10 of the Rules of the Superior Court such that no settlement or compromise or payment or acceptance of money paid into court either before, at or after trial shall as regards the claims of any such infant be valid without the approval of the Court. Such a rule was mandated on grounds of public policy and ensured that the Court must be satisfied where any attempts are made to compromise the claim of an infant. The import of Order 22 Rule 10 is such that in effect no proceedings where an infant sues for damages can produce a result which is not vetted ultimately by or ordered by the court. The effect of the arbitration clause in this instance was to oust this important jurisdiction in a situation where the infant was contractually bound by virtue of the contract signed by his mother.

Affidavit Evidence

The mother of the infant who had signed the contract stated in her affidavit that she had no knowledge of the arbitration clause within the contract and that same had not been brought specifically to her attention. It was accordingly submitted on behalf of the infant plaintiff that the failure to bring this clause specifically to the attention of his mother meant that the arbitration clause never became part of the contract or was in the alternative inoperable and incapable of being performed.

For its part, the Applicant alleged that the plaintiff's mother had signed immediately beneath a portion of text which drew her attention to the arbitration clause and that the agent who had sold the holiday had signed the booking form to the effect that she had specifically brought this issue to the attention of the plaintiff's mother when signing the form.

The Decision

Mr Justice Johnson issued an ex tempore judgment wherein he refused to grant the stay sought by the defendants and thereby refused to let the matter proceed to arbitration. The learned trial judge was concerned that the effect of the arbitration

clause was a restriction on the right of an infant of access to the courts. He addressed this concern to the applicants counsel. The argument was advanced that the plaintiff was seeking to rely on the Married Womens Status act of 1957 to establish that the plaintiff had *locus standi* to sue for breach of the contract on

"In light of section 8(2) of the Married Woman's Status Act 1957 it is a legitimate defence to an alleged agreement to arbitrate that where the contract involves an infant, the inherent jurisdiction of the court operates to prevent the removal of his action from the purview of the court."

foot of the signature of said contract by his mother. It was argued that the plaintiff could not at the same time argue that the parent, by signing the contract in place of the infant, purported to oust the jurisdiction of the court as provided for in Order 22 Rule 10. Further to this it was submitted that there was provision under the Arbitration Acts for an arbitrator to state a case to the court on the issue of damages payable to an infant.

The learned trial Judge was concerned to establish whether any authorities existed in relation to the conflict between Order 22 Rule 10 and the removal of a matter before a court to arbitration, in respect of a minor. Counsel for the Plaintiff mentioned the case of *Carroll(A Minor) V Budget Travel,* unreported, High Court (Morris J), & December 1995. The facts were largely similar in the case. The issue before the trial judge was whether the arbitration clause as drafted was wide enough to encompass an action for damages for negligence in Tort arising "in connection" with the contract. It was not moved before the court in that case that there was a public policy issue with respect to the courts jurisdiction in infant cases.

In the instant case it was argued by plaintiffs counsel that while Sec 5 of the Arbitration Act 1980 allowed for the ouster of the court's jurisdiction on foot of an arbitration agreement it made no provision and provided no basis to oust the special jurisdiction of the court in infant cases.

In giving his ruling the learned Judge indicated that he was basing his decision solely on the issue raised with respect to the court's jurisdiction in infant cases. He noted that there could in fact be a contradiction with respect to the position of the plaintiff as outlined above but that this was a matter best raised at trial. In the absence of any authority to suggest that the order should be made despite the provisions of Order 22 Rule 10 he refused to stay the application.

Analysis

It is submitted that there is no inherent contradiction in the approach of the plaintiff. Section 8 of the Married Woman's Status Act of 1957 states:

(1) Where a contract (other than a contract to which section 7 applies i.e insurance contracts) is expressed to be for the benefit of, or by its express terms purports to confer a benefit upon, a third person being the wife, husband or child of one of the contracting parties, it shall be enforceable by the third person in his or her own name as if he or she were a party to it.

(2) The right conferred on a third person by this section shall be subject to any defence that would have been valid between the parties to the contract.

In light of subsection 2 it is a legitimate defence to an alleged agreement to arbitrate that where the contract involves an infant, the inherent jurisdiction of the court operates to prevent the removal of his action from the purview of the court. Furthermore when one looks to the substance of the Arbitration Acts and in particular the provisions of Section 5 of the 1980 Act, it provides a mechanism to support arbitration (for reasons of public policy in that parties should have rights to choose within certain parameters how they wish to have their disputes resolved) by staying concurrent court proceedings. It is predicated on the existence of a valid and effective agreement to arbitrate. The Act does not envisage nor does it deal with a competing issue of public policy, namely the protection of infants. It is submitted that the learned trial judge was correct to refuse to stay court proceedings in the absence of any specific statutory authority or guidance on this point.

"Section 5 of the Arbitration Act 1980 is predicated on the existence of a valid and effective agreement to arbitrate. The Act does not envisage nor does it deal with a competing issue of public policy, namely the protection of infants. It is submitted that the learned trial judge was correct to refuse to stay court proceedings in the absence of any specific statutory authority or guidance on this point."

Significance

This decision, although not argued extensively but rather by motion on notice, does cast some doubt on the validity of Arbitration clauses where the effect of such clauses is to oust the jurisdiction of the court in infant matters. While infant parties may be bound by a contract pursuant to the Married Womens Status Act of 1957, it is doubtful if even by an undisputed agreement, that the rights of the infant and the protection granted under the rules of court can be ousted.

This is a matter of particular significance in the context of the arbitration scheme now in operation with the Irish Travel Agents Association wherein children on family holidays may not come under the arbitration clause for the purposes of a claim in damages for breach of contract or negligence.●

TATE OBLIGATIONS IN RESPECT OF THE USE OF LETHAL FORCE

Grainne Mullan BL considers the implications for Irish law of recent decisions of the European Court of Human Rights concerning the duty to properly investigate violent deaths attributable to the use of force by State officials or third parties.

The recent decisions[1] of the European Court of Human Rights ("the Court") in the cases of *McKerr v. United Kingdom,*[2] *Jordan v. United Kingdom,*[3] *Kelly v. United Kingdom*[4] and *Shanaghan v. United Kingdom*[5] in which the UK Government was found to be in breach of the guarantee to right to life contained in Article 2 of the European Convention on Human Rights 1950, caused consternation among certain sections of the British press, who decried the decisions as akin to a murderers' charter. Closer examination of the decisions, however, reveals a somewhat more conservative approach to Article 2 by the Court, but one which nevertheless should have a significant impact on the way in which allegations of unlawful use of force by state agents are investigated not just in the North but in this jurisdiction also.

It is proposed to outline briefly the factual bases of each of the four claims, all of which involved allegations that the UK government was responsible for the deaths of relatives of the Applicants, either directly in that agents of the state fired the lethal shots, or indirectly, in that state agents colluded with or facilitated those who did fire the lethal shots. The decisions of the Court will then be examined with some analysis of their possible implications for Irish law.

McKerr v. United Kingdom

The Applicant's father, Gervaise McKerr, along with two other men, none of whom were armed, were shot dead in November 1982 by officers in a specially trained mobile support unit of the RUC. An initial investigation was conducted by other RUC officers. A file was sent to the DPP who decided to institute criminal prosecutions in relation to the death of one of the men (the charges being murder and aiding and abetting). The trial judge directed the acquittal of the three officers at the close of the prosecution case, on the basis there was no case to answer.

However, in April 1984, in the light of two other incidents in which unarmed men were shot dead by members of the security forces, the DPP requested the RUC Chief Constable to conduct further investigations into these cases, particularly into suspicions that evidence had been suppressed and that misleading statements had been given by members of the security forces. As a result John Stalker, then Deputy Chief Constable of the Greater Manchester Police, was appointed to investigate these allegations. Mr Stalker was replaced by Colin Sampson, then Chief Constable of West Yorkshire Police, who completed his inquiry in April 1987. On reviewing this report the DPP concluded that no further prosecutions were required in respect of the shootings themselves but considered the separate question of whether prosecutions were necessary in relation to possible incidents of perversion of the course of justice. In the course of his deliberations the DPP consulted with the then Attorney General, Sir Patrick Mayhew, after which the DPP decided not to institute any criminal prosecutions. Eight officers were however subject to disciplinary proceedings.

An inquest also commenced at the conclusion of the criminal trial. However, the coroner eventually adjourned the inquest until after the conclusion of the Stalker/Sampson inquiry. In November 1988, as the inquest was due to begin, the then Secretary of State for Northern Ireland issued a Public Interest Immunity Certificate (PIIC) in relation to certain categories of documents. The inquest began and the Coroner admitted unsworn evidence by the three officers involved in the shootings, the men not being present at the inquest. Proceedings were adjourned to allow judicial review proceedings to be taken in relation to this decision and further adjourned to await the decision in unrelated judicial review proceedings concerning the power of a coroner to admit written statements from persons who had shot the deceased. The inquest recommenced in 1992 but was adjourned again to allow proceedings to be taken challenging the coroner's refusal to compel the RUC to produce a particular witness statement. These proceedings were successful and a new inquest opened in 1994. However, this inquest was adjourned once more to allow a challenge to the decision of the coroner to subpoena the production of various documentation including the Stalker and Sampson reports. Finally in September 1994 the inquest into the death of Gervais McKerr was abandoned 10 years after it had begun, without reaching any conclusion.

Finally, a writ initiating civil proceedings in relation to the death of the Applicant's father was issued in 1991 but no further steps in respect of this claim had been taken by the time the case came before the European Court of Human Rights.

Jordan v. United Kingdom

Pearse Jordan, the Applicant's son, was shot dead by a member of the RUC as he drove along the Falls Road in November 1992. He was unarmed. A Deputy Superintendent from an RUC division outside Belfast was appointed to conduct an investigation into the shooting, supervised by the Independent Commission for Police Complaints (ICPC). Interviews and forensic examinations were conducted and a report, declared satisfactory by the ICPC, was sent to the DPP in May 1993. The DPP decided that there was insufficient evidence to

warrant any prosecutions in relation to the shooting and the ICPC concluded that the evidence did not warrant the bringing of disciplinary charges against any RUC officer.

Following the DPP's decision the coroner decided to hold an inquest which began in January 1995. The family of Pearse Jordan was legally represented, as was the RUC. During the course of the hearing new evidence arose which was sent to the DPP to enable him to reconsider whether to bring any prosecutions in respect of the shooting. His decision remained unchanged. The inquest recommenced but was then adjourned to allow judicial review proceedings to be taken challenging the conduct of the inquest and in particularto challange rulings by the coroner in relation to the anonymity of various witnesses and the refusal of access to witness statements prior to these witnesses giving evidence. Further adjournments were granted to await the outcome of unrelated proceedings in relation to the failure to grant legal aid to families of deceased persons at inquests and also to allow the RUC Chief Constable to decide on a request by the family for certain documentation. The inquest had not concluded when the Court made its decision.

Civil proceedings were instituted in 1995 but again had not been terminated at the time of the Court's decision.

Kelly and others v. United Kingdom

This case concerned the events at Loughgall RUC station in May 1987 in which the SAS shot dead eight IRA volunteers and one civilian. The civilian and at least two of the IRA volunteers were unarmed. A police investigation of the events was carried out and a report forwarded to the DPP, who decided not to institute any proceedings.

In 1990 an inquest began. It was adjourned to await the outcome of an unrelated case concerning the powers of coroners and the procedure at inquests, and then adjourned again to await the outcome of judicial review proceedings in the *McKerr* case. The inquest opened in 1995. Counsel for the some of the applicants who were represented at the inquest withdrew after the coroner refused to adjourn the proceedings to allow judicial review proceedings challenging the decision of the coroner not to allow access to witness statements until the witness was giving evidence. The inquest then proceeded without representation for any of the nine families.

Some of families of the deceased instituted civil proceedings. The claim of the family of the civilian who was killed was settled, but the remaining sets of civil proceedings had not been concluded when the Court gave its decision.

Shanaghan v. United Kingdom

The *Shanaghan* case was different to the other three in that the deceased in this case (Patrick Shanaghan, the Applicant's son) had been shot by loyalist paramilitaries, but his family alleged that the security forces had colluded with the killers and that the investigation into his death had been inadequate.

A police investigation into the killing was conducted but did not result in any prosecutions being brought. Eventually, over four and a half years after the killing, an inquest into the death opened. The time lapse was due to a delay in the RUC file being transmitted to the coroner, the reason being given that police in that particular area (West Tyrone) were stretched at that time. During this period the family of the deceased had not been kept informed as to the progress of the police investigation.

During the course of the inquest the family tried to introduce evidence in support of their allegations that the RUC knew in advance that an attempt would be made to kill Patrick Shanaghan, that the RUC had made threats against him and that the police investigation into his death had been inadequate. The coroner agreed to this request but this decision was quashed by the High Court on an application for judicial review.

The Applicant also made a complaint to the RUC about its conduct at the scene of the killing. This complaint was investigated by an assistant chief constable under the supervision of the ICPC. An internal investigation was also conducted into allegations that members of the RUC had made threats against the Applicant's son while he was in custody. Further inquiries were made under the supervision of the ICPC. The ICPC concluded that it was satisfied with the police investigation and the DPP decided not to prosecute anyone in relation to the events surrounding the shooting. Civil proceedings were issued but had not concluded when the Court gave its decision.

Decision of the European Court of Human Rights

The Applicants in all four cases made two distinct arguments in respect of Article 2 of the ECHR, which protects the right to life and sets out the circumstances in which deprivation of life may be justified. The first argument was a substantive one, namely that the UK Government had actually been responsible for the deaths of all of the deceased, in that its servants or agents had used more force than was necessary in the circumstances, or, in the case of Patrick Shanaghan, were implicated in the use of lethal force by others. The second plank of the Applicants' argument was procedural in nature, namely that the UK Government had failed to carry out any or any adequate official investigation into the deaths, such an effective investigation being a requirement of Article 2.

The Substantive Allegation of State Responsibility for the Killings

Contrary to what many people believed at the time, the Court in fact refused even to address this claim, let alone make a determination on it. Given the political sensitivity of such a claim it is perhaps not surprising that this was the approach adopted by the Court. The legal reasoning given, however, was that a determination as to this allegation would involve consideration of a number of factual issues, all of which were matters currently pending examination in the civil proceedings which had been brought by most of the applicants. Therefore, the Court held, it would be inappropriate and contrary to the subsidiary role played by the Court under the ECHR for it to embark on a fact-finding exercise of its own in relation to these matters, as this would duplicate the proceedings before the domestic civil courts which were better placed to determine such factual matters. Even though in many of the cases the civil proceedings had not been pursued "with any vigour" the Court noted that neither had the proceedings been withdrawn. Moreover, it held there was nothing to suggest that the civil courts would be deprived of their ability to establish the facts and to determine the lawfulness or otherwise of the killings.

Hence the civil proceedings could not be regarded as so ineffective as to justify the Court conducting its own fact-finding exercise.[6]

Thus the Court refused to engage in what would have been a most controversial process of determining whether the UK Government had acted unjustifiably in killing the men. This can be contrasted with its approach in the case of *McCann and Others v. United Kingdom*[7] the so-called "Gibraltar Three" case, where it did engage in such a process. In that case the Court found that although there was no breach of Article 2 in relation to the actual force used, there was a violation in respect of the way in which the anti-terrorist operation was controlled and organised. It was able to engage in such a determination because the civil proceedings which the families had initiated had been struck out on a jurisdictional point, and in addition the inquest had long since concluded. Hence, in *McCann* unlike in the instant cases there were no proceedings pending in the domestic arena whereby these matters might be determined.

Moreover, in *McKerr and others* the Court also specifically refused to carry out a general examination of various incidents over a thirty-year period with a view to establishing whether there was a practice on the part of the security forces to use excessive force, i.e., whether the security forces in the North had operated a "shoot-to-kill" policy. To do so, the Court said, would go far beyond the scope of the present applications.

The Procedural Requirement for an Effective Official Investigation

Here the Court accepted the Applicants' arguments. It found that Article 2, together with Article 1 of the Convention, which obliges the State to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention, required by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The purpose of such an investigation is to secure the effective implementation of the domestic laws that protect the right to life and to ensure the accountability of State agents for deaths occurring under their responsibility.

Having thus decided that some investigation was required the Court stated that the exact form of investigation required would vary with the particular circumstances of each case. It did, however, set out certain requirements that would apply in every case:

(i) First, the investigation must be brought about by the authorities acting of their own motion. In other words the State could not leave it to the initiative of the families of the deceased to institute proceedings. Hence the availability of civil proceedings would not, on its own, provide a sufficient procedure, as the initiation of such proceedings depended on the will and ability of the families to act.

(ii) The investigator should be independent of those implicated in the events. This independence included practical as well as formal independence. [8]

(iii) There must be a sufficient element of public scrutiny of the investigation. In all cases the families or next-of-kin of the deceased must be involved in the procedure to the extent necessary to safeguard their interests.

(iv) The investigation must be capable of leading to a determination of whether the force used was or was not justified in the circumstances, as well as to the identification and punishment of those responsible. Any deficiency in the investigation which undermines its ability to establish the cause of death or persons responsible will risk falling foul of this standard. Thus civil proceedings are not a sufficient form of investigation as these will not necessarily lead to the identification and punishment of those responsible.

(v) The investigation must be prompt and reasonably expeditious.

Given these minimum requirements, the investigations in relation to the four cases fell short in a number of respects.

An Independent Investigation

First, the Court found a violation of Article 2 in those cases where members of the RUC were investigated by other members of the RUC. Even though the investigation may have been supervised by the ICPC, nonetheless there was a hierarchical link between the officers who were the subject of the investigation and the officers carrying out the investigation. Ultimately both sets of officers were subject to the authority of the RUC Chief Constable, who also played a role in the decision whether to institute any disciplinary or criminal proceedings. Therefore the requisite degree of formal and practical impartiality and independence was not present. The power of the ICPC to require the RUC Chief Constable to refer the investigating report to the DPP for a decision as to these matters was not in the circumstances a sufficient safeguard.[9]

Subject to Public Scrutiny and Safeguarding the Interests of the Families

Secondly, the Court found that a lack of public scrutiny, and in particular a lack of information given to the families of the deceased, in relation to the decision of the DPP not to institute prosecutions in respect of the incidents constituted a violation of Article 2.[10] The Court stated that in cases such as these, where the police investigation is open to doubts as to a lack of independence, it is all the more important that the officer who decides whether or not to prosecute gives the appearance of independence in his decision-making. Otherwise, one of the principal purposes of an investigation into such deaths, namely the need to allay the fears of the public and reassure it that the rule of law had been respected, would be defeated.

For this same reason the Court found that any lack of transparency in the investigative process would be problematic. In the *McKerr* case, for example, it was critical of the failure of the authorities to publish the Stalker/Sampson report (even though the Court did not doubt the independence of either Stalker or Sampson in carrying out their investigations). Such lack of transparency only added to the considerable degree of public disquiet already in existence in that case.[11]

In relation to the need to safeguard the interests of the families of the deceased, the Court was particularly concerned with two aspects of the inquest procedure. First as a matter of law, the families were not entitled to legal aid for the inquest.[12] Secondly, the practice at inquests during the relevant time was not to release witness statements in advance of the particular witness giving evidence.[13] The Court held that these factors together placed the families at a disadvantage in terms of preparation and ability to participate in the proceedings, in contrast with the security forces who had the resources to provide for legal representation and had full access to the witness statements.

Capable of Leading to Identification and Prosecution of those Responsible for Death

Thirdly, the Court found that the procedures adopted in each of the cases failed to meet the requirement that there must be a procedure whereby it can be determined whether the force used was justified in the circumstances and whereby those responsible can be identified and punished. In only one of the cases were criminal prosecutions instituted, and even these collapsed at the end of the prosecution stage, meaning that there was no opportunity to subject the defendants to cross-examination. Furthermore there may be circumstances in which issues arise which cannot properly be examined in a criminal trial, in which case Article 2 would require some wider form of procedure whereby these issues could be examined. The question then arose: was the inquest procedure as existed in the North at the time capable of fulfilling this requirement? The Court found that it was not, for a number of reasons. In terms of the scope of the inquest, under UK law, this was limited to the facts immediately related to the death and the coroner was not entitled to look further to the broad circumstances of the death. In terms of the procedure applicable at inquests, any person suspected of causing the death could not be compelled to give evidence at the inquest. Therefore they could not be subject to examination and cross-examination which detracted from the ability of the coroner to establish the facts relevant to the death. Furthermore, the verdict that the inquest jury could give was limited and could not include a verdict of unlawful death.[14] Although the coroner has a duty pursuant to statute to furnish a written report to the DPP where the circumstances of a death appear to disclose that a criminal offence may have been committed, it was not clear (from statute or otherwise) that the DPP was obliged to do anything in response to such a report. Therefore the inquest mechanism could play no effective role in the identification or prosecution of any criminal offences that might have occurred.

Conducted with Reasonable Expedition

Finally the Court found that in all cases the purported investigation (whatever form it took) into the deaths did not proceed with reasonable expedition. The Court accepted that the delay in each case had been contributed to by the various legal challenges taken by the families to the inquest procedure. However, this did not absolve the authorities from ensuring that matters progressed promptly. Indeed the Court commented that if the various adjournments had been considered necessary to protect the interests of the families this called into question whether the inquest procedure at the time was structurally capable of meeting both the requirement of reasonable expedition and the requirement of effective access for the families.[15] Even apart from the delay related to these challenges, the Court found that the inquests had not proceeded as quickly as they should. For example in the *Jordan* case the Court found that the inquest had not commenced promptly where there had been a delay of 25 months between the death of the Applicant's son and the opening of the inquest.

In coming to its conclusions in relation the inquest procedure the Court on a number of occasions distinguished its earlier decision in the *McCann* case, where it had held that the alleged shortcomings in the inquest proceedings did not substantially hamper the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings. The Court stated that in the *McCann* case, unlike the instant cases, the inquest had been prompt and thorough. Moreover those involved in the killings had participated in the inquest, thereby giving the families the opportunity to cross-examine them. Furthermore the jury in the *McCann* case, unlike in the instant cases, was entitled to give verdicts such as "unlawfully killed" which, under the law in Gibraltar, would have forced the DPP to reconsider his decision not to prosecute and to give reasons for his subsequent decision. In relation to the question of legal aid or prior access to documents, the Court noted that these had not been available in the *McCann* case either. However, in *McCann* this had not been shown to hinder the families' participation in the otherwise very thorough inquest procedure. In fact the inquest in *McCann* was almost "exceptional" in that regard, certainly when compared with the proceedings in the instant cases. Moreover the Court noted that since the *McCann* case the Court had laid more emphasis on the importance of involving the family of a deceased in the procedure and providing them with information, hinting that if the *McCann* case had come before it today this aspect of the inquest procedure may have been found to be in breach of Article 2.

Implications for Irish law

A detailed examination of the law and procedure relating to the investigation of lethal force by State agents cannot be conducted here. However a number of points can be made in relation to certain features of the Irish system, which in the light of the Court's decisions in the cases of *McKerr and others*, arguably do not meet the requirements of the Convention.

Police investigations

As we have seen one of the requirements of Article 2 is an independent and impartial investigation of the facts surrounding a death. In this respect, one of the factors which the Court considered relevant in the various cases was the supervisory role played by the Independent Commission for Police Complaints (ICPC) in relation to the police investigations, and its power to require the RUC Chief Constable to refer the investigation report to the DPP. However, in circumstances where there was a hierarchical link between those investigating the incident and those subject to the investigation, the Court found that the ICPC did not constitute a sufficient safeguard. In this jurisdiction there is no equivalent of the ICPC.[16] The Garda Complaints Board is not an independent body, containing as it does members of the Gardaí. Also its powers and functions are limited; for example, it cannot act of its own motion, as a member of the public must make a complaint before it can act. Nor does it appear to have any supervisory role in relation to ongoing investigations. It is unlikely the European Court of Human Rights would consider it to be a sufficient safeguard, particularly in cases where the only investigation into a death has been a police investigation followed by an inquest.

Inquest procedure

There are a number of difficulties here. First, the law and practice relating to the procedure to be adopted at inquests is scattered among a variety of sources.[17] Unlike in the North there are no rules of procedure governing how an inquest is to proceed. It is arguable that this situation falls short of the requirement under the ECHR that laws be "sufficiently accessible and foreseeable", particularly where families cannot get legal aid to facilitate their participation in an inquest. The scope of an inquest is limited. It is expressly prohibited from considering questions of civil and criminal liability and is confined to ascertaining "the identity [of the deceased] and how,

when and where the death occurred" (section 30 of the Coroners Act 1962). It is therefore not clear whether, and if so to what extent, the inquest may consider the circumstances surrounding the death rather than simply the circumstances of the death. The authority of a jury to return a verdict of unlawful killing is also not clear. Section 30 together with section 31(1) of the Act, which states that no verdict shall contain a censure of any person, would certainly appear to prohibit any such verdict which expressly or impliedly identified any particular person.[18] And although the Act gives the coroner the power to compel witnesses to attend, including persons responsible for the death, there may be constitutional difficulties in respect of this power and the enforcement mechanisms which accompany it.[19] There is also no equivalent to the power of a coroner in the North to send a written report to the DPP where the circumstances appear to disclose the commission of a criminal offence, and even if a coroner were to do this there is no duty on the DPP to act in response to it. Therefore the extent to which the inquest will be capable of identifying and leading to the prosecution of those responsible for the death is limited.

Families of deceased in this country are also not entitled to legal aid in respect of participation at inquests. Nor are they entitled to have access to witness statements in advance of the witness giving evidence. In other words, they are in the same position as the families in the cases of *McKerr and others.* Therefore the criticism of the Court of this position would appear to apply equally to the inquest procedure here.

Whether there has been delay so as to constitute a violation of Article 2 will depend on the circumstances of each case. However, given the availability of judicial review in this jurisdiction, and given the lack of clarity in relation to many aspects of the inquest procedure, it is conceivable that significant delays will occur in the hearing of inquests into such a contentious issue as the use of lethal force by the agents of the State.

An application from Ireland has been lodged with the Secretariat of the ECHR which should result in many of these issues being ventilated.[20] For now, however, as recent events such as the Abeylara inquiry demonstrate, the law and procedure in this jurisdiction in relation to the investigation of lethal force by agents of the State remains unclear and in need of reform.●

1. The President of the Chamber of the Third Section of the Court, which heard the cases, decided that in the interests of the proper administration of justice the proceedings in all four cases would be conducted simultaneously and judgment in all four cases was delivered on the same day, May 4, 2001.
Note also the procedural avenue which allowed submissions to be heard from the Northern Ireland Human Rights Commission, established as a result of the Good Friday Agreement.
2. Application No. 28883/95.
3. Application No. 24746/94.
4. Application No. 30054/96.
5. Application No. 37715/97.
6. In this way the Court distinguished from earlier decisions involving Turkey in which it had conducted such a fact-finding exercise. In those cases, the Court stated, the domestic proceedings had terminated and were of a criminal nature. Moreover, one of the essential arguments made by the applicants in those cases was that there were serious defects in the criminal proceedings which would render them ineffective. This was not the case here.
7. Application No. 18984/91.
8. For example in the case of *Ergi v. Turkey,* Application No. 23818/94 the Court found this practical independence was absent where the public prosecutor investigating the death of a girl during an alleged clash with police relied heavily on the information provided by the police officers implicated in the incident.
9. In relation to the *Kelly* case, where the fatal shots were fired by SAS officers, the Court nonetheless found that the operation at Loughgall had been carried out jointly by the SAS and local RUC officers. Therefore there remained a link between those carrying out the investigation and those subject to the investigation.
10. Note that even in the *McKerr* case, where prosecutions were brought in relation to the original lethal use of force, the Court found that the failure of the DPP to give reasons for his subsequent decision not to institute prosecutions for perverting the course of justice after he had received the Stalker/Sampson report amounted to a violation of Article 2. A bald statement, such as issued here, declaring that it had been decided in the public interest not to institute any further prosecutions, was not sufficient when no reasons were given as to why this was the case.
11. This is not to say, however, that the publication of every document generated in connection with the use of lethal force is required. In the *Kelly* case the Court did not condemn the failure of the RUC to grant access to police investigation files to the families of the deceased. The Court accepted that in some instances the possible prejudicial effects of publication could be such as to justify suppression of certain material. However, in such circumstances the public and family members *must* be granted access to the investigative process at some other stage.
12. Legislation passed in 1981 would have provided for legal aid at inquests but was never brought into force. However, in July 2000 the Lord Chancellor announced the establishment of a non-statutory ex gratia scheme to make legal aid available in exceptional inquests in the North, the decision whether to grant it being based on various criteria, for example, whether an effective investigation by the State was needed and whether the inquest was the only way to conduct it.
13. This practice has also been changed recently, in the light of the Stephen Lawrence Inquiry. The practice now is for police in the UK to disclose witness statements 28 days in advance of an inquest.
14. Contrast this with the position in England and Wales where inquest juries are permitted to return verdicts of "lawfully killed" or "unlawfully killed".
15. Note that the Court specifically rejected the reason given by the RUC in the *Shanaghan* case for the delay in transmitting the file to the coroner. The Court stated that such an explanation was simply not sufficient to justify the failure to transmit documents for a very important judicial procedure.
16. Itself replaced in the North in October 2000 with the Police Ombudsman for Northern Ireland.
17. Something noted in the Report of the Working Group on the *Review of the Coroner Service* (2000), which called for a codification of the statute and common law relating to the coroner service.
18. There have been contradictory statements from the courts in relation to whether such verdicts involve issues of cr0iminal liability so as to be prohibited by s.30 of the 1962 Act. For example in *Greene v. McLoughlin,* unreported, SC, January 26, 1995 the SC quashed the verdict of the inquest jury that the deceased had died at his own hands, as suicide was a crime at the time. On the other hand in the Farrell case the interests served by an inquest as set out by the SC could be interpreted as allowing for such verdicts, provided no individual is named. The latter is the view of the Dublin Coroner Brian Farrell: see Farrell, Coroners: Practice and Procedure (Round Hall Ltd, 2000), pp.227-228 and 354-356. note also the comments of the Working Group on the Review of the Coroner Service, op.cit. n. 17, pp. 61-63.
19 This was acknowledged, without the point being decided, in Attorney General v. Lee [2001] 1 ILRM 553, where the SC noted that a practically identical provision in the Committee of Public Accounts of Dáil êireann (Privilege and Procedure) Act 1970 had been found to be unconstitutional in Re Haughey [1971] IR 217. In Lee the SC stated that in light of these difficulties the High Court could grant an interlocutory injunction to compel the attendance of a witness at an inquest. However, this jurisdiction would only be exercised in "exceptional circumstances" 9at 558). This constitutional difficulty was also recognised by the Working Group on the *Review of the Coroner Service, op.cit.* n. 17, pp.65-66.
20. Taken by relatives of John Morris, a suspected INLA member shot dead by Gardai in 1997.

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Administrative Law

Byrne v. Judge Scally
High Court: **Ó Caoimh J**
12/10/2000

Administrative; judicial review; applicant served with notice to quit which affirmed by respondent; failure to comply with principles of natural and constitutional justice; failure of basic fairness of procedures in proceeding to hear the application against applicant in the absence of legal representation; applicant had been deemed eligible for legal aid and respondent had adjourned the case twice to facilitate the receiving of legal advise; legal aid however was to take a number of months before it could be provided; case heard with absence of legal representation; whether lack of legal representation was breach of natural and constitutional justice; whether case involved technical and complex legal issues that warranted legal representation; whether District Court in housing application exercising straightforward and simple proofs to be satisfied.
Held: Application denied.

D.P. v. Govenor of the Training Unit
High Court: **Finnegan J.**
18/08/2000

Administrative; leave to apply for judicial review; deportation order; asylum application made and refused; applicant appealed decision but did not appear at the hearing; appeal was dismissed; letter sent to applicant informing him of decision and of his right to appeal to the Minister for Justice, Equality and Law Reform within 15 days; applicant claims he never received the letters; deportation order was made; applicant was arrested but was returned to the State; whether respondent was estopped from deporting applicant by virtue of having him returned to the State; whether arrest of applicant was breach of Article 40.4 of the Constitution;
Held: Application denied; failure by applicant to inform of change of address as required by law.

Stokes v. Minister for Public Enterprise
High Court: **Kelly J.**
03/07/2000

Administrative; access to documents; applicant seeking order directing respondent to make available to her all records, notes and memoranda pertaining to the investigation of helicopter crash in order to comprehensively comment on respondent's draft final report into incident; whether regulations confer a right to the documents; whether there is a common law right to the documents which exists per se; whether there is any general entitlement to discovery of documents in the possession of the State or other bodies; whether applicant has demonstrated that her entitlements to either natural or constitutional justice would be impaired by the non-production of documents; s.24 Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations 1997 SI 205/1997.
Held: Application dismissed.

Statutory Instrument

Oireachtas (allowances to members) (special secretarial allowance) regulations, 2001
SI 434/2001

Agriculture

Statutory Instrument

Diseases of animals act, 1966 (foot-and-mouth disease) (restriction on exhibition, sale and transport of animals) (amendment) order, 2001
SI 420/2001

Aliens

Adam v. Minister for Justice
Supreme Court: **Hardiman J., McGuinness J.**, Murray J.
05/04/2001

Aliens; judicial review procedure in asylum applications; applicants had been granted leave to seek judicial review of respondents decision to issue deportation orders against them; High Court had subsequently issued order discharging order granting leave and striking out proceedings as disclosing no reasonable cause of action; whether High Court or Supreme Court on appeal has jurisdiction to set aside an order granting leave to seek judicial review of a decision; whether the courts enjoy an inherent jurisdiction to strike out an order granting leave to seek judicial review; whether applicants had in their original statement of grounds and affidavits made out a stateable or arguable case for relief sought by way of judicial review; whether proceedings disclose any reasonable cause of action or are frivolous, vexatious or doomed to fail;
Held: Appeal dismissed; order of High Court affirmed; jurisdiction to be exercised sparingly.

P v. Minister for Justice, Equality and Law Reform
Supreme Court: Keane C.J., Denham J., Murphy J., Murray J., **Hardiman J.**
30/07/2001

Aliens; constitutional; judicial review; duty to give reasons; statutory interpretation; applicants appealing refusal of leave to apply for judicial review against respondent's decisio to order their deportation; respondent appealing grant of leave to B.; whether refusal of asylum and failure of appeal in that regard was sufficient basis for respondent to order deportation; whether sustainable argument made for purposes of leave application that us of plural form "reasons" requires that respondent must give an additional reason; whether respondent bound to have regard to s.3(6) Immigration Act, 1999; whether respondent entitled to take into account the reason for the proposal to make a deportation order; whether the "common good" implies an conclusion derogatory of applicants as individuals; whether reasons stated in letter of notice received by applicants adequate and sufficiently understandable; whether deportation order itself, as opposed to notification of decision, should contain reason for decision and date of effect of deportation; whether State's obligation to protect with special care the institution of marriage and protect it against attack precludes respondent from deciding to deport one partner while the other's application for leave to remain pending whether trial judge correct, in the case of B., i granting leave to apply for judicial review, where failure to expressly give reasons after th coming into effect of 1999 Act.
Held: Appeals dismissed.

Animals

Statutory Instrument

Diseases of animals act, 1966 (foot-and-mouth

disease) (restriction on exhibition, sale and transport of animals) (amendment) order, 2001
SI 420/2001

Wildlife (wild birds) (open seasons) (amendment) order, 2001
SI 428/2001

Arbitration

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Charities

Article

Charitable donations - getting the treatment they deserve
Woods, Tom
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Commercial Law

UPM Kymmene Corporation v. BWG Ltd.
Supreme Court: **Murphy J.,** Murray J., McGuinness J., Hardiman J., Geoghegan J.
04/04/2001

Commercial; breach of warranty; defendant agreed to sell entire issued share capital in three companies to plaintiff under share purchase agreement; whether defendant disclosed to plaintiff certain deficiencies in pension funds of companies.
Held: Plaintiff's appeal dismissed.

Company Law

Articles

Company directors: all is about to change! The new company law enforcement act 2001
Walker, Brian
2001 CLP 151

"Get your house in order now"
Heffernan, Paul
2001 FSLJ 7

Let me entertain you - at what cost?
Lohan, Robert
14 (2001) ITR 409

Statutory Instruments

Companies act, 1990 (section 34) regulations, 2001
SI 439/2001

Company law enforcement act, 2001 (commencement) (no.2) order , 2001
SI 438/2001

European communities (single-member private limited companies) regulations, 1994 (amendment) regulations, 2001
SI 437/2001

Competition

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Whish, Richard
Competition law
4th ed
London Butterworth 2001
W110

Constitutional Law

Knowles v. D.P.P.
High Court: **McKechnie J.**
06/04/2001

Constitutional; judicial review; applicant seeks order of prohibition restraining prosecution of assault charge; delay of 14 months in proceeding with preliminary examination; whether time-lapse constitutes excessive or unreasonable delay; whether breach of applicant's constitutional right to trial with reasonable expedition or right to trial in due course of law; whether Court should infer, or make a finding of, presumptive prejudice; Art. 38.1 of the Constitution;
Held: Relief refused; whilst frequently right to reasonable expedition is considered in context of Art. 38.1, violation of the former right will not necessarily result in breach of latter provision.

Contract

Forbes v. Tobin
High Court: **McCracken J.**
08/03/2001

Contract; land; specific performance; tax; contract for sale of land; plaintiff purchaser seeks specific performance of contract of sale; defendant's solicitors refused to complete sale due to dispute as to whether plaintiff was bound to pay value added tax to defendant in addition to purchase price; completion notices served by defendant on plaintiff; whether contract for sale of premises only or of business being carried on therein by defendants; whether tax is "exigible" within meaning of special conditions of sale; whether when plaintiff issued proceedings he was ready willing and able to complete in accordance with terms of contract, given that he had wrongly refused to pay value added tax; whether defendant's completion valid; whether, at time of service of completion notice, defendants were ready willing or able to complete sale and entitled to forfeit deposit.
Held: Order for specific performance refused, as plaintiff's refusal to pay value added tax meant not willing to close in accordance with the contract and furthermore would be inequitable to so order; contract for sale declared to be rescinded; injunction granted restraining defendants from forfeiting deposit and ordering repayment by defendants to plaintiff of deposit together with interest.

AHP Manufacturing B.V. v. DHL Worldwide Network N.V.
Supreme Court: Denham J., Murphy J., Murray J., Hardiman J., **Fennelly J.**
30/07/2001

Contract; breach of contract for carriage of goods; consignment damaged; whether trial judge erred in drawing inferences which led him to the conclusion that acts of appellants were both reckless and done with the requisite knowledge; whether appellants can be held liable for gross negligence given that "important notes" on German version of Airway bill were not part of contract; Articles 11(1) and 25, Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), 1929
Held: appeal allowed.

Ó Murchú v. Eircell Ltd.
Supreme Court: Geoghegan J., McGuinness J., Hardiman J.
21/02/2001

Interlocutory injunctions; appellant seeks interlocutory injunctions to compel respondent, until further order, to continue supplying or permitting supply of 'Ready to Go' mobile phones to appellant and to treat appellant as an authorised agent for this purpose; whether a contract exists between the parties in specific terms; whether an oral or implied agency agreement exists; whether it is a term of that agency agreement that the appellant would enter into written agency agreement, the form of which was to be prepared by respondent, whenever requested by respondent to do so; whether appellant has an arguable case that the agreement had not been terminated by reasonable notice or by respondent treating and accepting a serious breach by the appellant as a repudiation of the contract; whether damages are adequate remedy; whether damages could be confined within a limited period; whether balance of convenience favours granting rather than refusing injunction; whether granting of an injunction would involve ongoing supervision or compel two parties to trade with one another when one, for rational reasons, did not want to carry on such trading; whether practical for court to force such continued trading;
Held: Order of High Court affirmed.

Library Acquisition

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Haigh, Simon P
Dublin Round Hall Sweet & Maxwell 2001
N285.4

Criminal Law

D.P.P. v. Haugh
High Court: **Carroll J.**
03/11/2000

Criminal; exercise of jurisdiction; notice party returned for trial in Circuit Criminal Court on two counts of obstructing Tribunal of Inquiry; applicant seeking judicial review of trial judge's decision to grant a stay of further proceedings without leave of court on grounds of unfair pre-trial publicity; whether order made was a final one in the nature of order of prohibition or permanent stay; as trial judge is not known until jury empanelled and trial commences, whether trial judge appropriate person to hear pre trial applications; whether applicant has discharged onus of proof that trial judge's decision made without jurisdiction.
Held: Application refused.

Hourigan v. Judge Neilan
High Court: **Murphy J.**
30/11/2000
Criminal; applicant did not attend Circuit Court appeal hearing; Circuit Court heard case; applicant's solicitor was present during appeal; whether Circuit Court should have heard appeal in absence of applicant; whether listing of the Appeal to the Circuit Court was an unreasonably early date; whether Court could impose prison sentence under Section 1 of the Protection of Animals Act 1911; whether offences were minor.
Held: Application refused.

D.P.P. v. Judge Martin
High Court: **Kinlen J.**
19/05/2000

Judicial review; prohibition; summons not signed by District Court Clerk; first named respondent had dismissed charge; applicant had then left the court with his solicitor; first named respondent had then commented to Gardai in their absence that they could proceed again against the applicant; applicant seeks order of prohibition to prevent any further criminal proceedings in this matter; whether autrefois acquit arises; whether Judge acted without jurisdiction; whether court can look outside the written order in a court of record
Held: Order granted.

The People (D.P.P.) v. O'Callaghan
Court of Criminal Appeal: **Hardiman J.,**
O'Sullivan J., O'Caoimh J.
18/12/2000

Evidence; res judicata; issue estoppel; applicant convicted at a second trial of causing damage by fire of premises, after first jury discharged due to disagreement; whether finding of judge in first criminal trial that evidence of proposed witness was inadmissible because irrelevant precluded its admission at second criminal trial; whether fact trial ended inconclusively prevents the decision constituting a res judicata.
Held: Conviction set aside; new trial directed on additional basis that question of admissibility of proposed evidence of witness is res judicata.

The People (D.P.P.) v. Redmond
Court of Criminal Appeal: **Hardiman J.,**
McCracken J., Murphy J.
20/12/2000

Criminal; sentencing; undue leniency; respondent had been fined by Circuit Criminal Court for failure to make tax returns; applicant applied pursuant to s.2 Criminal Justice Act, 1993 to review sentences imposed on respondent; whether although penalties imposed on the low side, there was error in principle on part of trial judge in sentencing respondent; whether fines could therefore be said to be unduly lenient.
Held: Application refused.

The People (D.P.P.) v. Kiely
Court of Criminal Appeal: **McGuinness J.,**
O'Sullivan J., Finnegan J.
21/03/2001

Criminal; evidence; sentencing; applicant appealing against conviction and sentence for three counts of assault and possession of an offensive weapon in a public place for damaging property; whether trial judge erred in admitting evidence in question; whether interruptions of evidence by trial judge excessive; whether trial judge erred in leaving count to jury; whether omission of specific words concerning the benefit of the doubt in the trial judge's charge to the jury relating to the burden and standard of proof could have led to a miscarriage of justice; whether trial judge erred in principle in imposing sentence, in that he did not take into account all proper considerations.
Held: Appeals dismissed.

The People (D.P.P.) v. Egan
Court of Criminal Appeal: **Hardiman J.,**
O'Sullivan J., O'Caoimh J.
18/12/2000

Criminal; sentencing; undue leniency; applicant applied pursuant to s.2 Criminal Justice Act, 1993 to review sentences imposed on respondent; respondent was sentenced to immediate custodial sentence of three months, the balance of the twelve month sentences imposed in respect of counts of gross indecency, buggery and harassment being suspended; respondent, a first offender of previous good character, had already been released from prison when application came on for hearing; whether sentence imposed unduly lenient, in light of the gross indecency offences being the most serious charged and in view of the fact that the mitigating circumstances would preclude the imposition of more than half the maximum of two years imprisonment;
Held: sentence unduly lenient; however in present circumstances of case, trial judge's sentence affirmed with added condition that defendant undertake to abide by the advices of psychologist in every respect during period of suspension.

The People (D.P.P.) v. Kennedy and Wills
Court of Criminal Appeal: **Denham J.,**
Carroll J., Smith J.
27/02/2001

Criminal; sentencing; applicant applied to review sentences imposed by the Circuit Criminal Court pursuant to s.2 Criminal Justice Act, 1993; respondents had been sentenced to five years suspended sentence and compensation to be paid to the victim; respondents had broken into the house of elderly man at 3 a.m. and robbed £600; respondents had pleaded guilty and cooperated with the Gardai; sentencing was adjourned for a year to collected compensation; respondents had been of good behaviour during this period; whether sentence was unduly lenient having regard to the serious offence of robbery committed; whether sentence was proportionate to the crime and the impact on the victim
Held: Trial court sentences quashed and sentence of five years imprisonment the final four to be suspended entered.

The People (D.P.P.) v. M.
Court of Criminal Appeal: **Denham J.,**
Carroll J., Smith J.
15/02/2001

Criminal; conviction for sexual assault offence; appeal due to inconsistent versions of the incident by the complainant; whether the witness was unreliable; whether inconsistencies go to issues of credibility and reliability; whether inconsistencies matter of fact for jury to determine
Held: Appeal dismissed.

McNamara & Others v. Judge MacGruairc
Supreme Court: **Murphy J.,** Murray J., Hardiman J.
05/07/2001

Criminal; delay; judicial review; applicant had sought order for prohibition preventing the respondents proceeding against him with charges of assault on the ground of delay; appeal from decision of High Court holding that there had been delay attributable to the applicant but that it had not been prejudicial; whether there had been adequate explanation for the delay; whether the delay was prejudicial to the applicant in the circumstances of the case; whether the delay constituted an infringement of the applicant's right to trial with reasonable expedition; whether it would be unjust and unnecessary to grant the relief sought;
Held: Appeal dismissed; order of the High Court affirmed.

Articles

Drugs driving in Ireland - a preliminary study of the prevalence of driving under the influence of drugs on Irish roads
Moane, S
Leavy, C P
7 (2001) MLJI 21

Fitness to plead and insanity in the District Court
Whelan, Darius
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Reynolds, D
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Reid, Paula
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The obtaining, examining, analysis and retaining of forensic samples in criminal investigation
Donovan, James
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SI 427/2001

District court (criminal justice) (no. 2) rules, 2001
SI 448/2001

Sex offenders act, 2001 (commencement) order, 2001
SI 426/2001

Damages

Devlin v. Minister for Justice
High Court: **Morris P.**

04/04/2001

Damages; claim for damages for assault, battery, negligence and breach of statutory duty; claim for damages for assault instituted outside 3 year time limit but within 6 year limit; whether action for assault is an action "claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty" so that plaintiff's action is statute-barred; whether seeking damages for assault is a separate cause of action to an action based on negligence since, unlike the latter, the former involves deliberate intention to cause injury; s. 3, Statute of Limitations (Amendment) Act, 1991;
Held: Claim for damages for assault not statute-barred.

R.L. v. Minister for Health and Children
High Court: **O'Neill J.**
06/04/2001

Damages; assessment of damages; supervening events; concurrent wrongdoers; applicant suffers from moderate Haemophilia A and as a result of treatments administered to him was infected with Hepatitis C virus; applicant suffers profound fatigue, requires a liver transplant and had to give up work in chosen career; applicant subsequently involved in serious road accident resulting in amputation of leg above knee; whether as a matter of policy tortious events should not be considered to be amongst the vicissitudes of life to which a court should have regard in the assessment of future losses; whether road traffic accident could have been a novus actus interveniens; whether both respondent and owner/driver of motor car involved in road traffic accident are concurrent wrongdoers.
Held: General damages awarded in sum of £300,000; award of £142,500 in respect of future loss of earnings, entitling applicant to a decree in the sum of £442,500.

Education

Article

Staying ahead of the game
Law Society
2001 (August/September) GLSI

Statutory Instrument

Qualifications (education and training) act, 1999 (commencement) (no. 2) order, 2001
SI 418/2001

Employment

Coonan v. The Attorney General
Supreme Court: **Murphy J.(*dissenting), Geoghegan J.,** Fennelly J.
29/05/2001

Contract; employment; renewal of contracts for State Solicitors; customary to grant extensions of one year period year by year from age 65; policy decision had been made that extensions to contracts of State Solicitors after the age of 65 would not be granted henceforth; plaintiff had been refused grant of an extension pursuant to policy decision; defendant appealing award of damages to plaintiff; whether attorney general in breach of contract; whether award of £100,000 damages reasonable.
Held: appeal dismissed; although defendant has residual discretion which could be exercised against renewal in particular circumstances, not contractually entitled to introduce a blanket policy.

Articles

The race directive and the framework directive: analysis of their effect on Irish employment - part 1
Connolly, Ursula
2001 ILT 206 [Part 1]
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Pressure points
Deane, Jane
2001 (August/September) GLSI 14

Environmental Law

Articles

Changes in the level of protection for the Irish architectural heritage since the enactment of the local government (planning and development) act 1999
O'Rourke, Mona
2001 IP & ELJ 109

Strengthening rights of participation in environmental decision-making
Ryall, Aine
2001 IP & ELJ 103

European Law

Maher v. Minister for Agriculture
Supreme Court: **Keane C.J., Denham J.,** Murphy J., **Murray J., Fennelly J.**
30/03/2001

European law; delegated legislation; principles and policies; property rights; milk quotas; applicants had unsuccessfully challenged by way of judicial review validity of regulations restructuring milk quota regime made by respondent; whether detailed rules being made in the form of statutory instrument rather than act conflicts with exclusive legislative role of Oireachtas; whether choice of appropriate measures can be regarded as involving no determination of policy or principle; whether property rights of the applicants have been infringed under national law; whether there are property rights of the applicants which have been infringed under community law. Arts. 15.2.1 & 29.4.7 of the Constitution; S.I. 94/2000.
Held: Appeal dismissed.

Articles

Cabletron Systems Ltd. v. the Revenue Commissioner (ECJ case C 463/98)
McCarthy, Damien
14 (2001) ITR 391

Strengthening rights of participation in environmental decision-making
Ryall, Aine
2001 IP & ELJ 103

Evidence

McDonald v. Radio Telefís Éireann
Supreme Court: **Murphy J., McGuinness J.,** Fennelly J.
25/01/2001

Evidence; public interest privilege; proceedings for defamation; plaintiff claims that defendant implied that member of IRA and involved in murder; pleadings exchanged between the parties; defendant served subpoenas to number of members of Garda Siochana to give evidence at trial; Gardaí had consultation with legal advisers of defendants; plaintiff's solicitors did not request consultation; leave granted to amend defence to plead justification claiming inter alia that plaintiff aided and abetted in murder; exchange of further particulars on the same day between the parties; plaintiff sought third party discovery against Gardaí whether public interest privilege applied; whether public interest privilege waived by Gardaí if showed documents to defendants;
Held: No waiver, privilege applied over certain documents.

Extradition

Heywood v. Egan
High Court: **Finnegan J.**
14/11/2000

Extradition; lapse of time; exceptional circumstances; plaintiff seeking order directing his release; whether on balance of probability by reason of lapse of time since commission of alleged offences up to hearing date and other exceptional circumstances, having regard to all circumstances it would be unjust, oppressive or invidious that plaintiff should be extradited; whether substantial grounds for believing that plaintiff would be prejudiced in another jurisdiction by reason of his race.
Held: Relief refused.

Adams v. D.P.P.
Supreme Court: **McGuinness J.,** Murray J., Geoghegan J.
06/03/2001

Extradition; service of proceedings; sovereign immunity; appellant had been arrested in and extradited from Northern Ireland and subsequently prosecuted in Ireland; upon his release appellant had been re-arrested and charged with separate offences; such a prosecution had required issuance of certificate by British Home Secretary waiving specialty in matter; appellant seeks inter alia order of *certiorari* quashing certificate issued by British Home Secretary waiving specialty with regard to offences; whether High Court, or Supreme Court on appeal, has any jurisdiction to judicially review administrative acts or executive actions of a Minister of a foreign government carried out in his own country; whether Irish statute or statutory instrument create a power, reviewable by the courts, in the Home Secretary to provide such certificate; whether dismissal of action against British Home Secretary deprives appellant of his constitutional right of access to the courts; s. 39, Extradition Act, 1965; S.I. No. 221 of 1994.
Held: Appeal dismissed.

Martin v. Conroy
High Court: **Herbert J.**
01/05/2001

Extradition; lapse of time; exceptional circumstances; plaintiff, on expiry of sentence for unlawful possession of firearms, was re-arrested on foot of extradition warrants relating

to alleged explosives offences in the United Kingdom; plaintiff seeking order directing his release on ground that it would be unjust, oppressive or invidious to deliver him up by reason of the lapse of time since the commission of the offence specified in the warrant and other exceptional circumstances; whether distinction to be drawn between lapse of time entirely or substantially occasioned by the deliberate and voluntary actions of a person in seeking to evade discovery and a lapse of time referable to that person serving a term of imprisonment; whether wholly unexplained lapse of seven years in issuing warrants is lapse envisaged by section 50(2)(bbb) of the Extradition Act, 1965, as amended; whether such delay is negation of plaintiff's right to trial with reasonable expedition; whether despite failure of plaintiff to demonstrate any actual or probable prejudice to his capacity to defend himself by reason of the passage of time since date of alleged offences, it would be unjust to deliver him up after such unexplained delay; whether wholly unexplained dilatoriness of Requesting Authorities in seeking extradition, together with inferred reality of real and serious risk of unfair trial amount to exceptional circumstances.
Held: Relief granted; plaintiff failed to discharge onus that normal practice to seek extradition of prisoner at determination of sentence is incorrect.

Library Acquisition

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Jones, Alun
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Family Law

R.McC. v. Judge Murphy
Supreme Court: **Keane C.J.**; Murphy J; Murray J.
23/03/2001

Family; administrative; judicial review; applicant seeks order of *certiorari* quashing order of respondent refusing an application for review of periodic maintenance payments payable by applicant on granting of divorce decree; applicant had submitted that proceedings were not proceeding under Family Law (Divorce) Act 1996 and as such should not have been heard in camera; whether respondent had acted within jurisdiction.
Held: Appeal refused; judgment had been correctly held *in camera.*

Article

Selecting responses to domestic violence
Vaughan, Barry
2001 (2) ICLJ 23

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Fisheries

Statutory Instruments

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Cod (fisheries management and conservation) (no. 5) order, 2001
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Common sole (fisheries management and conservation the Irish sea) (no.2) Order, 2001
SI 423/2001

Haddock (fisheries management and conservation) (no. 5) order, 2001
SI 454/2001

Hake (fisheries management and conservation) (no.4) order, 2001
SI 455/2001

Herring (prohibition of fishing in ICES divisions VB, VIAN, VIB and VIASS, VIIBC revocation) order, 2001
SI 435/2001

Merchant shipping (registry, lettering and numbering of fishing boats) (amendment) regulations 2001
SI 411/2001

Monk (fisheries management and conservation) (no.4) order, 2001
SI 456/2001

Quality of shellfish waters (amendment) regulations, 2001
SI 459/2001

Whiting (fisheries management and conservation) (no. 6) order, 2001
SI 453/2001

Freedom of Information

E.H. v. The Information Commissioner
High Court: **O'Neill J.**
04/04/2001

Freedom of information; discovery; statutory interpretation; appeal pursuant to s.42(1) Freedom of Information Act, 1997; in the course of a negligence proceedings appellant obtained an order for discovery against defendants and undertook to preserve confidentiality of discovered documents; appellant was refused access to records held by defendants on the basis all relevant information had been made available in discovery; appellant appealing two decisions of respondent to refuse access to certain records held by defendants; whether respondent correct in concluding as a matter of law that disclosure of documents sought would be a breach of undertaking given and hence a contempt of court; whether where head of public body or respondent is aware of existence of undertaking, expressed or implied, to a court, disclosure must be refused; whether on the evidence the appellant could have obtained access to records under categories B C and D of records in issue.
ss.6(4) and (5), 22(1)(b) Freedom of Information Act, 1997
Held: Appeal dismissed; respondent's findings that documents in category A should not be disclosed upheld; Court to examine documents in respect of which there is a refusal, in order to be satisfied no grounds of appeal on a point of law.

Minister for Justice v. Information Commissioner
High Court: **Finnegan J.**
14/03/2001

Freedom of information; access to records; appeal against decision of respondent to grant notice party access to records relating to particular criminal proceeding; whether records in question come within exception contained in statutory provisions; whether "proceedings" refers to any step in an action which is held in public; whether at all material times official stenographer had a relationship exclusively with court; whether transcripts are only provided by registrar to a party interested in an appeal or application for leave to appeal; whether notice party is such a party; whether there is an appeal in being; whether transcript requested by notice party is a record whose disclosure to general public is prohibited by court; whether assembling of documents, in particular, statements, and binding them together, constitutes a record; whether compilation of documents, even if this consists solely of photocopying of documents prepared elsewhere, and putting them into a book is creation of a record for purposes of Act; whether originality a necessary ingredient; whether, on information before court, it can be shown that refusal to grant a request in relation to the two claims for payment of fees in respect of the medical reports in the criminal proceedings had been justified; whether respondent properly granted access to same, subject to full information becoming available; ss. 7, 34.12(b) and 46.1, Freedom of information Act, 1997; s. 33, Courts of Justice Act, 1924 (as amended by s.7, Criminal Justice (Miscellaneous Provisions) Act, 1997.
Held: Decision of respondent discharged and substituted by order granting notice party access to two claims in respect of payment of fees in respect of the medical reports.

Garda Síochána

Cahill v. Garda Commissioner
Supreme Court: **Keane C.J.,** Murphy J., Murray J. (ex tempore)
17/05/2001

Practice and procedure; Garda disciplinary investigation; judicial review; applicant seeks order of *certiorari* quashing findings and recommendations of disciplinary inquiry and appeal board and order of respondent that applicant in breach of discipline; applicant seeks order of prohibition restraining members of disciplinary inquiry taking further steps to investigate complaints against applicant by two members of public; whether fact that new materials had been found subsequent to disciplinary hearing which might suggest possible line of inquiry not pursued at actual hearing of and by itself entitles applicant to order of *certiorari* quashing hearing.
Held: Appeal dismissed.

Statutory Instrument

Garda Síochána (associations) (amendment) regulations, 2001
SI 451/2001

Guarantees

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Human Rights

Article

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Information Technology

Articles

Industrial espionage and the encryption debate
O'Reilly, Declan
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O'Herlihy, Edel
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The regulatory framework for risk management
Tighe, Una
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Contract law in an e-commerce age
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Insurance

Article

Recent developments in the regulation of insurance intermediaries
Boyle, David P
2001 ILT 223

Intellectual Property

Montex Holdings v. Controller of Patents
Supreme Court: Keane CJ., Murphy J., Murray J., McGuinness J., **Geoghegan J.**
05/04/2001

Intellectual property; registration of trademarks; plaintiff had applied to first named defendant to register trademark; first named defendant had refused to register trademark because of rival use of same brand name by second named defendant; High Court had held that there had been a lack of *bona fides* in plaintiff's proposed user of mark and had refused registration on this ground; whether registration of trademark would be reasonably likely to cause deception and confusion amongst a substantial number of persons; whether there must be some element of blameworthiness on part of applicant above and beyond likelihood of deception or causing confusion to disentitle him/her from obtaining legal protection of relevant trademark; ss. 19, 25(2), Trade Marks Act, 1963.
Held: Appeal dismissed; blameworthiness does not have to be established for registration to be refused if there is a proven likelihood of confusion.

International Law

Article

Criminalising attacks on peacekeepers and the creation of an effective international legal protection
Murphy, Ray
Wills, Siobhan
2001 (2) ICLJ 14

Library Acquisition

An introduction to the international criminal court
Schabas, William A
Cambridge University Press 2001
C219

Judicial Review

Library Acquisition

De Blacam, Mark
Judicial review
Dublin Butterworth Ireland 2001
M306.C5

Legal Aid

Statutory Instrument

Criminal justice (legal aid) (amendment) (no.2) regulations, 2001
SI 427/2001

Legal Profession

Library Acquisition

The Irish legal system
Byrne & McCutcheon
4th ed
Dublin Butterworth Ireland 2001
L13

Local Government

Statutory Instrument

Local government act, 2001 (commencement) order, 2001
SI 458/2001

Medical Law

Articles

A comparative study of the law on infectious disease testing of refugees and asylum seekers in Europe and the USA
McGovern, Cliona
7 (2001) MLJI 13

Improving conditions in Irish psychiatric hospitals
Boland, Faye
7 (2001) MLJI 5

Statutory Instrument

European communities (medical devices) (amendment) regulations, 2001
SI 444/2001

Mental Health

Blehein v. St. John of God Hospital
High Court: **O'Sullivan J.**
06/07/2000

Medical; mental treatment; applicant seeks leave to institute proceedings under s.260, Mental Treatment Act, 1945; applicant claims he was detained against his will on foot of orders made by or on behalf of the respondent and claims declarations that respondent has acted in breach of rules of natural justice and violated his constitutional rights; whether applicant had established substantial grounds for contending that the respondent acted either in bad faith or without reasonable care; s.185 Mental Treatment Act, 1945; s.5 Mental Treatment Act, 1953.
Held: leave refused on all grounds bar one; applicant established substantial ground that respondent is not and was not at relevant time designated by law as a place of detention; matter adjourned; no final order made.

Negligence

Thomas v. Leitrim County Council
Supreme Court: Keane C.J., McGuinness J., **Hardiman J.**
07/03/2001

Negligence; trespass; apportionment of liability; plaintiff involved in an accident on tourist site owned by Defendant; trial judge's finding being appealed by plaintiff on grounds of apportionment of liability and by defendant on grounds of finding that plaintiff an invitee; whether plaintiff a licensee on defendant's lands; whether evidence establishes that material benefit conferred on defendant; whether trial judge entitled to conclude that defendant in capacity as licensor had not acted with reasonable diligence to prevent the particular area from misleading the licensee; whether plaintiff must bear the larger share of the fault for this accident;
Held: Plaintiff's appeal dismissed: plaintiff must bear two thirds of fault; defendant's appeal upheld.

Kelly v. Minister for Agriculture, Food and Forestry
High Court: **Butler J.**
01/05/2001

Negligence; preliminary trial of issues of law; whether on facts pleaded defendants owed plaintiff duty of care at common law; whether on facts pleaded defendants in breach of duty of care; whether on facts pleaded breach caused or contributed to alleged or any loss or damage of plaintiff; whether on facts pleaded defendants vicariously liable in respect of alleged negligence and breach of duty of officials of first defendant; whether cause of action for malicious prosecution disclosed.
Held: Defendants found liable.

Planning

Cork County Council v. Cliftonhall Ltd.
High Court: **Finnegan J.**
06/04/2001

Planning; judicial review; applicant seeks orders ensuring respondent's compliance with planning permission as granted; whether the construction of utility rooms not provided for in plans constitutes exempt development; whether there has been a deviation from plans with regard to footprint of development; whether ridge height of part of development as constructed deviates from plans lodged with application; whether each individual deviation is in itself immaterial in the context of overall development; whether combined effect of deviations from approved plans constitutes material noncompliance with planning permission; s. 27(2), Local Government (Planning and Development) Act, 1976; s. 19, Local Government (Planning and Development) Act, 1992; Local Government (Planning and Development) Regulations, 1994;
Held: Relief refused; elevations for each block in the development to be submitted within four weeks.

Dolan v. Cooke
Supreme Court: **Keane C.J.** (ex tempore), Denham J., McGuinness J.
13/03/2001

Planning; works carried out by the respondent on land; respondent carried out drainage works and created path on the land; whether these works constituted exempt development for the purpose of agriculture or forestry;
Held: Appeal dismissed.

Articles

Changes in the level of protection for the Irish architectural heritage since the enactment of the local government (planning and development) act 1999
O'Rourke, Mona
2001 IP & ELJ 109

Judicial review of planning decisions - section 50 practice & procedure
Simons, Garrett
6(8) 2001 BR 449

Practice & Procedure

Ryan v. Connolly
Supreme Court: **Keane C.J.,** Murphy J., McGuinness J.
31/01/2001

Practice and Procedure; Statute of Limitations; "without prejudice" privilege; plaintiff involved in road traffic accident with defendant; limitation period for initiating proceedings expired; trial judge determined that defendants precluded from standing on their legal rights due to circumstances of case; whether court entitled to look at "without prejudice" correspondence for the purpose of determining whether circumstances were such that defendants should not be allowed to maintain their plea under Statute of Limitations, 1957; whether defendants precluded from relying on a defence under Statute.
Held: Appeal allowed

Bula Ltd. v. Crowley
High Court: **Barr J.**
20/02/2001

Practice and procedure; limitation of action; order of High Court prohibiting plaintiffs from making new claims against defendants of which plaintiffs were aware or ought to have been aware at that time; plaintiffs had been given liberty by High Court to issue revised Points of Claim; whether these new claims captured by the prohibition; plaintiffs seeking discovery of documents relating to new claims; whether the court should exercise its discretion on an application to amend pleadings by inclusion of new claims; whether there is a stateable argument in support of the claim; whether inclusion of new claims would be unjust to defendants; Order 28, rule 1, Rules of the Superior Courts; Statute of Limitations, 1957;
Held: Allowed 11 of the new claims; allowed discovery in relation to named suspense accounts.

Proctor and Gamble v. The Controller of Patents, Designs and Trade Marks
High Court: **Finnegan J.**
30/03/2001

Practice and procedure; time limits; trade marks; plaintiff appealing pursuant to s.79 Trade Marks Act, 1996 against a decision of defendant to refuse to register a three dimensional mark; plaintiff had been notified by letter that application refused; summons issued outside period of three months from date of letter notifying refusal of application but within three months computed from the handing down of written grounds of decision; whether appeal within time.
Held: Matter adjourned to enable plaintiff to bring an application for an enlargement of time.

Hannon v. Commissioners of Public Works
High Court: **McCracken J.**
04/04/2001

Practice and procedure; motion for further and better discovery; claim for declaratory, injunctive relief and damages for personal injury allegedly due to defendant's negligence, breach of duty, breach of statutory duty, breach of contract and breach of plaintiff's constitutional rights; whether, as a matter of probability, a particular document is relevant to issues to be tried; whether discovery of documents oppressive; Or. 31, r. 12, Rules of the Superior Courts, 1986;
Held: Allowed further discovery of certain documents.

O'Shea v. Judge O'Buachalla
Supreme Court: **Denham J.,** Murray J., Hardiman J. (ex tempore)
24/05/2001

Practice and procedure; judicial review; appeal by applicant against decision of High Court discharging conditional order and awarding costs to respondent; respondent had made order refusing applicant's request to make further depositions and had ordered return for trial; whether respondent had acted within jurisdiction in refusing request for further depositions; whether respondent entitled to refuse application for depositions; whether, having been granted initial request for depositions, accused would have been prejudiced by denial of subsequent request for depositions; s. 5 and 7, Criminal Procedure Act, 1967;
Held: Appeal dismissed.

Riordan v. Chief Justice Hamilton
High Court: **Smyth J.** (ex tempore)
26/06/2000

Practice and procedure; striking out proceedings; abuse of process; defendant seeking orders to strike plaintiff's case out and to restrain applicant from issuing any further proceedings against defendants; whether an abuse of process of the court to engage in this litigation; whether, as facts had already been litigated, plaintiff's claim should be struck out on grounds no reasonable cause of action disclosed and has no reasonable prospect of success; whether order should be granted restraining applicant from issuing any further proceedings against the defendants or any person holding the office of Judge of the Supreme Court or of the High Court; whether pleadings should be stricken from the record, in view of the contemptuous language and scandalous allegations; O.19 r.28 Rules of the Superior Courts.
Held: Relief granted.

Article

Statutes and limitations
King, Michael
2001 (August/September) GLSI 26

Prisons

Murray v. Governor of Mountjoy Prison
Supreme Court: **Keane C.J,** Murphy J, Fennelly J.
09/03/2001

Administrative; judicial review; applicant had alleged he had not been allowed television in cell; applicant claimed he had suffered discriminatory practices due to fact he was in particular area of prison; applicant further alleged that he had suffered an assault consequent upon threat; whether his right to bodily integrity infringed by failure of Governor to inform him of threat; whether it was for Prison Rules to determine alleged discriminatory practices; whether such matters could be canvassed by way of judicial review.
Held: Appeal dismissed.

Hassett v. Governor of Limerick Prison
Supreme Court: **Keane C.J,** Murphy J, Fennelly J.
09/03/2001
Administrative; judicial review; applicant alleged that he was not permitted to have private medical treatment whilst a prisoner; applicant sought order of mandamus to permit him to have such treatment; whether entitlement to private medical care existed whilst in prison; whether decision of prison doctor as to what treatment was appropriate susceptible to judicial review.
Held: Appeal dismissed.

Kelly v. Minister for Justice Equality and Law Reform
Supreme Court: **Keane C.J,** Murphy J, Fennelly J.
09/03/2001

Administrative; judicial review; applicant had alleged that he was refused particular type of medical treatment; alleged he had been denied

proper access to gymnasium; alleged there was infestation of cockroaches in cell; further alleged that he was denied proper access to Courts due to necessity of paying Commissioner's fees; Deputy Governor of Mountjoy had sent report setting out prison authorities views in relation to these matters; whether any substance in complaint regarding Commissoner's fees; whether matters in relation to governance of prison were appropriate matters for judicial review.
Held: Appeal dismissed; practice of obtaining views of prison authorities in relation to matters of this nature not appropriate.

Cummins v. Governor of Portlaoise Prison
Supreme Court: **Keane C.J,** Murphy J, Fennelly J.
09/03/2001

Prisons; habeas corpus application; applicant alleges that he is being held under invalid warrant on basis that warrant does not contain any reference to statute under which he is being held; whether form of warrant correct.
Held: Appeal dismissed; warrant good on its face; not necessary for record attached to warrant to specify precise statute that relates to counts on indictment.

Ward v. Governor of Portlaoise Prison
Supreme Court: **Keane C.J,** Murphy J, Fennelly J.
09/03/2001
Constitutional; habeas corpus; applicant had alleged that fact that case had been conducted by solicitor from Chief State Solicitor's Office had been unlawful; alleged that no return for trial order had been proved; complained that it had not been stated in open Court that he was being prosecuted in the name of the people at the suit of the DPP; whether D.P.P. entitled to retain counsel to conduct prosecutions on his behalf; whether necessity to prove return for trial order on a plea of guilty; whether any ground had been laid for an order of habeas corpus.
Held: Appeal dismissed.

Gilligan v. The Governor of Portlaoise Prison
High Court: **McKechnie J.**
12/04/2001

Administrative; prison rules; fair procedures; applicant prisoner physically and verbally abused prison officer and issued serious threats to the safety and health of him and his family; applicant seeking *certiorari* of decision to impose sanctions of close confinement, loss of remission and loss of privileges; whether arguable case that impugned decision unconstitutional; whether Rules for the Government of Prisons, 1947 ultra vires the Prisons (Ireland) Act, 1877, as amended; whether basement area of prison as place of detention ultra vires prison rules; whether fair procedures and natural and constitutional justice complied with, in that applicant should have been informed of intention to charge him with breach of discipline, that all evidence should have been put before him, that applicant should have had opportunity to consult with solicitor and of making plea in mitigation.
Held: Leave refused.

Property

Library Acquisition

Cousins, Edward
The law of mortgages
2nd ed
London Sweet & Maxwell 2001
N56.5

Prisons

Statutory Instrument

Prisons act, 1972 (section 3) order, 2001
SI 461/2001

Proceeds of Crime

M.F.M. v. M.C.
High Court: **O' Sullivan J.**
19/12/2000

Proceeds of crime; constitutional; respondent involved in distribution of heroin; applicant seeks freezing order in relation to certain property and appointment of receiver to take possession of property; whether appropriate to appoint receiver as no interlocutory order had been made; whether admissible evidence had been tendered that value of property in excess of £10,000; whether Article 29.3 of Constitution had effect of incorporating text of European Convention on Human Rights into Constitution itself; whether Proceeds of Crime Act 1996 contravened Article 6 of European Convention on Human Rights.
Held: Order pursuant to s. 3 of 1996 Act prohibiting respondent from disposing of property granted; receiver appointed for limited purpose of receiving rents from property pending outcome of trial; consideration of constitutional issue inappropriate as respondent lacked locus standi.

Property

Persian Properties Ltd. v. Registrar of Titles
High Court: **Carroll J.**
14/02/2001

Land; registration of title; damages; dispute regarding title to a bottleneck entrance between two properties; property in the entrance destroyed; map submitted with application for first registration of one property inaccurately portrayed its breadth; bottleneck eliminated on the Folio map registered with the Land Registry; whether the discrepancies would have been obvious on an examination of the two maps; whether error had been substantial or within acceptable margin of error in mapping practice; whether plaintiffs were aware before signing of the dispute as to title; whether plaintiffs entitled to compensation for the diminution in value of their freehold interest by reason of the loss of part of the entrance; whether the value of such loss is limited to the value of that land; whether the loss is entirely attributable to the error of the Land Registry; Registration of Title Act, 1964;
Held: Plaintiffs awarded £10,000 and the High Court costs.

Twil Ltd. v. Kearney
Supreme Court: **Murphy J., Fennelly J.,** Murray J.
28/06/2001

Land; statutory interpretation; right to new tenancy deriving from business user; case stated from Circuit Court regarding relevant date by reference to which performance of tenant's conditions precedent to the grant of a new tenancy must be determined; (1) whether expression "at that time" (referring to the appropriate date) is the date of expiry of the lease; (2) whether the occupation of a subtenant for a period of time constitutes occupation by person who is tenant immediately before that time; s. 13, Landlord and Tenant Act, 1980;
Held: Affirmative; negative.

Refugees

Article

A comparative study of the law on infectious disease testing of refugees and asylum seekers in Europe and the USA
McGovern, Cliona
7 (2001) MLJI 13

Road Traffic

D.P.P. v. Mangan
Supreme Court: Keane C.J., Denham J., **Geoghegan J.**
06/04/2001

Road traffic; case stated; appellant convicted for refusing to permit doctor to take blood specimen; whether trial judge entitled to infer that requirement made by Garda pursuant to Road Traffic Act was made under Road Traffic Act, 1994; whether trial judge correct in law in holding that later requirement merely a repetition of earlier requirement or alternatively otiose; whether requirement with which appellant refused to comply, was lawful.
Held: Trial judge entitled to hold that appellant had refused to comply with a lawful requirement pursuant to 1994 Act.

Articles

Drugs driving in Ireland - a preliminary study of the prevalence of driving under the influence of drugs on Irish roads
Moane, S
Leavy, C P
7 (2001) MLJI 21

Introduction of evidential breath testing in Ireland
Reynolds, D
Kearns, H
7 (2001) MLJI 9

Shipping

Statutory Instrument

Merchant shipping (registry, lettering and numbering of fishing boats) (amendment) regulations 2001
SI 411/2001

Social Welfare

Statutory Instrument

Social welfare (consolidated payments provisions) (amendment) (increase for qualified adult) regulations, 2000
SI 81/2000

Social welfare (consolidated payments provisions) (amendment) (no. 2) (homemakers) regulations, 2000
SI 82/2000

Social welfare (consolidated payments provisions) (amendment) (no. 1) (disregard from spouse's earnings) regulations, 2000
SI 83/2000

Social welfare (consolidated payments provisions) (amendment) (no.5) (educational opportunities) regulations, 2001
SI 408/2001

Social welfare (consolidated payments provisions) (amendment) (no. 10) (sale of residence) regulations, 2000
SI 232/2000

Taxation

McAonghusa v. Ringmahon Company
Supreme Court: Denham J., Murray J., **Geoghegan J.**
29/05/2001

Revenue; corporation tax; deductible expenses; Schedule D Case I; respondent redeemed £6 million of redeemable preference shares and borrowed £6 million from a bank; High Court held on case stated that Circuit Court correct to allow expenditure as deduction; whether interest on an ongoing basis must be regarded as being laid out wholly or exclusively in earning of the profits of the particular accounting year.
Held: Appeal dismissed

Article

A "wholly alien" case - the Halifax decision
Lockhart, Greg
14 (2001) ITR 399

Cabletron Systems Ltd. v. the Revenue Commissioner (ECJ case C 463/98)
McCarthy, Damien
14 (2001) ITR 391

Charitable donations - getting the treatment they deserve
Woods, Tom
14 (2001) ITR 395

Demerger of family business
Andrews, Derek
14 (2001) ITR 369

Don't mention the "amnesty"....!
Dolan, Eugene
14 (2001) ITR 353

FRS 19 - deferred tax
Fennell, David
14 (2001) ITR 415

Let me entertain you - at what cost?
Lohan, Robert
14 (2001) ITR 409

Patrick J. T. O'Connell, Inspector of taxes v Tara Mines Ltd. - mining or manufacturing
O'Hanlon, Niall
14 (2001) ITR 375

Rent a room reliefs
Moriarty, Francis
14 (2001) ITR 361

Revenue-approved share option schemes
McGrath, Nicola
2001 ILT 202

Library Acquisitions

Butterworths orange tax handbook 2001-2002
Gammie, Malcolm
Butterworths
27th ed
London Butterworths 2001
M335

Tolley's value added tax 2001-02
Wareham, Robert
Dolton, Alan
2nd ed
London Butterworths 2001
M337.45

Statutory Instrument

Finance act, 2001 (commencement of part 2) order, 2001
SI 430/2001

Taxes (electronic transmission of income tax and capital gains tax returns under self assessment) (specified provision and appointed day) order, 2001
SI 441/2001

Telecommunications

Article

Guidelines for negotiation of telecom provider agreements
Delany, Sandra
2001 FSLJ 3

Statutory Instrument

Wireless telegraphy act, 1926 (section 3) (exemption of certain classes of land mobile earth stations) order, 2001
SI 398/2001

Tort

Connell v. McGing
High Court: **Lavan J.**
08/12/2000

Tort; negligence; breach of statutory duty and common law duty of care; plaintiff was part of crew on board fishing vessel; defendant knew that haulage operation of nets was dangerous; plaintiff caught his ankle on netting when trying to haul it in; whether there had been contributory negligence; whether there had been contributory negligence with regard to breach of statutory duty;
Held: Judgment for the plaintiff; no contributory negligence.

Articles

Concurrent liability in contract and tort - part 1
Carey, Gearoid
2001 CLP 183

Haunted by Hillsborough
Kelly, Gillian
2001 (August/September) GLSI 18

Tribunals of Inquiry

Flood v. Lawlor
High Court: **Smyth J.**
15/01/2001

Tribunals of inquiry; contempt of court; in two previous sets of proceedings respondent did not comply with High Court orders to make discovery to Tribunal of Inquiry of certain documents; applicant seeking attachment and/or committal for alleged contempt of court orders, and ancillary orders to ensure discovery and production of information to be given to Tribunal is in accordance with orders as to content and intendment; whether contempt of court established by reason of failure to discover, produce and answer questions as provided and directed by orders; whether limit to range of questions or matters upon which respondent could have expected when he attended at the Tribunal.
Held: Respondent held in contempt of court and fined £10,000; custodial sentence of three months imposed, with first seven days to be served immediately and balance suspended to enable respondent to comply with court orders; no limitation on inquiry.

Directives implemented into Irish Law up to 23rd November 2001

Information compiled by Eve Moloney and Venessa Curley, Law Library, Four Courts

European communities (a system of mandatory surveys for the safe operation of regular ro-ro ferries and high-speed passenger craft services) regulations, 2001
SI 405/2001
DIR 1999/35

European communities (introduction of organisms harmful to plant products) (prohibition) (amendment) regulations, 2001
SI 414/2001
DIR 2001/33

European communities (requirements to indicate product prices) regulations, 2001
SI 422/2001
DIR 98/6

European communities (motor vehicles type approval) regulations, 2001
SI 429/2001
DIR 2001/1, DIR 2001/27, 2001/43

European communities (protection of consumers' collective interests) regulations, 2001
SI 449/2001
DIR 98/27

Court Rules

Circuit court rules (no. 1) 2001
SI 433/2001

District court (criminal justice) (no. 2) rules, 2001
SI 448/2001

European Judgments

C-77/99 Commission v Oder-Plan Architektur GmbH & Ors
Court of Justice of the European Communities
Judgment delivered: 11/10/2001
Arbitration clause-Financial support for the energy sector - Thermie Programme-Non-performance of a contract- Termination-Right to repayment of an advance

C-267/99 Adam & Anor v Administration de l'enregistrement et des domaines
Court of Justice of the European Communities
Judgment delivered: 11/10/2001
Sixth VAT directive-Concept of liberal profession-Managing agent of buildings in co-ownership

C-294/99 Athinaiki Zithopiia AE v Elliniko Dimosio (Greek State)
Court of Justice of the European Communities
Judgment delivered: 4/10/2001
Taxation of company profits-Parent companies & subsidiaries-Directive 90/435/EEC-Concept of withholding tax

C-457/99 Commission of the European Communities v Hellenic Republic
Court of Justice of the European Communities
Judgment delivered: 11/10/2001
Failure by a Member State to fulfill its obligations-Directive 95/69/EC-Animal nutrition-Non-implementation

C-110/00 Commission v Republic of Austria
Court of Justice of the European Communities
Judgment delivered: 11/10/2001
Failure by a Member State to fulfill its obligations-Directive 97/59/EC

C-111/00 Commission v Republic of Austria
Court of Justice of the European Communities
Judgment delivered: 11/10/2001
Failure by a Member State to fulfill its obligations-Directive 97/65/EC

C-254/00 Commission v Kingdom of Netherlands
Court of Justice of the European Communities
Judgment delivered: 11/10/2001
Failure by a Member State to fulfill obligations-Failure to implement Directive 95/47/EC within the prescribed period-Use of standards for the transmission of television signals

Acts of the Oireachtas 2001 up to 23/11/2001

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

1/2001 AVIATION REGULATION ACT, 2001
SIGNED 21/02/2001
SI 47/2001 (ESTABLISHMENT DAY)

2/2001 CUSTOMS AND EXCISE (MUTUAL ASSISTANCE) ACT, 2001
SIGNED 09/03/2001

3/2001 DISEASES OF ANIMALS (AMENDMENT) ACT, 2001
SIGNED 09/03/2001

4/2001 BROADCASTING ACT, 2001
SIGNED 14/03/2001

5/2001 SOCIAL WELFARE ACT, 2001
SIGNED 23/03/2001
S.I. 243/2001 = part 5 commencement.
S.I. 244/2001 = S.38 commencement.

6/2001 TRUSTEE SAVINGS BANKS (AMENDMENT) ACT, 2001

SIGNED 28/03/2001

7/2001 FINANCE ACT, 2001
SIGNED 30/03/2001
S.I. 212/2001 = COMMENCEMENT OF S169

8/2001 TEACHING COUNCIL ACT, 2001
SIGNED 17/04/2001

9/2001 ELECTRICITY (SUPPLY) (AMENDMENT) ACT, 2001
SIGNED 17/04/2001

10/2001 HOUSING (GAELTACHT) (AMENDMENT) ACT, 2001
SIGNED 23/04/2001

11/2001 INDUSTRIAL RELATIONS (AMENDMENT) ACT, 2001
SIGNED 29/05/2001
S.I. 232/2001 = COMMENCEMENT

12/2001 ACC BANK ACT, 2001
SIGNED 29/05/2001
S.I. 278/2001 = COMMENCEMENT

13/2001 VALUATION ACT, 2001
SIGNED 04/06/2001

14/2001 HEALTH (MISCELLANEOUS PROVISIONS) ACT, 2001
SIGNED 05/06/2001
S.I. 305/2001=

COMMENCEMENT
S.I. 344/2001 = COMMENCEMENT (NO.2)

15/2001 IRISH NATIONALITY AND CITIZENSHIP ACT, 2001
SIGNED 05/06/2001

16/2001 EURO CHANGEOVER (AMOUNTS) ACT 2001
SIGNED 25/06/2001

17/2001 HEALTH INSURANCE (AMENDMENT) ACT, 2001
SIGNED 27/06/2001

18/2001 SEX OFFENDERS ACT 2001
SIGNED 30/06/2001
S.I. 426/2001 = COMMENCEMENT

19/2001 CARER'S LEAVE ACT, 2001
SIGNED 02/07/2001

20/2001 HORSE AND GREYHOUND RACING ACT, 2001
SIGNED 02/07/2001

21/2001 NITRIGIN EIREANN TEORANTA ACT, 2001
SIGNED 03/07/2001

22/2001 MOTOR VEHICLE (DUTIES AND LICENCES) ACT,2001
SIGNED 03/07/2001

23/2001 VOCATIONAL EDUCATION (AMENDMENT) ACT, 2001
SIGNED 05/07/2001

24/2001 CHILDREN ACT, 2001-07-31
SIGNED 08/07/2001

25/2001 MENTAL HEALTH ACT, 2001
SIGNED 31/07/2001

26/2001 IRISH NATIONAL PETROLEUM CORPORATION LIMITED ACT, 2001
SIGNED 09/07/2001

27/2001 PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2001
SIGNED 09/07/2001

28/2001 COMPANY LAW ENFORCEMENT ACT, 2001
SIGNED 09/07/2001
S.I. 438/2001 = COMMENCEMENT (NO.2) ORDER.

29/2001 AGRICULTURE APPEALS ACT, 2001
SIGNED 09/07/2001

30/2001 OIREACHTAS (MINISTERIAL AND PARLIAMENTARY OFFICES) (AMENDMENT) ACT, 2001
SIGNED 14/07/2001

31/2001 STANDARDS IN PUBLIC OFFICE ACT, 2001-08-20
SIGNED 14/07/2001

32/2001 DORMANT ACCOUNTS ACT, 2001
SIGNED 14/07/2001

33/2001 MINISTERIAL, PARLIMAMENTARY AND JUDICIAL OFFICES AND OIREACHTAS MEMBERS (MISCELLANEOUS PROVISIONS) ACT, 2001-08-20
SIGNED 16/07/2001

34/2001 ADVENTURE ACTIVITIES STANDARDS AUTHORITY ACT, 2001-08-20
SIGNED 16/07/2001

35/2001 HUMAN RIGHTS COMMISSION (AMENDMENT) ACT, 2001
SIGNED 16/07/2001

36/2001 WASTE MANAGEMENT (AMENDMENT) ACT, 2001
SIGNED 17/07/2001

37/2001 LOCAL GOVERNMENT ACT, 2001
SIGNED ?

38/2001 ELECTORAL (AMENDMENT) ACT, 2001
SIGNED 24/10/2001

(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

(NB) Must have "adobe" software which can be downloaded free of charge from internet

Bills of the Oireachtas up to 23/11/2001

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)

Air navigation and transport (indemnities) bill, 2001
1st stage - Dail

Asset covered securities bill, 2001
Committee - Dail

Care of persons board bill, 2001
2nd stage - Dail

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

Central bank (amendment) bill, 2000
2nd stage - Seanad (Initiated in Seanad)

Children bill, 1996
Committee - Dail

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

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

Containment of nuclear weapons bill, 2000
Committee - Dail (Initiated in Seanad)

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

Corporate manslaughter bill, 2001
2nd stage - Dail [p.m.b.]

Courts bill, 2000
2nd stage - Dail

Courts and court officers bill, 2001
1st stage - Dail

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

Criminal justice (temporary release of prisoners) bill, 2001
1st stage -Dail

Criminal justice (theft and fraud offences) bill, 2000
2nd stage - Seanad (Initiated in Seanad)

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

Disability commissioner bill, 2001
1st stage - Seanad

Disability commissioner (no.2) bill, 2001
2nd stage - Dail [p.m.b.]

Dumping at sea (amendment) bill, 2000
2nd stage - Dail (Initiated in Seanad)

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

Electoral (amendment) (donations to parties and candidates) bill, 2000
Committee - Dail [p.m.b.]

Electoral (control of donations) bill, 2001
2nd stage - Dail [p.m.b.]

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]

European communities and swiss confederation bill, 2001
2nd stage - Dail (Initiated in Seanad)

European convention on human rights bill, 2001
Committee - Dail

European union bill, 2001
Committee - Dail

Extradition (European union conventions) bill, 2001
1st stage - Dail

Family law bill, 1998
2nd stage - Seanad

Family support agency bill, 2001
Committee - Dail

Fisheries (amendment) bill, 2000
Committee - Dail (Initiated in Seanad)

Fisheries (amendment) (no.2) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Freedom of information (amendment) bill, 2000
2nd stage - Dail [p.m.b.]

Gas (interim) (regulation) bill, 2001
2nd stage - Dail (Initiated in Seanad)

Harbours (amendment) bill, 2000
Committee - Seanad

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

Health insurance (amendment) bill, 2000
Committee - Dail

Health Ombudsman bill, 2001
2nd stage - Dail

Heritage fund bill, 2001
Committee - Dail

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

Housing (miscellaneous provisions) bill, 2001
1st stage -Dail

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

Industrial designs bill, 2000
Committee - Seanad (Initiated in Dail)

Independent Garda Ombudsman bill, 2001
2nd stage - Dail

Interpretation bill, 2000
1st stage - Dail

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

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

Law of the sea (repression of piracy) bill, 2001
2nd stage - Dail (Initiated in Seanad)

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

Licensing of indoor events bill, 2001
1st stage - Dail

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
1st stage - Seanad

Local government (Sligo) bill, 2000
2nd stage -Dail [p.m.b.]

Ministerial, parliamentary and judicial offices and oireachtas members (miscellaneous provisions) bill, 2001

National stud (amendment) bill, 2000
Committee - Dail

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

Ordnance survey Ireland bill, 2001
Committee - Dail (Initiated in Seanad)

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
Committee - Dail

Pensions (amendment) bill, 2001
Committee - Seanad

Postal (miscellaneous provisions) bill, 2001
1st stage -Dail

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

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

Private security services bill, 2001

1st stage - Dail

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

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

Prohibition of female genital mutilation bill, 2001
2nd stage - Dail [p.m.b.]

Protection of employees (part-time work) bill, 2000
Report - 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 health (tobacco) bill, 2001
1st stage - Dail

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 births bill, 2000
2nd stage - Dail

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.]

Residential institutions redress bill, 2001
2nd stage - Dail

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

Road traffic bill, 2001
1st stage -Dail

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
2nd stage - Dail

Sex offenders bill, 2000
Report - Dail

Shannon river council bill, 1998
Committee - Seanad

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

State authorities (public private partnership arrangements) bill, 2001
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.]

Surgeon General bill, 2001
2nd stage - Dail

Sustainable energy bill, 2001
2nd stage -Dail (Initiated in Seanad)

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

Transport (railway infrastructure) bill, 2001
Committee - Dail (Initiated in Seanad)

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

Tribunals of inquiry (amendment) bill, 2001
2nd stage - [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]

Twenty-first amendment of the constitution bill, 2001
2nd stage - Dail [p.m.b.]

Twenty- first amendment of the constitution (no.2) bill, 2001
2nd stage - Seanad

Twenty-second amendment of the constitution bill, 2001
Committee - Dail

Twenty-third amendment of the constitution bill, 2001
Committee - Seanad

Twenty- fourth amendment of the constitution bill, 2001
2nd stage -Dail

Twenty- fifth amendment of the constitution bill, 2001
2nd stage - Dail [p.m.b.]

Twenty-fifth amendment of the constitution (protection of human life in pregnancy) bill, 2001
2nd stage - Dail

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

UNESCO national commission bill, 1999
2nd stage - Dail [p.m.b.]

Waste management (amendment) bill, 2001
1st stage - Dail

Waste management (amendment) (no.2) bill, 2001
Report (Initiated in Seanad)

Whistleblowers protection bill, 1999
Committee - Dail

Youth work bill, 2000
Committee - Dail

Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Law & Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Law 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
T & ELJ = Technology and Entertainment Law Journal

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HE CROSS BORDER INSOLVENCY REGULATION

Aillil O'Reilly BL considers the implications of Council Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings in the European Union.

Introduction

The resolution of cross-border insolvency proceedings can affect the operation of the internal market.[1] As insolvency is specifically excluded from the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters by Article 1(2), problems abound when insolvency crosses national boundaries. Apart from the regular conflict of laws difficulties, the limitations of the Brussels Convention can be used to forum-shop in order to restrict insolvency proceedings. For example, one jurisdiction may give a more favourable position on transfer of assets.

In *Bell Lines*[2] the European Court of Justice was asked to rule on the position of an insolvent firm with establishments in various Member States. The employees had claimed from a guarantee institution in the country where they were employed. The Court distinguished an earlier test for insolvency jurisdiction in a similar situation[3] and held that a permanent commercial presence was enough to anchor a claim to the guarantee institution of the relevant state. The case appears to be the basis from which this regulation proceeds. The regulation focuses on the centre of main interests of the debtor, being where the centre of his administration is, but permits secondary proceedings where the company has an establishment.

The Council regulation on insolvency proceedings[4] permits the law of one Member State to apply to insolvency proceedings[5] that take or involve assets in other Member States. For example, Irish law will apply in Germany if the proceedings are opened here.[6] It also allows EU-wide[7] recognition for judgments in cross-border insolvencies and judgments which are delivered directly on the basis of such proceedings.[8] The regulation will not come into force until 31 May 2002.

The 1968 Brussels Convention is intended to facilitate the free movement of judgments by establishing a single and rapid procedure[9] in the Contracting State where enforcement is sought. While the Convention constitutes an autonomous and complete system[10] for obtaining an order for the enforcement of foreign enforceable instruments it does not deal with execution itself, which is handled by national law. Similarly, regulation 1346/2000 governs the decision as to where to open insolvency proceedings without creating new insolvency law. In Ireland the Companies Acts will continue to apply, but the conduct of such insolvency proceedings that cross national frontiers will be governed by this regulation.

One law for EU-wide insolvency proceedings

Insolvency proceedings under the regulation aim at encompassing all of the debtor's assets in a single case constituting one estate covering the debtor's property wherever located in the territories of the Member States. Such proceedings do not necessarily involve the judicial authority; as "court" is given a broad meaning and includes any body empowered by law to commence insolvency proceedings.[11] It was emphasised in the proposals for the regulation that it does not bring about or constitute new law on the *locus standi* requirements, rather it deals with overlapping jurisdictions in insolvency. Thus, territorial jurisdiction within each Member State must be established according to the national law of the country concerned.

Jurisdiction to open proceedings

The regulation mandates that insolvency proceedings are to be commenced in the Member State where the debtor has the centre of his main interests. Those proceedings will then be the main proceedings for the purposes of the regulation. Secondary proceedings are permitted in Member States where the debtor has an establishment but are limited to assets in that jurisdiction.

The law applicable to the insolvency proceedings and their effects shall be that of the Member State in which proceedings are commenced.[12] The law of that Member State shall then govern all of the assets of the debtor across the EU.

The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of assets situated in the territory of another Member State at the time when the proceedings commenced.[13] Neither do the insolvency proceedings affect the rights of creditors to claim set-off of their claim against any claims of the debtor, where permitted by law.

The test for the appropriate Member State to open proceedings is the "centre of main interests". This is that place where the debtor administrates his business or affairs on a regular basis. The recitals suggest that this should be ascertainable by third parties. In the absence of proof to the

contrary, the registered office of a company shall be presumed to be that place.14

Establishment is the place where the debtor carries out a non-transitory economic activity with human means and goods.

Jurisdiction to open secondary proceedings

Secondary proceeding may be opened prior to the main insolvency proceedings only when primary proceedings cannot be opened due to the law of that member state, or where they are requested by a creditor that has his domicile or registered office in that Member State.[15] This would allow the liquidation of the Irish based establishment of a Greek company. They may only be opened in a Member State in which the debtor possesses an establishment. Such secondary proceedings must be a winding-up.

Once insolvency proceedings have been opened, a creditor in another Member State may open secondary proceedings

"The law applicable to the insolvency proceedings and their effects shall be that of the Member State in which proceedings are commenced. The law of that Member State shall then govern all of the assets of the debtor across the EU."

without having to examine the debtor's solvency in that other State. Such proceedings are restricted to the assets of the debtor situated within the territory of that other Member State.

The right to request secondary insolvency proceedings is limited to local creditors prior to the opening of the main insolvency proceedings and where the insolvency proceedings cannot start due to the law of the Member State where the debtor has his centre of main business interests. Following the institution of the main insolvency proceedings, the right to commence proceedings in Member States where the debtor has an establishment is not limited by the regulation. Importantly the liquidator in the main proceedings is considered by the regulation to be coordinating the approach and should be given the opportunity to intervene in the secondary liquidation.

Every creditor who has his habitual residence, home, domicile or registered office in the Community has the right to lodge his claims in writing in each of the insolvency proceedings relating to the debtor's assets. However, he can recover from insolvency proceedings in other jurisdictions only if the creditors of equal standing have received the same proportion of their claims.

All creditors' claims shall indicate the nature of the claim as well as whether it alleges preference, security *in rem* or retention of title and what assets are covered by the claim invoked.

Assets

The relevant member state in which assets are situated differs for each type of asset:

- For tangible property, it is the Member State in which it is situate;
- For property the rights of ownership of which must be entered in a public register, it is the Member State in which the register is kept,
- For claims, it is the Member State within the territory of which the third party required to meet them has the centre of his main interests.

A lawsuit pending, concerning an asset or right of which the debtor has been divested, shall be governed solely by the law of the Member State in which the lawsuit is pending. A Community patent, trade mark or other similar right established by Community law may be included in proceedings only in the jurisdiction of the Member State of the centre of the company's main interests.

"Insolvency Proceedings"

The regulation applies to insolvency proceedings whether the debtor is a natural or legal person, a trader or an individual.

"Insolvency proceedings" are defined in Article 2(a) as collective proceedings that entail the total or partial divestment of a debtor and the appointment of a liquidator.[16] The regulation's definition of "insolvency proceeding" is broad, and does not limit the particular proceeding to be intended exclusively for the equal satisfaction of creditors or for the liquidation of the property for distribution purposes.

Insolvency proceedings involving insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings are excluded from the scope of the regulation.[17]

In Ireland[18] those proceedings are:

- Compulsory winding-up by the court.
- Bankruptcy.
- The administration in bankruptcy of estates of persons dying insolvent.
- Winding-up in bankruptcy of partnerships.
- Creditors' voluntary winding-up (with confirmation of a Court).
- Arrangements under the control of the Court which involve the vesting of all or part of the property of the debtor in the official assignee for realisation and distribution.
- Company examinerships.

Liquidator means: Liquidator, Official Assignee, Trustee in Bankruptcy, Provisional Liquidator and Examiner.[19]

Thus, receiverships are omitted from the definition of insolvency proceedings.

Conduct of cross border insolvency proceedings

The law of the Member State in which insolvency proceedings are opened directs the operation of the insolvency with equal effect in other jurisdictions.

Time of opening of proceedings

Time of opening proceedings is the time when the judgment opening proceedings becomes effective.[20] No further definition

is offered. By using the word "effective" rather than "final" in the Article, the regulation applies to all insolvency proceedings from the earliest moment possible, aiding interim measures.

Insolvency regime

The regulation allows automatic recognition of judgments concerning the opening, conduct and closure of insolvency proceedings.[21] Any judgment opening insolvency proceedings handed down by a court of a Member State, which has jurisdiction pursuant to Article 3, shall be recognised in all other Member States from the time that it becomes effective in the State of the opening of proceedings. The effect of this judgment shall without further formalities produce the same effect in other Member States as under the law of the State opening the proceedings. This applies as long as no secondary proceedings are opened in those Member States. The effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States.

Judgments handed down by the court that opened the proceedings concerning the course and closure of the insolvency proceedings are to be recognised without further formalities. Such judgments are to be enforced in accordance with Articles 31 to 51 of the Brussels Convention.[22] This also applies to judgments that "derive directly" from the insolvency proceedings and are "closely linked" to them, including preservation measures, even if handed down by another court.

Recognition of liquidator

Proof of the liquidator's appointment shall be evidenced by a certified copy of the original appointment decision. No further proof shall be required, save a possible requirement to translate the document proving his appointment into the official language of the Member State in which he intends to act.

Assets and liabilities

A creditor who, after the opening of proceedings, obtains partial or full satisfaction of his claim on assets belonging to the debtor situate in another Member State, must return what he has obtained to the liquidator.[23] Presumably this claim should be brought by the liquidator in the Member State where the creditor is situate according to the regulation. A creditor who has in the course of insolvency proceedings received a dividend, shall only share in distributions in other proceedings insofar as creditors of the same ranking in those proceedings obtained an equivalent dividend.

Where an obligation to a debtor has been honoured in a Member State after the publication of notice of the opening of insolvency proceedings, then in absence of proof to the contrary, the person honouring the obligation is deemed to have been aware of the proceedings. Similarly, in absence of proof to the contrary, the person honouring the obligation is deemed to have been unaware of the proceedings if no publication has occurred.[24]

The effect of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property shall be governed solely by the law of the Member State in which the property is situated.[25]

The regulation goes some way to ensure that set-offs are not avoided. If a set-off is not permitted in the law of the opening state a creditor should be entitled to a set-off if it is possible under the law applicable to the claim of the insolvent debtor.[26] The rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law applicable to that market or system. Employment contracts and relationships and the rights of a debtor in immovable property, a ship or aircraft subject to registration in a public register are dealt with similarly.

The provisions of the regulation that allow the law of the Member State opening proceedings to govern the voidness or voidability of legal acts shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that the act is subject to the law of a different Member State and that law does not allow any means for challenging that act.[27]

Rights of third parties

The case of rights in rem should be determined according to the *lex situs* and are not affected by the opening of insolvency proceedings.[28] The proprietor of the right *in rem* should be able to continue his right to segregation or separate settlement of the collateral security. If *rem* proceedings exist in a jurisdiction separate to that of the main insolvency proceedings then the surplus on the sale of the asset covered by the right *in rem* must be paid to the liquidator in the main proceedings.

Where at the time of commencement of proceedings an asset is situated in a Member State other than that in which the proceedings are opened, then the opening of insolvency proceedings shall:

- As against the purchaser of an asset, not affect the seller's rights based on a reservation of title ;
- As against the seller of an asset, not constitute grounds for rescinding or terminating the sale after delivery; and
- As against the seller of an asset, not prevent a purchaser from acquiring title.

Preservation of Assets

Preservation measures prior to and following the commencement of insolvency proceedings are vital to guarantee effectiveness. The court is able to grant interim protective measures including allowing a temporarily appointed liquidator to apply for preservation of assets.[29] A court of a Member State that appoints a "temporary administrator" prior to the opening of the main the proceedings shall be empowered to request any measures to secure and preserve any of the debtor's assets situate in another Member State for the period between the request for the opening of the proceedings and the judgment opening those proceedings.[30]

Interim measures

Where by an act after the opening of proceedings the debtor disposes for consideration of immovable assets, or a ship or aircraft subject to public registration, or securities whose existence is subject to registration laid down by law, the validity of that act shall be determined by the law of the Member State in which the asset or register is situated.[31]

Powers of main liquidator

Further to the regulation[32] the liquidator has all the powers granted to him by the law of the State of the opening of proceedings and in particular may remove the debtor's assets from other Member State's territories[33] as long as no insolvency proceedings have opened or are in the process of opening there.

Control of proceedings

Any closure permitted by law of the secondary insolvency proceedings by a rescue plan, composition or comparable measure, may be proposed by the main liquidator. During a stay in the secondary proceedings, only the main liquidator may make propose such measures. Moreover, any closure of the secondary proceedings by such measures shall not become final without the consent of the liquidator in the main proceedings, if the financial interests of the creditors in the main proceedings are affected. The liquidator in the main proceedings may request that the secondary proceedings be converted into a winding-up if this proves to be in the interests of the creditors in the main proceedings.

Stay on insolvency proceedings

The court which opened the secondary proceedings shall stay them on receipt of a request from the liquidator in the main proceedings. In so doing it may request the main liquidator to take some suitable measure to guarantee the interests of the creditors in the secondary proceedings. The main liquidator may refuse such a request if it is "manifestly of no interest to the creditors in the main proceeding."[34] The stay may be for a maximum of three months, but may be renewed. It may be terminated at the request of the main liquidator, or by the court's own motion, at the request of the secondary liquidator, or by the creditors in the main or secondary proceedings. Before the court can approve the latter terminations it must be satisfied that the measure no longer appears justified, in particular by the interests of the creditors in the main or secondary proceedings.

Competing liquidators

If by liquidation of assets in the secondary proceedings it is possible to meet all of the claims allowed, the liquidator shall immediately transfer any remaining assets to the liquidator in the main proceedings.

Duties of the liquidator and examiner

The role of a liquidator or examiner involved in proceedings governed by the Regulation is largely unchanged. His duties are those ascribed to him by the Companies Acts. He will still be judged according to those standards. The regulation adds additional publication requirements. There may well be conflict between the main liquidator and a secondary liquidator. In so far as the regulation accords superiority to the main liquidator, it does not oblige the secondary liquidator towards the creditors in the main liquidation.

Publication

The liquidator may request that notice of the judgment appointing him be published in any other Member State in accordance with the publication procedures in that State.[35] Some Member States within which the debtor has an establishment may require mandatory registration or publication; in such cases the liquidator in the opening proceedings must ensure that this publication[36] or registration[37] takes place. The costs of all such publication or registration shall be regarded as costs and expenses incurred in the proceedings.[38]

As soon as the insolvency proceedings are opened, the liquidator shall inform by an individual notice all known creditors whose habitual residence, domicile or registered office is outside the Member State of opening of proceedings.

Employees

The effects of insolvency proceedings on continuation and termination of employment must be determined according to the law applicable to the agreement in accordance with general rules on the conflict of law. Issues such as whether employees' claims are preferential are dealt with according to the law of the opening state.[39]

Conflict

Challenge to jurisdiction

The presumption in Article 3(1) that a registered office is the "centre of business" may be challenged. The wording of the regulation leaves the onus on the party seeking to disprove that a particular Member State to establish a more appropriate location to commence the proceedings. If such a challenge established a third country[40] location then the Regulation could not apply.

Challenge to recognition of foreign judgments

Member States are not required to recognise judgments that might result in "a limitation of personal freedom or postal secrecy". It is unclear how the operation of the Companies Acts in insolvency matters could affect either personal freedom or postal secrecy. More significantly, Member States are not obliged to recognise insolvency proceedings opened in another Member State or judgments where the effects of recognition or enforcement would be manifestly contrary to public policy or the fundamental principles or constitutional rights and liberties of the individual.[41] This permits the decisions of courts in other Member States to be measured in Ireland according to the provisions of the Irish Constitution.

This is an unusually accommodating clause for Community legislation. In principle, it would appear that all of the provisions of national constitutional law apply to such a challenge. In effect it allows for a derogation from the obligations of the Regulation in circumstances where an Irish court considers that the recognition of such insolvency proceedings would fail to respect the Constitution.

Conclusions

The regulation does not enforce harmonisation of European insolvency legislation. Rather it compliments the existing law and the Brussels Judgments Convention. It leaves the courts of the Member States to resolve the inevitable conflicts that will arise. However, by providing a framework it provides greater certainty for insolvency in an increasingly integrated European economy. Moreover, in cases without substantial conflict, it should dramatically speed up and improve the completion of insolvency proceedings.●

1. See Remien, "European private international law, the European Community and its emerging area of freedom, security and justice", (2001) 38 CMLRev 53.
2. Case 198/98 *Everson and Barrass v Secretary of State for Trade & Industry and Bell Lines Ltd (in Liquidation)* [1999] ECR I-8903.
3. Case C-117/96 *Mosb_k v L_nnaodtagernes Garantifond* [1997] ECR I-5017
4. Council regulation 1346/2000, 2000 OJ L 160/1, 30 May 2000.
5. It only regulates cross-border insolvency of the types listed in the annex.
6. And vice versa if the proceedings are opened in Germany.
7. This regulation does not apply to Denmark or non-member states.
8. Article 25 also permits the enforcements of judgments handed down by courts other than that commencing the proceedings, provided they to derive directly from the insolvency proceedings.
9. C-267/97, *Ėric Coursier v Fortis Bank SA and Martine Coursier (NÇe Belami),*[1999] ECR I-2543.
10. See C-148/84, *Deutsche Genossenschaftsbank v Brasserie du. Pàcheur* [1985] ECR I-1981, para 17.
11. Article 2(d).
12. Article 4; National provisions on choice of law and jurisdiction differ significantly among the EU member states.
13. Article 5, read literally, the regulation does not apply to proceedings where the debtor remains in full possession and a trustee or examiner is not appointed.
14. Article 3(1).
15. Article 3.
16. This definition used has been proposed by the Commission to replace that in Directive 80/987/EEC, dealing with the approximation of the laws of Member States relating to the protection of employees in whose employers are insolvent.
17. Directive 2001/17/EC, 2001 OJ No L110/28, deals specifically with the reorganisation and winding up of insurance undertakings.
18. As listed in the Annex to the Regulation.
19. The UK legislation includes Official Receivers as well.
20. Article 2.
21. The effect of the regulation is that Member States owe "full faith and credit" (as per US law) to the procedures to which the Regulation applies. The judgment of the ECJ in Case 67/97 *Ėric Coursier v Fortis Bank SA and Martine Coursier (NÇe Belami),* [1999] ECR I-2543, which dealt with the effect of the closure of insolvency proceedings against the Plaintiff in France would have had a different outcome had Court been able to avoid the implications of Article 1(2) of the Brussels Convention.
22. With the exception of Article 34(2) of the Brussels Convention Judgments.
23. Article 20. Subject to Articles 5(rights in rem) and Article 7 (reservation of title)..
24. Article 24.
25. Article 8; similarly to the provisions regarding rights in rem this Article defers to the Brussels Convention.
26. Article 6.
27. Article 13.
28. Following the provisions of the Brussels Convention on rights in rem.
29. See definition of "time of opening of proceedings" and Article 16.
30. See Article 38.
31. Securities do not seem as immovable as the preceding two types of asset. Perhaps this is out of deference to the markets.
32. Article 18.
33. Subject to Article 5 (rights in rem) and Article 7 (reservation of title).
34. Article 33(1). This clearly places the interests of the creditors in the main proceedings above those in the secondary proceedings.
35. Article 21(1).
36. Article 21(2).
37. Article 22(2).
38. Article 23.
39. Also see Directive 80/987/EEC at note 17 above.
40. Denmark is also excluded from the operation of this Regulation.
41. Article 26. The Article does not make reference to the ECHR and it may not be used as a gauge here. However, it would not be the application of the Regulation that is to be reviewed, rather the law of the *other* Member State.

RECENT DEVELOPMENTS IN PRIVACY BREACH OF CONFIDENCE

Patrick Leonard BL examines recent developments in the law of breach of confidence in England and considers whether, in the light also of the Constitution and the European Convention on Human Rights, Irish law might recognise an actionable right of personal privacy against unwanted and intrusive media disclosures.

Introduction

Notwithstanding the recognised constitutional right to privacy, interfering with an individual's right to privacy does not appear to be an actionable tort in itself. In recent years, however, the action for breach of confidence has been greatly extended into the area of privacy.

This article considers the classic action for breach of confidenceparticulury in the light of , how this action has been extended into the area of privacy in the remarkable case of *Thompson and Venables v. News Group Newspapers Ltd*[1] (in which the English High Court granted anonymity for life to the convicted killers of the infant James Bulger) and finally looks at whether such an action could successfully be brought in this jurisdiction.

Constitutional Right to Privacy[2]

Article 40.3.1[0] of the Constitution provides that :

"The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen"

In the milestone decision of *Ryan v.Attorney General*[3], Kenny J. stated that:

"the personal rights which may be invoked to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State."

Whereas the right to marital privacy was recognised as early as 1973,[4] it was not until 1983 that a member of the Supreme Court expressly recognised a general right to privacy. In a dissenting judgment in *Norris v. Attorney General,*[5] Henchy J. declared that:

"a right of privacy inheres in each citizen by virtue of his human personality, and ... such right is constitutionally guaranteed as one of the unspecified personal rights comprehended by Article 40.3."

The plaintiff in that case was unsuccessful before the Supreme Court, and it was only in the case of Kennedy v. Ireland[6], that Hamilton P. (as he then was) held for the plaintiffs on the basis of a general right to privacy. He held that :

> "Though not specifically guaranteed by 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 ... The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely a sovereign, independent and democratic society."

Interference with the right to privacy - an actionable tort?

Although there are many torts which involve a right to privacy, there does not appear be an actionable tort in Ireland for the interference with an individual's right to privacy in itself.[7] This is in contrast to the position in the United States[8], New Zealand[9], and India[10], where there is a specific tort of breach of privacy.

The absence[11] of such a tort was highlighted in the English case of *Kaye v. Robertson*[12], where reporters gained entrance to the plaintiff's hospital room, and interviewed and took photographs of him while he was recovering from serious brain injuries[13]. In the course of an application to restrain publication of this interview, the Court of Appeal noted that there was no actionable right of privacy in English law. In the words of and Bingham L.J. held that :

> "If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law."

In order to plug this gap in the common law, courts have often looked for a remedy in the laws of trespass, nuisance and confidence.

Although most of the case law in the area of confidence is concerned with the protection of commercial information, the action to restrain a breach of confidence has emerged as one of the most important ways to protect privacy.

The action for breach of confidence.

The law of confidence has most commonly been invoked in order to protect trade secrets[14]. Although such a cause of action had been recognised in the 19th century[15], the area was fully re-examined the English Court of Appeal decision of *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*[16] where the defendant used the plaintiff's engineering drawings to manufacture its own leather punching tools. In such a situation the obligation of confidence normally arises through the express or implied terms of a contract between parties, and Greene M.R. set out the basis of the action in the following way :

> "If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights"

Insofar as the information was obtained under a contract, he stated that :

> "If two parties make a contract, under which one of them obtains for the purpose of the contract or in connection with it some confidential matter, even though the contract is silent on the matter of confidence the law will imply an obligation to treat that confidential matter in a confidential way, as one of the implied terms of the contract."

That said, he recognised that :

> "the obligation to respect confidence is not limited to cases where the parties are in a contractual relationship"

In a subsequent English case, *Coco v. A.N. Clark (Engineers) Ltd*[17], Megarry J. set out the three essential elements of an action for breach of confidence in the absence of a contract as follows:

> "three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First the information itself .... must have the necessary quality of confidence about it. Secondly that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

In *House of Spring Gardens v. Point Blank Ltd.*[18], Costello J., applying these cases, held that in an action for breach of confidence a court must :

> "firstly decide whether there exists from the relationship between the parties an obligation of confidence regarding the information which has been imparted and it must then decide whether the information which was communicated can properly be regarded as confidential information ... Once it is established that an obligation in confidence exists and that the information is confidential, then the person to whom it is given has a duty to act in good faith, and this means that he must use the information for the purpose for which it has been imparted, and he cannot use it to the detriment of the informant."

An early use of this remedy to protect personal privacy was in *Duchess of Argyll v. Duke of Argyll*[19], where the English High Court granted the plaintiff an injunction to restrain the defendant from revealing secrets of their married life to the press, on the basis that :

> "with the object of preserving the marital relationship, it was the policy of the law that communications ... between husband and wife should be protected against breaches of confidence, so that, where the court recognised that such communications were confidential and that there was a danger of their publication ... it would interfere,"

Rather like *McGee v. Attorney General*, this case focused on the right to marital privacy rather than a general right to privacy *per se*, and it was to be some time before the remedy protected the right to privacy in a broader way.

The obligation of confidence and the 'Spycatcher' Case

In the celebrated 'Spycatcher' case, properly called *A.G. v. Guardian Newspapers Ltd. (No.2)*[20], the House of Lords extensively reviewed the legal principles behind the action for breach of confidence.

In that case, the British government had unsuccessfully sought to restrain the publication of Peter Wright's memoirs in Australia, and then sought to prevent the subsequent serialisation of those memoirs in the United Kingdom. As a former agent of M.I.5, there was no doubt that the information contained in his memoirs was confidential, nor that Peter Wright was under a duty of confidence to his former employer, the British government.

Whereas the House of Lords recognised that the vast majority of cases in which a plaintiff sought to protect confidential information resulted from a transaction or a relationship between the parties, normally a contract, Goff L.J. stated that:

> "A duty of confidence arises when confidential information comes to the knowledge of a person "confident" in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

and that :

> "It is well settled that a duty of confidence may arise in equity independently of such (a contract or a relationship)"

To this broad general principle, Goff L.J. set three limiting principles, as follows:

> "The first limiting principle ... is that the principle of confidentiality only applies to information to the extent that it is confidential ... once it has entered ... the public domain, ... as a general rule, the principle of confidentiality can have no application to it.... The second limiting principle is that

the duty of confidence applies neither to useless information, nor to trivia."
and then :
"The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favoured disclosure. This limitation may apply ... to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure"

In *National Irish Bank Limited v. RTE* [21], Keane J., (as he then was), adopted this balancing approach between the public interest in maintaining confidences and any other countervailing public interest favouring disclosure.

The Jamie Bulger case.

In the case of *Jon Venables and Robert Thompson v. News Group Newspapers and others*[22], the English High Court radically extended the type of relationship protected as giving rise to confidential information. In that case, the English High Court effectively granted Venables and Thompson anonymity for life.

They had been convicted on the 24th November, 1993, of the murder of the two year old James Bulger. At conviction, Venables and Thompson were only eleven years old, and following much litigation about the amount of time they would have to serve in prison, it became clear that they would be released into the community at some stage during the year 2001.

Under the inherent jurisdiction of the High Court to deal with children, and under s.39 of the (English) Children and the Young Persons Act 1933, the trial judge, Morland J. had granted comprehensive injunctions restricting publication of information about Venables and Thompson with no limit of time. On conviction, but before sentence, Morland J. had revealed the names and background of each of the convicted killers, but when News Group Newspapers Limited applied to fully lift the reporting restrictions, Morland J. held that:

"It is necessary for me to balance the public interest in lifting reporting restrictions and the interests of the defendants. I lifted the reporting restrictions .... because the public interest overrode the interest of the defendants following the murder and I consider that the background in respect of the two boys' families, life style, education and the possible effect of violent videos, on the defendants' behaviour ought to be brought out into the open because there was a need for informed public debate on crimes committed by young children. However, public interest also demands that they have a good opportunity of rehabilitation. They must have an opportunity to be brought up in the units in a way so as to facilitate their rehabilitation."

As a result of the impending majority of Venables and Thompson, four newspapers groups applied to the English High Court on the 24th July, 2000, asking for clarification in relation to the injunctions granted by the trial judge. Counsel for Venables and Thompson made it clear that they intended to seek to continue the injunctions after they had attained their majority, and the newspapers' applications were heard at the same time as separate proceedings brought by Venables and Thompson in which Venables and Thompson sought injunctive relief to protect their identity.

In those proceedings, they sought injunctions designed to protect information of 4 general types, namely:

1. Information regarding changes in their physical appearance since detention.
2. Protection of their new identity when released into the community.
3. Protection of information about their existing placements.
4. Protection of specific information relating to their time in secure units between February 1993 and August 2000.

Evidence of Danger to Venables and Thompson

It seemed certain that in the absence of an injunction, that the press would identify both Venables and Thompson to the public at large. It also seemed certain that this identification would immediately put Venables and Thompson's lives at serious risk. Thompson's mother had changed her family name and moved home on eight occasions. Vigilantes had threatened to burn down the home of a woman wrongly thought to be mother of Thompson or Venables.

In an article entitled "Throw away the key" a newspaper had quoted the following statement:

"if Venables and Thompson returned to Liverpool 'they would be lynched - and nobody would shed a tear. The pair of them should stay inside for the rest of their natural lives. They took a baby's life. So why should they be allowed a life of their own"

Jamie Bulger's father was alleged to have said on television :

"Something's got to be done about it. We can't just stop know, and let these two little animals get released ... I will do all I can to try my best to hunt them down."

Another newspaper said :

"CRAZY James Bulger's killers tortured the two-year-old to death. Our top judge says they should go free early because jail would expose them to drugs and violence... James' mum : they have got away with MURDER ... WE'LL NEVER FORGIVE THEM"

A representative of a victim's support group was reported in a newspaper as having said:

"you could say you shouldn't take the law into your own hands but if the law worked for the victims rather than the criminals there wouldn't be these vigilante attacks. I couldn't advocate anyone being murdered but I haven't had a child murdered so I am not in a position to say how I would feel"

Many articles in a similar vein were put before the court, and there did not seem to be any real dispute that the press, if allowed, would identify Venables and Thompson, and further that this identification would put their lives at risk.

Key Issue

Having regard to this, the central question in this case was :

"Is there jurisdiction to grant an injunction in respect of an adult to protect his identity and whereabouts and other relevant information?"

Venables and Thompson, supported by the Attorney General, claimed that the existing common law right of confidence gave the court such jurisdiction.

Relying on the principles as to the law of confidence enunciated by Goff L.J. in the Spycatcher case, and on the right to life and to protection of privacy enshrined in the European Convention of Human Rights, the Attorney General submitted that:

> "Information the disclosure of which would substantially impair a person's private life and imperil his safety must be capable of protection ... notwithstanding the general public interest in knowing the identify of those responsible for serious crime."

The European Convention of Human Rights (the 'ECHR') was incorporated into the domestic law of the United Kingdom by the Human Rights Act, 1998.

It will be remembered that the Spycatcher case had set out a number of limiting principles to the duty of confidence. The most important of these was that although:

> "there is a public interest that confidences should be preserved and protected by the law ... that public interest may be outweighed by some other countervailing public interest which favoured disclosure. ... It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure"

Insofar as the court had to conduct a balancing exercise between the public interest in maintaining confidence (i.e. preserving the anonymity of Venables and Thompson), and the public interest in the freedom of expression (i.e. identifying the perpetrators of a serious crime), the rights enshrined by several different articles of the ECHR had to be considered.

From Venables and Thompson's point of view, the relevant articles of the ECHR were article 2(1) which provides that :

> "Everyone's right to life shall be protected by law ...",

Article 3 which provides that :

> "No one shall be subjected to torture or to inhuman or degrading treatment of punishment",

and Article 8, which states that :

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of morals, or for the protection of the rights and freedoms of others."

From the point of view of the defendants, the central article was Article 10 which provides that :

> "Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..... the exercise of these freedoms since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for the prevention of disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

When balancing the competing public interests involved, Griffiths L.J. had stated in the Spycatcher case that :

> "in the case of a private claim to confidence, if the three elements of quality of confidence, obligation of confidence and detriment are established, the burden will lie on the defendant to establish that some other overriding public interest should displace the plaintiff's right to have his confidential information protected"

Goff L.J. had spoken of a balancing operation between different public interests. However, s.12(4) of the Human Rights Act, 1998, provided that :

> "The court must have particular regard to the importance of the Convention right to freedom of expression ..."

Having regard to this, Butler-Sloss P. held in *Venables and Thompson v. News Group Newspapers Ltd.* that there should not be a balancing act between the parties but that :

> "The onus of proving the case that freedom of expression must be restricted is firmly on the applicant seeking the relief."

Article 10 of the ECHR was, of course, central to the case, and in the view of Butler-Sloss P., it gave greater weight to a principle which was already established in the case law of the United Kingdom. Notably in *R. v. The Secretary of State or the Home Department; Ex p. Simms* [23], Lord Stein had said that:

> "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the markets'. Thirdly, freedom of speech is the lifeblood of democracy. The freeflow of information and ideas informs political debate. It is a safety valve; people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a break on the abuse of power by public officials. It facilitates the exposure of errors in the government and administration of justice of the country".

Particular consideration was then given to the judgment of *Hoffman L.J. in R. v. Central Independent Television plc,* [24]where he said that:

> "The motives which impelled judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest, but a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well

motivated, think should not be published. It means the right to say things 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined acceptance laid down by common law or statute. ..... it cannot be too strongly emphasised that outside the established acceptance, or any new ones that a parliament may enact in accordance with its obligations under the convention, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins..... No freedom is without cost and in my view the judiciary should not whittle away freedom of speech with ad hoc exceptions. The principle that the press is free from both government and judicial control is more important than the particular case."

The suggestion that the freedom of the press is a "trump case which always wins" seems to have caused some controversy in the United Kingdom. Lord Hoffman subsequently referred to this in a lecturexxv and said that :

"Some people have read that to mean that freedom of speech always trumps over other rights and values. But that is not what I said. I said that in order to (in) the balance against free speech, another interest must fall within some established exception which could be justified under article 10 of the Convention"

This view echoes the decision of the European Court of Human Rights in *The Sunday Times v. United Kingdom*[25], in which the Court stated that :

"The court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted".

Conclusions of Butler-Sloss P.

Notwithstanding the exceptional position of Venables and Thompson, Butler Sloss P. held that :

"The starting point is, however, the well-recognised position of the press, and their right and duty to be free to publish, ... it is a powerful card to which I must pay appropriate respect. I am being asked to extend the domestic law of confidence to grant injunctions in this case. I am satisfied that I can only restrict the freedom of the media to publish if the need for those restrictions can be shown to fall within the exceptions set out in article 10(2). In considering the limits to the law of confidence, and whether a remedy is available to the claimants within those limits, I must narrowly interpret those exceptions. In doing so, and having regard to articles 2,3 and 8, it is important to have regard to the fact that, the rights under article 2 and 3 are not capable of derogation, and the consequences to the claimants if those rights were to be breached. It is clear that, on the basis that there is a real possibility that the claimants may be the objects of revenge attacks, the potential breaches of articles 2, 3 and 8 have to be evaluated with great care. "

In the first instance then Butler Sloss P. considered what was the information sought to be protected by the claimants was and how important it was to protect it. Obviously the single most important element of that information was the detection of the future identity of the claimants once reintegrated into the community. The risk to those claimants was extreme if it became known what they looked like or where they were.

As Article.10(2) of the ECHR recognised that freedom of expression may be restricted in order to prevent the "the disclosure of information received in confidence", freedom of expression could be restricted in this case so long as the restriction was :

"in accordance with the law, necessary in a democratic society to satisfy a strong and pressing social need and proportionate to the legitimate aim pursued".

Having regard to the broad jurisdiction under the law of confidence as set out in the Spycatcher case, Butler-Sloss P. considered that :

"A duty of confidence does already arise when confidential information comes to the knowledge of the media, in circumstances in which the media have notice of its confidentiality ... Under the umbrella of confidentiality, there will be information which may require a special quality of protection. In the present case, the reason for advancing that special quality is that, if the information was published, the publication would be likely to lead to grave and possible fatal consequences"

In light of this, and the obligations under the ECHR to take positive steps to enforce the rights under articles 2, 3 and 8 of the Convention, Butler-Sloss P. held that:

"the court does have jurisdiction in exceptional cases, to extend the protection of confidentiality of information, even to impose restrictions on the press, where not to do so would be likely to lead to serious personal injury, or to the death, of the person seeking that confidentiality, and there is no other way to protect the applicants other than by seeking the relief of the court."

Accordingly, the proposed restriction on freedom of expression was "in accordance with the law".

Having regard to the probability that Venables and Thompson would be pursued by people intent on revenge, and to the fact that the right to life and prohibition on torture could not be derogated from, the court held that the proposed restriction was clearly "necessary in a democratic society to fulfill a strong and pressing social need, and proportionate to the legitimate aim pursued".

In this regard, the court relied upon the decision of Wolfe M.R. in *R. v. Lord Saville of Newdigate, Ex p. A.* [27]which he said that:

"When a fundamental right such as the right to life is involved, the options open to reasonable decision maker are curtailed. They are curtailed because it is unreasonable to reach a decision, which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision maker to risk interfering with fundamental rights in the absence of compelling justification "

Having regard to all of these matters, Butler-Sloss P. held that :

"These uniquely notorious young men are and will, on release, be in a most exceptional situation and the risks to them of identification are real and substantial. It is therefore necessary, in the exceptional circumstances of this case, to place the right to confidence above the right of the media to publish freely information about the claimants. Although the crimes of these two young men was especially heinous, they did not thereby forfeit their rights under English law and under the convention on human rights. They have served their tariff period and when they are released, they have the right of all citizens to the protection of the law. In order to give them the protection they need and are entitled to receive, I am compelled to grant injunctions."

Opening the Floodgates?

Butler-Sloss P. was obviously concerned that the extension of the law of confidence in this case might result in muzzling of the media. In this regard, she said that:

> "I do not see that this extension of the law of confidence, by the grant of relief in the exceptional circumstances of this case, as opening a door to the granting of general restrictions on the media in cases where anonymity would be desirable."

She believed that this was where Article 10(2) of the ECHR had to be strictly applied, and that it would only be appropriate to grant an injunction where it was strictly necessary, and fell within the exceptions in Article 10(2).

By way of example, Butler-Sloss P. expressed the view that she was uncertain if it would be appropriate to grant an injunction to restrict the press where only a claimant's right to respect for family life and privacy under Article 8 of the Convention was likely to be breached. She said that :

> "serious though the breach of the claimants' right to respect for family life and privacy would be, once the journalists and photographers discovered either of the claimants, and despite the serious adverse affect on the efforts to rehabilitate them into society, it might not be sufficient to meet the importance of the preservation of the freedom of expression in art.10(1)."

The Thompson and Venables case was quite different in that their right to life would be put at risk if injunctions were refused.

This appears to be a more stringent approach that that of the Court of Appeal in *Douglas v. Hello! Ltd*[28]., which was decided some 3 weeks before the Venables and Thompson case. In that case, Michael Douglas and Catherine Zeta-Jones sought an injunction to restrain the magazine 'Hello!' from publishing photographs of their wedding, which had been obtained in an unauthorised manner, in circumstances where they had already sold the wedding photographs on an exclusive basis to another magazine, 'OK'.

The application for an injunction failed on the basis that any privacy would be lost in any event due to the agreed publicity in 'OK', that damages would be an adequate remedy, and that accordingly, that the balance of convenience was against granting the injunction.

However, Brooke L.J. considered that circumstances could arise where the photographer who took the unauthorised photographs had no duty or obligation of confidence to the plaintiffs, and that if this were the case :

> "the court would have to explore the law relating to privacy when it is not bolstered by considerations of confidence. In this context article 10(2) provides a potential justification for denying the right to freedom of expression not only by restrictions that are necessary "for preventing the disclosure of information received in confidence" but also those that are necessary "for the protection of the reputation and rights of others. On the hypothesis .. suggested .. above, the question would arise whether Mr. Douglas and Ms. Zeta-Jones had a right of privacy which English law would recognise. "

Sedley L.J. went further, and stated that :

> "we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy. The reasons are twofold. First equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everyone has a right to some private space. Secondly, the Human Rights Act, 1998 requires the courts of this country to give appropriate effect to the right to respect for private and family life set out in article 8 of the European Convention on Human Rights."

It will be remembered that section 12(4) of the Human Rights Act, 1998, provided that :

> "The court must have particular regard to the importance of the Convention right to freedom of expression ..."

In relation to this, Sedley L.J. held that :

> "The case being one which affects the Convention right of freedom of expression, s.12 of the Human Rights Act 1998 requires the court to have regard to article 10 ... This, however, cannot ... give the article 10(1) right of freedom of expression a presumptive priority over other rights. What it does is require the court to consider article 10(2) along with article 10(1), and by doing so bring into the frame the conflicting right to respect for privacy. This right contained in article 8 and reflected in English law, is in turn qualified in both contexts by the right of others to freedom of expression. The outcome, which self-evidently has to be the same under both articles, is determined principally by considerations of proportionality."

There appears to be a substantial difference in emphasis between these two cases. Butler-Sloss P. reserved her position as to whether a breach of a person's privacy would be sufficient to restrict freedom of expression. Sedley L.J. clearly felt that a breach of privacy could justify a restriction of freedom of expression, and appears to be stating that the common law and equity might protect privacy in the absence of the ECHR or an obligation of confidence.

In at least one subsequent case, *Mills v. Newsgroup Newspapers Ltd*[29]., the English High Court, having considered both the Venables and Douglas cases, held that it would not be appropriate to grant an injunction to restrain a newspaper from publishing details of the address of Heather Mills. In that case, Collins J. had regard to the publicity which Ms. Mills had courted in the press over previous years, and the absence of any apprehended harm to Ms. Mills, in deciding that the balancing exercise came down against the grant of an injunction.

On the other hand, in *A. v. B. plc*[30], Jack J. granted an injunction restraining the defendant newspaper from publishing an article about a sexual relationship between A, a professional footballer, (married with children), and two other women. He considered that "the law should afford the protection of confidentiality to facts concerning sexual relations both within and outside marriage" and that as there was no public interest in the publication of the articles, that the claimant would succeed in showing that his right to privacy superseded the defendant's right to freedom of expression.

Situation in Ireland.

For the time being, the ECHR has not been incorporated into Irish domestic law. That said, just as the right to freedom of expression is enshrined in the ECHR, the Constitution provides at Article 40.6.1.i that :

> "The State guarantees liberty for the exercise, subject to public order and morality, of ... the right of the citizens to express freely their convictions and opinions"

The Supreme Court recently asserted the importance of this right to freedom of expression in *Irish Times Ltd. v. Ireland*[31] However, in that case, O'Flaherty J. pointed out that :

> "While freedom of the press is constitutionally guaranteed, there is a sense in which freedom of the press might be categorised as such freedom as remains after the Constitution itself and the law have had their say: the publication of blasphemous, seditious or indecent matter is prohibited by the Constitution itself and is to be punishable by law and, in addition, there are the laws of contempt and defamation."

Unlike the ECHR, there is no express recognition in the Constitution that the law of confidence allows restriction of the right to freedom of expression. That said, in making a distinction between freedom of expression under Article 40.6.1ß, and the unenumerated personal right to convey information under Article 40.3.1ß, Keane J. (as he then was) in *Oblique v. The Promise Production Co.*[32] held that the:

> "right to communicate information must be subject to other rights and duties, and in particular, to the right of confidentiality"

A different approach was taken in the 'Irish Spycatcher' case of *Attorney General for England and Wales v. Brandon Book Publishers Ltd.*[27], where Carroll J. refused to grant the plaintiff an injunction to restrain publication of Peter Wright's memoirs in Ireland. In that case, the right to impart information was considered to fall under Article 40.6.1ß, rather than Article 40.3.1[0]. and Carroll J. held that:

> "Any consideration of the question of preventing publication of material of public interest must be viewed in the light of the Constitution. Article 40.6.1ß guarantees liberty for the exercise of the right of citizens to express freely their convictions and opinions subject to public order and morality. In the expansion of that, the Article refers to the organs of public opinion preserving their rightful liberty of expression provided it is not used to undermine public order or morality or the authority of the State. There is no question of public order or morality or the authority of the State being undermined here. Therefore in my opinion there is prima facie a constitutional right to publish information and the onus rests on the plaintiff to establish in the context of an interlocutory application that the constitutional right of the defendant should not be exercised."

In that case, Carroll J. was of the view that the law of confidence had no relevance, although she appears to acknowledge the possibility of preventing publication where a private confidence was involved.

This possibility did arise in the case of *Drury v. Maguire*[28]. In that case, the plaintiff applied for an injunction to restrain the publication of information concerning her alleged infidelity with a priest. This information had been given to the press by the plaintiff's husband. Having taken the view that the allegations did not concern the intimacies of married life, or marital communications, but an allegation of an extra-marital liaison which the plaintiff was anxious to publicise for the purpose of giving vent to the plaintiff's anger, and possibly to obtain some financial gain, O'Hanlon J. took the view that the plaintiff could not obtain relief on the basis of a breach of marital privacy, which would be protected by Article 41 of the Constitution.

The argument was then made that the publication of this information was potentially harmful to the plaintiff's children, and that their constitutional rights entitled them to the protection of the courts. O'Hanlon J. then considered the jurisdiction of the courts to intervene for the protection of infants, and the judgment of Hoffman L.J. in *R. v. Central Television Television plc,* (quoted above). In that case, it will be remembered, Hoffman L.J. had said that :

> "The motives which impelled judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest, but a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined acceptance laid down by common law or statute."

Hoffman L.J. had gone on to say that :

> *"This is why I respectfully think that Lord Denning M.R. was right in In re X. (a minor) [1975] 1 All E.R. 697, when he said that the wardship jurisdiction did not permit the courts to balance the competing interests of the child and the freedom of the press. The exceptions to freedom of speech were, he said, 'already staked out by the rules of law' ...It would be wrong, said Lord Denning, in In re X. to extend the law 'so as to give the judges a power to stop publication of a true matter whenever the judges - or any particular judge - thought that it was in the interests of the child so to do"*

In *Maguire v. Drury, O'Hanlon J.* adopted this statement of the law in saying that :

> "I am of the opinion that the general approach supported by the judgment of Hoffman L.J. is to be recommended in cases where the freedom of the press is sought to be circumscribed on the basis that publication may be a source of distress to persons named or even to their children who are totally innocent of blame in matters alleged against one or both of their parents.
>
> There are extreme cases where the right to privacy, (which is recognised as one of the personal rights, though unspecified, guaranteed protection by the Constitution ...) may demand the intervention of the courts. An example might be the circumstances illustrated in Argyll v. Argyll ..., where confidential communications between husband and wife during their married life together, were protected against disclosure. Generally speaking, however, it seems desirable that it should be left to the legislature, and not to the courts to 'stake out the exceptions to freedom of speech'...
>
> In the present case the court is asked to intervene to restrain expression is enshrined in the ECHR, the Constitution provides at Article 40.6.1.i that :
>
> "The State guarantees liberty for the exercise, subject to public order and morality, of ... the right of the citizens to express freely their convictions and opinions"

The Supreme Court recently asserted the importance of this right to freedom of expression in *Irish Times Ltd. v. Ireland*[31] However, in that case, O'Flaherty J. pointed out that :

> "While freedom of the press is constitutionally guaranteed, there is a sense in which freedom of the press might be categorised as such freedom as remains after the Constitution itself and the law have had their say: the publication of blasphemous, seditious or indecent matter is prohibited by the Constitution itself and is to be punishable by law and, in addition, there are the laws of contempt and defamation."

Unlike the ECHR, there is no express recognition in the Constitution that the law of confidence allows restriction of the right to freedom of expression. That said, in making a distinction between freedom of expression under Article 40.6.1ß, and the unenumerated personal right to convey information under Article 40.3.1ß, Keane J. (as he then was) in *Oblique v. The Promise Production Co.*[32] held that the:

> "right to communicate information must be subject to other rights and duties, and in particular, to the right of confidentiality"

A different approach was taken in the 'Irish Spycatcher' case of *Attorney General for England and Wales v. Brandon Book Publishers Ltd.*[27], where Carroll J. refused to grant the plaintiff an injunction to restrain publication of Peter Wright's memoirs in Ireland. In that case, the right to impart information was considered to fall under Article 40.6.1ß, rather than Article 40.3.1[0]. and Carroll J. held that:

> "Any consideration of the question of preventing publication of material of public interest must be viewed in the light of the Constitution. Article 40.6.1ß guarantees liberty for the exercise of the right of citizens to express freely their convictions and opinions subject to public order and morality. In the expansion of that, the Article refers to the organs of public opinion preserving their rightful liberty of expression provided it is not used to undermine public order or morality or the authority of the State. There is no question of public order or morality or the authority of the State being undermined here. Therefore in my opinion there is prima facie a constitutional right to publish information and the onus rests on the plaintiff to establish in the context of an interlocutory application that the constitutional right of the defendant should not be exercised."

In that case, Carroll J. was of the view that the law of confidence had no relevance, although she appears to acknowledge the possibility of preventing publication where a private confidence was involved.

This possibility did arise in the case of *Drury v. Maguire*[28]. In that case, the plaintiff applied for an injunction to restrain the publication of information concerning her alleged infidelity with a priest. This information had been given to the press by the plaintiff's husband. Having taken the view that the allegations did not concern the intimacies of married life, or marital communications, but an allegation of an extra-marital liaison which the plaintiff was anxious to publicise for the purpose of giving vent to the plaintiff's anger, and possibly to obtain some financial gain, O'Hanlon J. took the view that the plaintiff could not obtain relief on the basis of a breach of marital privacy, which would be protected by Article 41 of the Constitution.

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>
> There are extreme cases where the right to privacy, (which is recognised as one of the personal rights, though unspecified, guaranteed protection by the Constitution ...) may demand the intervention of the courts. An example might be the circumstances illustrated in Argyll v. Argyll ..., where confidential communications between husband and wife during their married life together, were protected against disclosure. Generally speaking, however, it seems desirable that it should be left to the legislature, and not to the courts to 'stake out the exceptions to freedom of speech'...
>
> In the present case the court is asked to intervene to restrain the publication of material, the truth of which has not as yet been disputed, in order to save from the distress that such

publication is sure to cause, the children of the marriage who are all minors. This would represent a new departure in our law, for which, in my opinion, no precedent has been shown, and for which I can find no basis in the Constitution, having regard, in particular, to the strongly expressed guarantees in favour of freedom of expression in that document."

Having regard to these decisions, it is unclear as to whether the Irish courts would today uphold an injunction to restrain a breach of privacy *per se.*

If the decision in *Maguire v. Drury* is correct, then there would appear to be a conflict between the Constitution and the ECHR on this point, in that the Constitution does not appear to allow an Irish Court perform a balancing test between rights of freedom of expression and rights of privacy. Accordingly, it is possible that the soccer player referred to in A. v. B. plc. would fail to obtain an injunction in Ireland to prevent details of his extra marital relationships being published.

That said, it seems likely that an Irish court would act to protect persons in the shoes of Thompson and Venables, on the basis that the right to freedom of expression could not override the right to life granted in Article 40 of the Constitution.

It remains to be seen, however, whether an Irish court would today follow the statement of Sedley L.J. that:

"we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy"

Whereas the law on confidence might well be stretched to protect privacy in an appropriate situation, the suggestion that :

equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everyone has a right to some private space."

is an altogether different prospect.

Even without the questions that the incorporation of ECHR might raise, there are a number of areas which require clarification in this area. To what degree can the unenumerated right to privacy override the right to freedom of expression ? Can the Irish law of confidence be extended to protect an individual's identity for life ? What is the true distinction between freedom of expression and freedom to convey information, and against which right should the public interest in maintaining confidences be balanced?

Some of these areas may well be dealt with sooner rather than later, for it cannot be long before an application is made in reliance on the authorities of Thompson and *Venables v. Newsgroup Ltd., Douglas v. Hello,* and A. v. B. plc.[35]●

1. [2001] 2 W.L.R. 1038.
2. See Kelly, *The Irish Constitution,* Butterworths, ed. Hogan and Whyte, 1994, pp.767-770.
3. [1965] I.R. 345.
4. *McGee v. Attorney General* [1974] I.R. 284.
5. [1984] I.R. 36.
6. [1987] I.R. 587
7. See McMahon & Binchy, *Law of Torts,* Butterworths, 3rd ed., Chapter 37.
8. A tort of invasion of privacy has developed in the United States, and is generally thought to be based on an influential article in the Harvard Law Review by Warren and Brandeis, "The Right to Privacy" (1890) 4 Harvard L. Rev. 193. It is traditionally divided into 4 categories, being the offensive disclosure of private facts, offensive intrusion into seclusion, placing the plaintiff in a false light in the public eye, and the wrongful appropriation of a plaintiff's name or personality.
9. See *P. v. D.* [2000] 2 N.Z.L.R. 591 : "The tort of breach of privacy was established by public disclosure of private facts which were highly offensive and objectionable to a reasonable person of ordinary sensibilities but subject to the nature and extent of legitimate public interest in the disclosure of information" *per* Nicholson J.
10. *Rajagopal v. State of Tamil Nadu* (1994) SUPP. 4 S.C.R. 353 : "The right to privacy as an independent and distinctive concept originated in the field of tort .. under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised."
11. See *Winfield & Jolowicz on Tort,* Butterworths, 15th ed., pp.464-471.
12. [1991] F.S.R. 61.
13. In Canada, there appears to be no common law tort of invasion of privacy. See *Lord v. McGregor,* Supreme Court of British Columbia, McKinnon J. 10th May, 2000.
14. See Lavery, *Commercial Secrets,* Round Hall Sweet & Maxwell, 1996, and Hull, *Commercial Secrecy : Law and Practice,* Sweet & Maxwell, 1998.
15. *Prince Albert v. Strange* [1849] 1 De G. & Sm. 652 and [1849] 1 Mac. & G.25; *Morison v. Moat* [1851] 9 Hare 241.
16. [1948] 65 R.P.C. 203.
17. [1969] F.S.R. 415
18. [1984] I.R. 611. This passage was approved on appeal by O'Higgins C.J.
19. [1967] 1 W.L.R. 923.
20. [1990] 1 A.C. 109.
21. [1998] 2 I.R. 465 at p.483.
22. [2001] 2 W.L.R. 1038.
23. [1999] 3 W.L.R. 328.
24. [1994] Fam. 192
25. The Goodman Lecture, 22nd May, 1996.
26. (1979) 2 E.H.R.R. 245.
27. [2000] 1 W L R 1885.
28. [2001] 2 W.L.R. 992.
29. High Court, Chancery decision, Collins J., 4th June, 2001.
30. High Court, Queen's Bench Division, Jack J., 10th September, 2001.
31. [1998] 1 I.R. 359.
32. [1994] 1 I.L.R.M. 74
33. [1986] I.R. 597.
34. [1995] 1 I.L.R.M. 108
35. See also McGonagle, *A Textbook on Media Law,* Gill & MacMillan, 1996, and *Law and the Media,* ed. Marie McGonagle, Round Hall Sweet & Maxwell, 1997.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS THE IRISH CRIMINAL JUSTICE SYSTEM

Una Ni Raifeartaigh B.L. critically appraises the likely impact of the European Convention on Human Rights on criminal law and practice in Ireland.*

Democracy and Crime Control

The dramatic events of September 11th 2001 have forged in the most painful way imaginable a new, or perhaps a renewed, consciousness of fundamental matters. The immediate impact of the three doomed airplanes was a tragedy of death and destruction; hardly less immediately, they left in their wake a host of dilemmas as to how the United States and the international community should respond to this act of violence. In the international debate now taking place as to what responsive measures are appropriate, one can discern a number of themes. There is undoubtedly a strong and urgent desire for effective, deterrent, and retaliatory action. However, there is a strong counter-current that any action taken should be informed by certain basic imperatives of democratic society about how we treat people, what actions may be resorted to, and who to treat as responsible. In this great moral challenge of our times, we see a theme that is echoed at a more local level in every democracy racked by the problem of crime. Democracy is a certain type of society, built on the bedrock of certain types of individual freedom. Criminal behaviour threatens those freedoms. The paradox is, then, how to respond to criminal behaviour in a way that is effective and yet does not undermine the very freedoms that constitute the democracy itself. In seeking to protect democracy, we might destroy it. There is a tension between taking effective steps and taking morally acceptable steps. It is a tension between democracy and crime control.

This tension is fundamental to any modern criminal justice system in a democracy. It is real. It is not an abstract concept dreamed up from the comfort of a well-heated office. On the contrary, the framers of the European Convention on Human Rights and Fundamental Freedoms were inspired by the very real horrors witnessed during the first half of this century; we should give some serious reflection to the thought that they chose to respond to those horrors by constructing a Bill of Rights.

In Ireland, we are already much familiar with the difficulties created by the twin demands of crime control and justice. We have grappled with them for decades in the shadow of our own Constitution. What then does the European Convention have to offer to us, assuming its provisions do come closer to home *via* the Human Rights Bill in the near future? A comprehensive answer to this question is far beyond the scope of this talk, and indeed, beyond this speaker's expertise. But of course before we can even begin to analyse the effect of the Convention jurisprudence, we have to know what it is. Perhaps a good place to start is to look at how the Convention deals with a small number of topics of key interest to Irish criminal lawyers. Through these examples, selected primarily for their topicality, I hope merely to give a flavour of the large and complex jurisprudence of the European Court in the area of criminal law.

Prosecution Disclosure of Sensitive Information to the Defence

The issue of prosecution disclosure of sensitive information to the defence acutely reflects the tension between the fairness of trial procedures to the accused, on the one hand, and the need to maintain effective law enforcement, which includes protecting informers, on the other. In this area there are a number of recent European Court decisions of interest. This is of particular importance in light of our own recent attempts to deal with this complex and difficult issue, as evidenced for example in the *Paul Ward* case *(Ward v. Special Criminal Court* [1998] 2 ILRM 493). In this case, the prosecution wished to withhold from the defence a number of documents on the grounds of sensitivity and/or danger to specific individuals

arising out of disclosure of the documents. The Special Criminal Court put forward an option; that either the Court would be shown the documents and would rule on disclosure, or that the defence lawyers (but not their client) would be shown the documents. Subsequently the High Court and Supreme Court on appeal concluded that the latter option, driving a wedge as it did between the defence lawyer and his client, was not available as an option. The resultant position in this jurisdiction is therefore that there is judicial scrutiny of the relevant documents prior to a judicial decision on disclosure. We may note, for reasons that will become apparent, that this decision is undertaken in a context where the judicial authority making the decision has, at the time of the initial decision on disclosure, no knowledge of the defence that will be put forward at the trial.

The legal position in the United Kingdom on the issue of disclosure has in recent years been undergoing a process of evolution. Following the *Judith Ward* decision [1993] 1 WLR 619, the Attorney General Guidelines on Disclosure of Information to the Defence in cases to be tried on Indictment and, more recently, the Crown Court (Criminal Procedure and Investigations Act 1996, the position may be summarised as follows: (i) In some cases, the defence are told what the category of information is and are given an opportunity to address the court in respect of whether disclosure should be ordered; (ii) In other cases, the defence are not told what the category of information is and the prosecution application is made *ex parte;* and (iii) In rare cases, where even to notify the defence that the application is being made would be too sensitive, the prosecution may apply ex *parte* to the Court without notice to the defence that the application is even being made.

These arrangements, at various stages of their evolution, have come under scrutiny by the European Court. The right to disclosure of information in the possession of the prosecuting authorities is embedded in the right to a fair trial in Article 6(1) of the Convention. From this general principle, a number of subsidiary principles emerge from the jurisprudence. First, while there is a general right of disclosure pursuant to Article 6(1), this right of disclosure is not absolute and is subject to competing rights such as national security, the need to protect witnesses who are at risk of reprisals, and the need to keep secret police methods of investigating crime. Secondly, only such measures restricting the rights of the defence as are strictly necessary will be permissible. Thirdly, any difficulties caused to the defence by a limitation on its rights must be counterbalanced as far as possible by appropriate procedural measures.

It is perhaps important to emphasise that in such applications, the European Court does not attempt to second-guess the domestic court as to whether disclosure should have been ordered or not on the particular facts of the case. What is, however, of concern to the European Court is whether the procedures comply with the principle of equality of arms envisaged by Article 6(1). It may help to think of the Court's examination as being one directed to 'process' rather than 'outcome' in this context.

In *Rowe and Davis v. United Kingdom* (2000) 30 EHRR 1, the European Court held invalid the 'old regime' under which the prosecution alone decided whether or not to disclose materials, without any court intervention. Interestingly, the disclosure issue had been dealt with on appeal in the domestic courts, but the European Court held that appellate procedures were not sufficient to cure the defect in trial procedures, because the only court in a position to assess the question of disclosure meaningfully was the trial court. Similarly, in the more recent case of *Atlan v. United Kingdom,* 19th June 2001, the Court held that there had been a violation of Article 6(1) where the prosecution had failed to disclose the existence of certain information to the defence until after their convictions for drug smuggling and pending their appeals. Again the Court emphasised that the appellate attempts to remedy the defect in disclosure were too late as disclosure was a matter for the trial judge. Accordingly, the legal position in Ireland, insofar as it provides for judicial intervention in the disclosure process, would appear to be a step in the right direction as far as the Convention is concerned. Whether some further steps are necessary is a question that may need to be addressed in the light of the following cases.

In the case of *Jasper v. United Kingdom* (2000) 30 EHRR 441, (a drug smuggling case) the defence were not told what the category of information was, but were informed that an *ex parte* application would be made to the Court concerning the issue of disclosure. The defence were then allowed, at a separate hearing, to address the Court as to the nature of their defence. A bare majority of the European Court upheld this procedure as being within the parameters of Article 6(1). In *Fitt v. United Kingdom* (2000) 30 EHRR 441 (an armed robbery case in which the police had been lying in wait for the accused), the defence were told, as regards one application, that the material related to sources of information, while as regards another application, that the category of information was too sensitive even to describe. The trial judge again heard separately from the defence as to the nature of the defence. These procedures were again upheld by a bare majority of the Court. In a decision in September of this year, *P.G. and J.H. v. United Kingdom,* 25th September 2001, the Court held that there had been no violation of Article 6(1) where the trial judge had put questions to a prosecuting officer in chambers on oath concerning the obtaining of a covert listening device, although the defence were not permitted to be present at that application.

As we can see from the above cases, one method by which the procedural imbalance in sought to be recalibrated in favour of the defence is by means of the defence revealing to the trial judge what the defence is going to be. The concept of advance signalling of one's defence is already used in the United Kingdom for 'ordinary' disclosure, and therefore its employment in 'sensitive' cases is less controversial than might first appear. An alternative method of addressing the problem, discussed in the cases mentioned above is the use a 'special counsel' who would be utilised only for the disclosure aspect of the case. Such a procedure has already been introduced in the United Kingdom in immigration, telephone interception and certain other cases. From the Convention jurisprudence,

therefore, one can see that a number of different models of dealing with the root problem are both possible and permissible, but there are certain minimum standards to be maintained.

The Right to Silence

The right to silence presents recurring headaches for any criminal justice system seeking to reconcile the need for effective criminal law investigation, on the one hand, and the need to avoid resort to methods which undermine the basic rights of the individual, on the other. The right to silence issue arises in many forms, one of which is the model enabling adverse inferences to be drawn from a suspect's silence in the face of police questioning. There are a number of European Court decisions on this point. The overall position avoids extremes and opts for a middle ground.

Certainly, there is no complete ban on the use of inferences at the subsequent trial. The Court has held that the permissibility of drawing an adverse inference in a particular case depends on a number of factors, identified repeatedly by the Court as the particular situation in question, the weight attached to the inference by the national court when assessing the evidence, and the degree of compulsion inherent in the situation. The Court has also emphasised that a conviction should not be based solely or mainly on silence. However, it has said on a number of occasions that the right to silence should not prevent a person's silence, in situations that clearly call for an explanation from him, to be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. The question of the right to silence is also closely linked with the question of access to legal advice while in policy custody, as can be seen from the following cases.

In *Murray v. United Kingdom* (1996) 22 EHRR 29 the Court held that, while the right to silence was at the heart of the process protected by Article 6, it was not an absolute right. It held that the drawing of an adverse inference was not prohibited in all circumstances, and each case would depend on its own facts. In light of the facts of that case, and in particular the weight of evidence against the accused, it was not inherently unreasonable for the domestic trial court to draw an inference against the accused. However, the Court went on to hold that there was a violation of Article 6 in a different respect. The applicant had maintained silence both in police custody, before and after legal advice, and during trial. His access to legal advice while in police custody had been delayed for 48 hours. The Court held that where domestic legislation permits the drawing of inferences from a decision not to answer questions in policy custody, the right of access to a solicitor is of 'paramount importance', such that a substantial delay on any ground will breach the right to a fair trial. Accordingly, while the drawing of an adverse inference per se did not violate Article 6, the denial of access to a lawyer in a situation where the inference might drawn from silence constituted such a violation.

In *Averill v. United Kingdom,* 6th June 2000, it was again held that the drawing of the inference in itself was not unreasonable or in breach of Article 6(1) on the facts of the particular case. Again, however, there was a violation of Article 6(1) insofar as his silence during a time prior to his having seen a solicitor had been relied on to draw an inference. Here the applicant's access to legal advice was delayed for 24 hours, a shorter period than in Murray. He continued to maintain silence during police custody after such legal advice, and only later gave evidence at his trial.

In contrast, in *Condron v. United Kingdom,* 2nd May 2000, it was held that Article 6(1) had been violated because of the terms in which the trial judge had directed the jury about drawing inferences. In essence the flaw in the direction was that it enabled the jury to draw the adverse inference even if the jury were satisfied that the explanation for maintaining silence was plausible. Unlike *Murray* and *Averill,* which concerned terrorist crime, this was a drug smuggling case in which the applicants were heroin addicts. A doctor had declared them fit for interview, although they were showing symptoms of withdrawal, but their solicitor disagreed and advised them to remain silent in view of their condition. They maintained silence in custody and subsequently gave evidence at the trial, not only as to their defence, but also as to their reason for silence in police custody, namely the advice of their solicitor.

It is interesting to note also that the Commission has declared inadmissible a challenge to the 'inference provisions' of the Criminal Justice Act 1984; see *Rock v. Ireland,* 11 May 2000. This was on the basis that following an unsuccessful constitutional challenge to the provisions, the applicant had pleaded guilty; the Court will not review cases in vacuo where there has been not trial at which inferences were actually drawn. Clearly there will be no pronouncement from Europe that such statutory provisions are automatically in breach of the Convention; all depends on their application to the facts of a particular case.

A second aspect of the right to silence, distinct from the issue of drawing inferences from silence, is the issue of criminalizing silence during a police investigation. In this context, *Heaney and McGuinness v. Ireland, and Quinn v. Ireland,* both 21 December 2000 are of significance. The Court held that a conviction for a refusal to answer questions pursuant to Section 52 of the Offences Against the State Act 1939 violated Article 6(1) in circumstances where the domestic law at the time of the refusal to answer was unclear as to whether an answer given under compulsion could be admitted into evidence at a criminal trial or not. At the time the applicants in these cases had refused to provide information, the Supreme Court decision in *Re NIB* [1999] 3 IR 145 had not yet been delivered. The terms of the European Court judgment appear to suggest that the use of Section 52 now i.e. in the legal landscape post- NIB, would not violate Article 6(1), given that the answers made could not be admitted into evidence at a criminal trial for another matter.

A closely related aspect of the right to silence is the use during a criminal trial of testimony that the accused supplied under compulsion in another forum e.g. a tribunal, a company law investigation. This was addressed in some detail in *Saunders v. United Kingdom* (1996) 23 EHRR 313. This celebrated case concerned the use in a criminal trial for illegal share-support arrangements of information provided by the applicant, under legal compulsion, to DTI inspectors. The Court held that such

use of the evidence, compulsorily obtained elsewhere, at his criminal trial was not permissible under Article 6(1). We have already seen the impact of this decision in the Supreme Court decision in *Re NIB* [1999] 3 IR 145. This area again illustrates the tension between a democracy's need for effective law enforcement and the repugnance for self-compelled criminal conviction referred to at the outset. While compelling testimony in a DTI investigation is permissible, using that testimony in a criminal trial is not. The respect for individual rights of expression, silence, autonomy and whatever other rights are engaged, must yield to some degree, but only so far. The line is drawn at criminal trials.

An interesting and extremely practical question following the *Saunders* and *NIB* decisions is whether information 'derived' from the compelled testimony, for example, by following up 'leads' supplied by the testimony, can be used at a subsequent criminal trial (as distinct from the testimony itself). Neither the European Court nor the Irish Supreme Court has yet addressed this 'derivative evidence' issue in detail, although it has been discussed many times by the Supreme Courts of the United States and Canada. The Supreme Court in the NIB decision briefly indicated a strong view that such evidence would be admissible. In light of the number of tribunals and investigative bodies currently operating with powers to compel testimony in Ireland, a detailed analysis of the law in this area must surely only be a matter of time and will have major repercussions for the prosecuting authorities.

Intrusive Surveillance

This might indeed be the topic that most exemplifies the dilemmas referred to at the outset of this talk. Clearly there is a very real risk that arbitrary or unrestricted use of intrusive surveillance techniques, done in the name of criminal investigations, could constitute a serious threat to fundamental democratic freedoms. As one might expect, there is a considerable European Convention jurisprudence in this area, particularly in the last decade *(Malone v. UK* (1985) 7 EHRR 14; *Huvig v. France* (1980) 12 EHRR 528*; Kruslin v. France* (1998) 12 EHRR 547; *Hewitt and Harman v. UK* (1992) 14 EHRR 657*;Valenzuela Contreras v. Spain* (1999) 28 EHRR 483; *Khan v. United Kingdom,* 12th May 2000. Most of the cases have concerned telephone tapping, although one of the most recent cases, the *Khan* case, concerned the 'bugging' of premises in the course of an investigation into drugs offences. So far, the Court's main concern has been to ensure that States have detailed and publicly accessible procedures concerning the use of this type of investigative method. This does not mean, of course, that a person is entitled to notice of his being the object of intrusive surveillance, but rather whether in general terms domestic law adequately regulates matters such as the type of offence in respect of which the surveillance might be used, the categories of persons who might be targeted, the duration of the surveillance, and the destruction of records, particularly after the discharge or acquittal of the person concerned.

The law of a significant number of countries has been found to fall short of Convention standards in this area, including the United Kingdom, France, Switzerland and Germany. The United Kingdom, for example, has enacted at least six major pieces of legislation since 1984 to respond to European Court judgments in this area. The most recent piece of legislation introduced by Ireland would appear to be the Interception of Postal Packets and Telephonic Communications Act 1993, which amends the Postal and Telecommunications Services Act 1983. One would have to have serious doubts that this sole piece of legislation meets the stringent and comprehensive requirements laid down by the European Court in this area.

Media reporting of criminal trials

Turning to a different kind of conflict between democratic principles and criminal justice, the Convention has some interesting things to say about media reporting of and about criminal trials and criminal investigations. The Convention posits a balancing of rights of freedom of expression and right to a fair trial similar to that necessitated by Ireland's domestic Constitutional provisions. In recent years, this conflict of rights has been increasingly put to the test by an increased hunger on the part of the media to exercise its rights to report, comment and photograph in relation to criminal trials to the fullest extent possible, and perhaps even beyond. Increasingly in Ireland we are witnessing the phenomenon of media organs making representation to criminal courts concerning the extent of permissible coverage of individual trials.

Convention jurisprudence may be helpful in this regard, particularly the formulation of the relevant test, which is whether the relevant restriction on freedom of expression is necessary in a democratic society, the phrase 'necessary' encompassing the concepts both of legitimacy of aim and proportionality of measure. An application of this test can be seen in the interesting decision in *Newsverlags v. Austria,* 11 January 2000, which presents an interesting foil to the decision of Carroll J. in the Catherine Nevin trial. Both cases feature a trial judge issuing a total prohibition to the print media on the publication of photographs of an accused standing trial. At issue in Newsverlags, was a court prohibition on the publication of any photographs of a suspect who was being tried in respect of a letter bomb campaign. Both the individual and the event were notorious, and some of the media comment was very far-reaching. However, the Court held that while a combination of photographs and text had interfered with the suspect's rights to a fair trial, a restriction banning all photographs was a disproportionate measure and therefore violated Article 10. In addition to this excellent demonstration of the strength of the proportionality test, this case contains an interesting statement of principle by the Court concerning editorial freedom and what aspects of this freedom Article 10 of the Convention protects.

Protection of Witnesses

In a democratic society, one would expect that it is not only the rights of the accused that are respected in the criminal justice system. After all, it is the rights of ordinary citizens that the criminal justice system seeks ultimately to protect. Some commentators believe that the Convention jurisprudence actually, and potentially, offers better protection to witnesses and victims of crime than traditional common law systems.

Indeed, the Court in *Mechelen v. Netherlands* (1998) 25 EHRR 647 specifically referred to rights of witnesses/victims as attracting the protection of certain Convention rights. On the other hand, it may be that the Convention jurisprudence here in particular shows the influence of civil law procedures and concepts concerning the limits of the accused's right to a fair trial, and in particularly the necessity for oral evidence and confrontation by way of cross-examination of a witness. In other words, it may not be a particularly pro-victim slant but rather a different conception of what fair trial procedures require.

One can see that a variety of 'pro-witness' factors are seen as legitimate reasons why a witness may not have given evidence in the usual way, including (a) fear of reprisals; *Doorson v. Netherlands* (1996) 22 EHRR 330 (where the court held that the trial was not unfair when two prosecution witnesses remained anonymous and were questioned by the judge in the presence of counsel, but not the accused); (b) reluctance to testify in a domestic violence case; *Asch v. Austria* (1993) 15 EHRR 597; and (c) physical or mental condition. Where such factors are present, the eliciting or presentation of a witness' evidence other than in the usual oral adversarial form may be permitted.

However, these witness considerations are not dominant, and the Court will weigh them in the balance with other factors, such as the degree to which the conviction was based on the specific evidence of that witness and the degree to which the restriction of the rights of the defence were counterbalanced by other protective measures. So, for example, in *Kostovski v. Netherlands* (1990) 12 EHRR 434, the conviction was based 'to a decisive extent' on the statements of two anonymous witnesses who gave evidence but who neither the defendant, nor defence counsel, nor the trial judge was able to observe. The defence were allowed to submit questions to a magistrate who then put them to the witnesses, but this was held insufficient to counterbalance the unfairness of the procedures. In contrast, in Doorson above, where there was held to be no violation of Article 6, the evidence in question was considered to be 'not decisive'. More recently, in *Van Mechelen v. Netherlands* (1998) 25 EHRR 647, the trial was held to be unfair where eleven anonymous police officers gave evidence for the prosecution in a room separate from the court but connected by sound link, with the questioning being done by the judge only. Again a relevant consideration was a fear of reprisals, but ultimately the procedures were held to be unfair to the accused

The Mentally Ill Offender

A somewhat different aspect of the tension between crime control and democratic freedoms arises in the context of the mentally ill offender. Here, there is always a serious danger that the emphasis on protecting the public from a person perceived as dangerous will result in that person being short-changed regarding his rights, particularly the right to liberty. The leading European Court decision on the detention/hospitalisation of the mentally ill is *Winterwerp v. Netherlands* (1979) 2 EHRR 387. The principles set out in this seminal judgment must cause serious concern that Ireland is in serious breach of the Convention as regards both the insanity defence and the issue of fitness to plead in criminal trials. The *Winterwerp* principles include the following requirements; (a) There must be a proper test of insanity, which is flexible and closely linked with current psychiatric concepts; (b) There must be a proper consideration, at the time of detention, of whether there is a need for such detention/hospitalisation; (c) There must be provision for periodic review of such detention/hospitalisation; (d) The test operated by the review body must be whether the conditions which warranted the original detention continue to exist; (e) The procedures operated by the review body must be fair to the detainee; (f) The review body must be sufficiently independent to have the power to order the release of the person if the previous condition is no longer satisfied; and (g) Reviews must be dealt with speedily. Without setting out a litany of possible shortcomings in this area of the criminal law, suffice it to say that many, if not all, of the *Winterwerp* requirements are ignored by seriously outdated Irish legal provisions concerning fitness to plead and insanity

Positive Duties imposed on Convention States

Perhaps one of the most interesting aspects of Convention jurisprudence is that in addition to imposing negative obligations on States to restrain from interfering with Convention rights, it also places certain positive burdens on States to respect and vindicate Convention rights. As has been seen from a number of the above areas, it is not only when a domestic law positively conflicts with Convention rights that there will be a problem, but also where a domestic law is found lacking by failing to measure up to Convention standards. These positive obligations are particularly onerous as regards rights under Article 2 (right to life) or Article 3 (freedom from torture, and inhuman or degrading treatment). The steps required of States can range from creating criminal law offences, circumscribing defences to existing criminal law offences, various procedural steps within the criminal justice process, and maintaining adequate models of official investigation or inquiry to address alleged violations of Convention rights.

In *X and Y v. Netherlands* (1985) 8 EHRR 235, the Court found the Netherlands to be in breach of Article 8 where a lacuna in the law prevented a criminal prosecution from being brought on behalf of a woman who was mentally impaired and who complained of being raped. Here the substantive criminal law was 'inadequate' rather than 'in conflict' with Convention rights. In *A v. United Kingdom*, 23 September 1998, the UK was found to have violated Article 3 when a jury acquitted a stepfather of assaulting his stepson, on the basis that if the law (which included the defence of reasonable chastisement) permitted an acquittal in circumstances which, in Convention terms, amounted to inhuman and degrading treatment of the boy, the domestic legal protection of the boy's rights was inadequate. This case illustrates in particular that potential breach of Convention rights may be lurking in the range or scope of defences as distinct from offence-definition in the more conventional sense. The case of *McCann v. United Kingdom* (1996) 21 EHRR arose out of the shooting in

Gibraltar of three IRA suspects. The court emphasised that the appropriate test where the State is alleged to have be responsible for killing citizens is one of 'absolute necessity' rather than 'necessary in a democratic society', the less rigorous test under Articles 8-11. This might well have implications for Irish domestic law of homicide, at least in cases where the State is involved. In addition, the Court examined the planning of the operation in question as well as the actions on the ground of the officers who actually carried out the killing, thus adopting a broadly focused inquiry. The court held that while the soldiers themselves had not violated Article 2, because on the information given to them they had good reason for the beliefs that led them to fire the shots, the Government had violated Article 2 through a failure to ensure that the operation was planned so as to minimise the risk of death. Accordingly the case contains discussions of a number of different positive obligations imposed on States, including the parameters of defences and the questions of 'system' response to infringements or potential infringements of basic human rights.

In *Osman v. UK,* 28th October 1998, there had been some warning signs that a teacher who had become infatuated with a pupil could constitute a danger to the pupil; in the event, he shot and killed the boy's father at their home, and injured the boy. Although on the facts the Court held that the police response to the threats was not so inadequate as to involve a breach of Article 2, it is interesting to note the Court's willingness to engage in a review of the police operation in question. The appropriate test, regarding appropriate police response, was whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party. However, the Court acknowledged that any preventive measures taken must have due regard to the rights of others who may be affected, and that police powers must be exercised in a manner which respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice. In this case, the police could not be criticised for failing to arrest the individual, because the evidence did not satisfy the test of suspicion that would have been required for a valid arrest. The Court went on to find that there had been a violation of Article 6 on the basis that access to the courts had been denied. The family had brought a civil action in the courts against the police, but this had been refused on the ground of a total immunity against negligence suits. The Court held that such a complete immunity was not sustainable. This case well illustrates the complexities of reconciling and balancing the different rights at issue in such a situation.

More recently, in *Kelly v. United Kingdom,* 4th May 2001, the Court considered the range of official responses and investigations into killings by agents of the State in a case where no prosecution ensued. The Court identified the necessary characteristics of an acceptable form of investigation following a killing by agents of the State as being (a) independence of the inquiry, together with (b) the capability of the inquiry to lead to a determination whether the force used was justified, and therefore to the identification and punishment of those responsible. Here, the police investigation was criticised for lack of sufficient independence; the decision not to prosecute was accompanied by, in the view of the Court, a wrongful lack of public scrutiny and information for the next of kin as to the reasons of the DPP not to prosecute; and the inquest procedure was held to be defective in a number of respects.

Such cases illustrate that States need to be wary of inaction as much as action, as the obligations placed upon them by the Convention, as interpreted by the European Court, can be of a complex and affirmative nature, and are not satisfied by a simple non-interventionist approach.

Conclusion

Given that we already protect fundamental rights under the Irish Constitution, some commentators would see the *rapprochement* of Convention jurisprudence, through the mechanisms in the Human Rights Bill as currently formulated or otherwise, as unlikely to have any major impact on Irish criminal law. Time alone will tell, although my own feeling is that this important legal development will have significant effects in the long run. Although there are specific areas where human rights within our criminal justice system would be strengthened by the direct application of Convention law, more generally I would see general and transforming effects being diffused or permeated in a more subtle way throughout the system as a whole. One message that came through the Convention jurisprudence loud and clear for me, as an Irish criminal lawyer, was that respecting human rights in an effective criminal justice system is complex, difficult and requires ongoing serious commitment. There are no simple answers and there is no running away from these issues. The more frequently we remind ourselves that this is so, the better. After all, it is our democracy itself that is at stake.●

*This article is based on papers given by the author earlier this year at conferences hosted by the Director of Public Prosecutions and by the Institute of Judicial Studies.

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