The Bar Review

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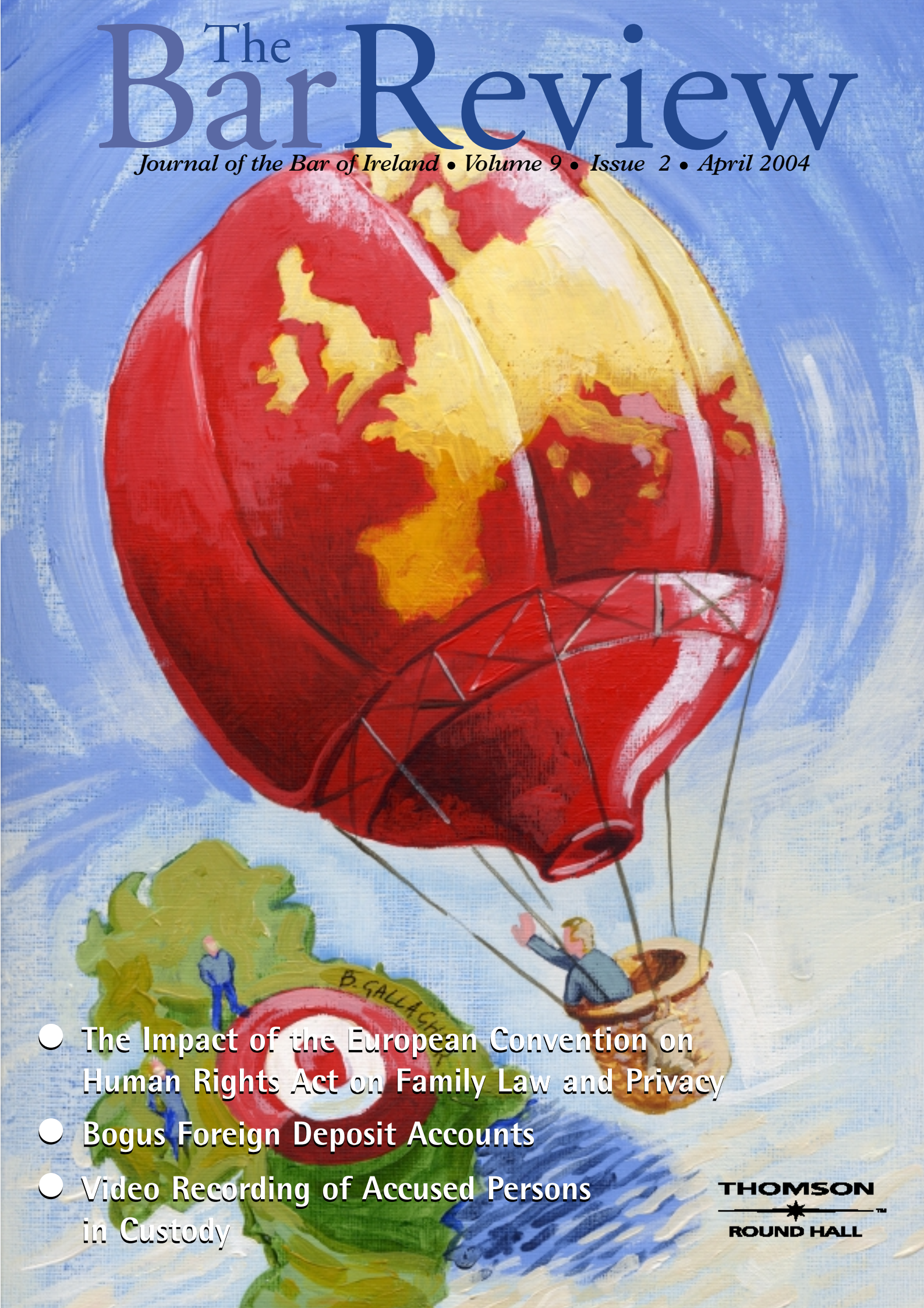

- The Impact of the European Convention on Human Rights Act on Family Law and Privacy
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THOMSON ROUND HALL

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Obituary

Mr. Justice Seamus Egan

Much has been written about Seamus Egan's contribution to Irish law. Knowing him from my first day as a raw recruit on the Western Circuit, I would, however, prefer to reflect upon Seamus, the man. As a colleague so eloquently put it, anyone who had the privilege of enjoying his company, either in Court or out of it, also had the privilege of benefiting from a 'learning curve in humanity'. The Bar is frequently perceived as arrogant and even when the contributions we make to the quality and standards of life in Ireland are positive or even commendable, the tone is often stentorian: it is heard as the bark of the privileged rather than the familiar intercourse of the equal. Seamus always maintained that whoever shouted loudest was usually in the wrong, and we would do well to remember the wisdom he dispensed in that quiet voice. Arrogance was a quality that was never attributed to him. His life, both personal and professional, was based on the premise that 'the small man is never small'; like Patrick Kavanagh, he recognised that 'half a rood of rock' has epic importance for its claimants, and that tragedy and triumph are as valid in the boreens of the West as they are in the corridors of power.

Despite his erudition and his workload, he was approachable by the most junior of Junior Counsel, an attitude he had honed to perfection at home where, standing in front of the Aga, he was always available to listen to, laugh with and counsel not only his own beloved children but scores of their friends whom he and Ada made so welcome. One of his daughters has said that his sense of fairness infiltrated every aspect of family life and the same could be said for his life both at the Bar and on the Bench. He had an irreproachable instinct for justice. Most people have heard the story of how, when he was first called to the Bar, he was savaged by the Judge hearing the case and that, there and then, he made the decision that if he were ever himself appointed to the Bench, he would always treat whoever came before him, whether plaintiff, defendant, witness or lawyer, with the utmost courtesy. Appearing before him, one trusted implicitly that the decision he reached would be as wise as Solomon's - and a good deal more humane. You might lose but even a decision against you was delivered with such charm and courtesy that in a way you felt the better for it!

Seamus loved the law. He revelled in the purity and precision of its language and was a master of interpretation. He practised on the Western Circuit with some of the giants of Irish legal history, among whom were Tommy Connolly S.C., Brian Fahy S.C., Nol Gogarty S.C., Patrick Lindsay S.C., Rex. Mackey S.C., Chris Micks S.C., John Willie O'Connor B.L. and Peter O'Malley S.C., not to mention the legendary raiders from East of the Shannon: Colm Condon S.C., Seamus McKenna S.C., Paddy MacKenzie S.C. and Ernest Wood S.C. They constituted a team for all time and Seamus, in my view, would always have been the captain. Despite his gentleness, failure to recognise his fiercely competitive spirit as an advocate, a golfer and superb tennis player spelled disaster for his opponent. I still laugh at the memory of him fixing me with a beady eye during a negotiation and asking, with a wry grin, whether I'd like to settle the matter on a tennis court……Unfailingly courteous and softly spoken, with a legendary dry wit, Seamus never had to resort to theatrics. As a young Junior Counsel, I was being led by the late Patrick Lindsay S.C. and Marcus Daly S.C. in a plaintiff's case against the State, whom Seamus represented. Many variations of this story, so illustrative of Seamus's understatement, have been told but this is the definitive version. I was there! Creating his own pool of quiet in the chaos of Galway Courthouse, Seamus puffed languidly on a cigarette as Marcus approached him outside the Bar room.

"Morning, Seamus!"
"Morning, Marcus."
"This is a serious case, Seamus!"
"Indeed it is, Marcus. What are you looking for?"
Marcus hesitated for a moment and then plunged in.
"£17,500!"
"Hmm," said Seamus, taking another long draw of his cigarette, "I have £20,000 for you."
He exhaled, wreathing them both in smoke, "Will that do?"
Marcus flushed but, to his credit, without missing a beat, replied,
"Hmph! Well, it's a start!"

Perhaps nothing demonstrates to greater effect the respect in which Seamus Egan was held in the country than the fact that he was appointed to the High Court by a Fine Gael/ Labour government and then to the Supreme Court by Fianna Fail and the Progressive Democrats. According to his family, this achievement afforded Seamus enormous pride and delight - a rare occurrence in a man so genuinely lacking in pomp and self regard. It seems absolutely fitting that he, who was so inclusive in his attitudes, should have been the recipient of such commendable pluralism.

However much we may miss him and, for many of us, our sadness is both poignant and permanent, it is nothing compared to the painful sense of loss suffered by his family. His wife and each of his children were, to Seamus, by far the most important part of his life. Whilst Ada might rightly have baulked at the idea of being regarded as Mrs. Bennett in 'Pride and Prejudice', Seamus revelled in thinking of himself as Mr. Bennett, the father of five delightful daughters. His pleasure knew no bounds when one of them actually married a Mr. Darcy……

The Bar, I know, joins me in extending deep sympathy to Ada, and to Frances, Brian, Sandra, Rory, Adrienne, Karen and Suzanne. And in the best tradition of the Western Circuit, I raise a glass to Seamus and say,

"His life was gentle, and the elements
So mixed in him that nature might stand up
And say to all the world, 'This was a man'".
H.O.B

Family Law Aspects of the European Convention on Human Rights Act 2003.

Dervla Browne BL*

Introduction

The European Convention on Human Rights Act 2003 came into force in December of 2003 and its implementation will very likely have a significant impact on Irish law. The key provisions of this Act have been described in full in an earlier edition of the Bar Review (see Lowry, *Practice and Procedure under the European Convention on Human Rights Act 2003*, Bar Review Volume 8, Issue 5, 183) and I do not propose to repeat them here. However, it is worth noting that the Convention is not incorporated in our Constitution (which can only be done by holding a referendum) but will be the context in which statutory law and rules of the common law will be interpreted by the Courts. Like the Human Rights Act of 1998 in the UK, the Irish Act does not contain a "force of law" provision. It will operate on an interpretative basis and requires legislation to be construed in accordance with the Convention as far as it is possible to do so. Therefore an act or actions by a public body or interpretation of the common law must be interpreted and accord with constitutional requirements and insofar as the Constitution permits, Convention law.

It has been argued very strenuously in some quarters that, because Ireland has a written Constitution incorporating fundamental human rights, that the effect of such an incorporation of the European Convention into Irish law will have little effect. However, in this article, I will point out areas where I think there may be conflict between our constitution and the Convention, and where the Convention will offer wider protection. I will also examine English law as it has developed over the past 3 years since the 1998 Human Rights Act came into force. In the U.K., there has been extensive litigation in this area. The index to the family law reports contains 17 cases reported for 2002 involving human rights issues and 9 in the first volume for 2003.

The Convention Provisions

The most important provisions of the Convention which impact on the practice of family law are primarily Articles 6, 8, 12 and 14. Reliance has also been placed on Article 3 in some cases.

Article 8 states that

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

Article 6 of the Convention provides : - In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 12 states that men and women of a marriageable age have the right to marry and found family life according to the national laws governing the exercise of this right.

Article 14 states the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Finally, Article 3 states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 8 and the meaning of family life

I am firmly of the view that the definition of family life will constitute a major dilemma for our Courts. It is clear that Article 41 of the Constitution gives the protection to the family that is based on marriage. This has been affirmed by the Supreme Court as recently as 1989 (*J.K.v. V.W.* [1990] 2 IR 437) In the case of *W. O'R. v. E.H.* [1996] 2 IR 248, the Supreme Court found that the relationship between a father and a child born outside the marriage, while not having constitutional protection, had rights which varied depending on the circumstances of the conception and the existence of *de facto* ties in relation to marriage. The Supreme Court considered that these rights would be taken into consideration by the Court in the context of the welfare of the child, which would be given paramount importance. This rationale for the determination and the protection of the *de facto* family differs considerably from the concept of " family life" as defined in the law of the European Convention. In the case of *Keegan v. Ireland*, 18 E.H.R.R. 341, the Court found that family life existed from the date of birth between a father and his child even though he was not married to the mother of his child and at the time of the birth, they were living separate and apart. In the case of *Marckx v. Belgium*, 31 2 E.H.R.R. 330, the Court found that family life included at least the tie between near relatives, for instance those between grandparents and grandchildren as such relatives may play a considerable part in family life. In *Boyle v. United Kingdom*,19 E.H.R.R. 2633, family life was held to exist between an uncle and nephew. In the case of *Gül v. Switzerland*, 1996 22 E.H.R.R. 93, the relationship between a divorced man and his child born within marriage, where a separation and absence had not severed the relationship, constituted a

* This paper was delivered to the Family Lawyers Association Conference in November 2003.

family. Also, in *Kroon v. The Netherlands*, 129 E.H.R.R. 263, the relationship between a man and a child conceived during an extra marital affair was held to be a family within the meaning of Article 8. And perhaps one of the most significant judgments in this area was the judgment of *X, Y and Z v. UK* [1997] 2 FLR 892. In that case, X was a female to male transsexual. Since 1979, X had lived in a permanent and stable relationship with Y, a woman. X underwent gender reassignment surgery. Z was born in 1992 and was the child of Y as a result of artificial insemination by a donor. X enquired whether there was any objection to his being registered as the father of Y's child. X was informed that only a biological man could be regarded as a father for the purpose of registration. Further following Z's birth, X and Y attempted to register the child in their joint names as the mother and father. X was not permitted to be registered as the child's father and that part of the register was left blank. The applicant sought a decision as to whether there had been a violation of Articles 8 and 14. The Court found that the relationship of post operative male transsexual who lived in a long term stable relationship with a natural born woman and her child constituted a family. The Court went on to find that employing the wide margin of appreciation to the State in providing respect and protection for that family life, that there was no violation of Article 8 since X was not prevented from acting as Z's father in a social sense and could with Y apply for a joint residence in respect of her.

It would be interesting to see how a case would be decided if the mother of the child in the X case, say after separation from him, applied to adopt the child with a new husband or even by herself. A person in the position of X would have absolutely no entitlements in Irish law as there is no procedure available to him to be appointed a guardian. It is doubtful if his position would have any constitutional protection. However it would appear that the State would be obliged to offer him some protection pursuant to the 2003 Act.

In the English case of *Rose v. Secretary of State for Health* [2002] 2 FLR, 1962, the claimants were both the product of artificial insemination. The claimants had requested the Secretary of State to make available non identifying information and either a contact register or, where possible, identifying information in respect of anonymous donors. The Secretary of State's response was that there was to be a consultation exercise, that the consultation document was to be published shortly and that the various points would be considered by Ministers following completion of the consultation exercised. The claimants sought a judicial review of that decision, arguing that their rights under Articles 8 and 14 of the European Convention were engaged. They claimed that in order to discharge its duties under these Articles, the State had a positive obligation to ensure that certain vital non identifying information about donors was collected and made available to children born as a result of artificial insemination, including all information routinely recorded in adoption cases. The claimants also argued that the State must establish a voluntary contact register to facilitate the exchange of information and contact between willing artificially insemination children and willing donors. They argued that the failure to take these steps was a continuing and unjustified breach of the claimant's rights under Articles 8 and 14. The issues at the hearing before the Queens Bench Division was whether Article 8 was engaged and whether the claimant's arguments, if accepted, would be capable of justifying the making of a declaration of incompatibility. Scott Baker J. reviewed the law under Article 8 and said the question involved was whether the claimant's private and family life were involved. The Court referred to *Gaskin v. United Kingdom* [1990] 12 EHRR 36 where the claimant had been in care throughout his minority and wished to obtain details about all the conditions in which he had lived while being fostered so that he could overcome his problems and learn about his past. The Court found that the file from the local authority did deal with Mr. Gaskin's private and family life. The Court also referred to *Johnston v. Ireland* [1986] 9 EHRR at p. 203 and stated that Article 8 may impose positive obligations to effect a respect for family life. Scott Baker J. referred to the case of *Mikulic v. Croatia* [2001] FCR 720 where the mother of a child born out of wedlock who filed a civil suit to establish paternity stated that the proceedings took so long that respect for her private and family life had been violated. In holding there had been a violation of Article 8, the Court found that respect for private life requires that everyone should be able to establish details of their identities as individual human beings and that such information is of importance because of its formative implications for his or her personality. The Court reviewed other cases, including *Gunn-Russo v. Nugent Care Society and Secretary of State of Health* [2002] Vol 1 FLR 1 and *Re. X Disclosure of Information* 2001 Vol 2 FLR 440 and stated that the principles to be drawn from the authorities are as follows:

1. Private and family life is a flexible and elastic concept incapable of precise definition.
2. Respect for private and family life can involve positive obligations on the State as well as protecting the individual against arbitrary interference by a Public Authority.
3. Respect for private and family life requires that everyone should be able to establish details of their identity as individual human beings. This includes their origins and the opportunity to understand them. It also embraces their physical and social identity and psychological integrity.
4. The respect for private and family life comprises, to a certain degree, the right to establish and develop relationships with other human beings.
5. The fact that there is no existing relationship beyond an unidentified biological connection does not prevent Article 8 from biting.

The Court went on to find that Article 8 was engaged but did not find that there had been a breach of it. The Court found that everyone should be able to establish details of his identity as a human being. That, in the opinion of Scott Baker J., plainly includes the right to obtain information about a biological parent who will inevitably have contributed to the identity of his child. The Court went on to deal with the wording of the Human Rights Act 1998. This wording is different to our wording in that it provided that it would be unlawful for a public authority to act in a way which is incompatible with the Convention. (Our equivalent section, section 3, states that every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention.) Therefore, the question in *Rose* was whether a failure to act and in particular, a failure to introduce a proposal for legislation constituted an unlawful act. The Court found that the wording of the Human Rights Act 1998 prevented the claimants from complaining of a failure to enact the primary legislation but could make the State amenable to a claim that by its failure to make regulations, it breached a positive obligation under the Act. It is arguable whether such a distinction could be upheld by the courts of this country.

In the case of *R (on the application of Stokes) v. Gwent Magistrates Court* [2001] All ER page 125, the imposition of a period of imprisonment for non payment of fines was successfully challenged on the grounds that prison was an unacceptable interference with the defaulter's childrens under their Article 8 right. This could have relevance for applications to attach and commit for failure to pay maintenance.

Article 8 and private life

In the case of *Odievre v. France,* (15th January 2003, ECHR), the system of anonymous births which had been in place for many years in France

was subjected to scrutiny. The practice originated with Saint Vincent de Paul who introduced the use of a revolving crib in the nursing home wall where a mother could leave her baby without disclosing her identity. The aim in setting up this procedure was to prevent infanticide abortion and babies being abandoned outside churches. The system was embodied in law no. 93/22 of the 8th January 1993, which stated that when giving birth, the mother may request that her admission to hospital and identity shall remain a secret.

In 2002, a law was passed in France which allowed access by adopted persons and people in State care to have information about their origins. It abolished the parent's rights to request confidentiality. The applicant had managed to obtain non identifying information about her natural mother and description of her mother and father and the reasons why she was placed for adoption. She stated that she wished to find out the civil status of her siblings. The applicant maintained that her request for information about strict personal aspects of her history and childcare came within the scope of Article 8 as forming an integral part of not only her private life, but also her family life. The Court found that the applicant's purpose was to discover the circumstances in which she was born and abandoned, including the identity of her natural parents and brothers, and found that it was necessary to examine the case from the perspective of private life and not family life. It referred to *Bensaid v. UK* and *Mikulic v. Croatia* in finding birth and, in particular, the circumstances in which a child is born, guaranteed by Article 8 of the Convention. The Court found that Article 8 may compel the State to take positive action to effect respect for private life. The Court noted that the applicant claimed that France had failed to ensure respect for her private life by its legal system, which precluded an action to establish maternity being brought once the natural mother had requested confidentiality. In the Court's opinion, persons had a vital interest protected by the Convention in receiving the information necessary to know and to understand their childhood and early development. The Court observed that the applicants in the *Gaskin* and *Mikulic* cases were in a different situation to the applicant in the present case. In this case, the applicant was an adopted child who was trying to trace her natural mother who had abandoned her at birth and who had expressly requested that information about the birth remain confidential. The Court found that the wording of 'Everyone' in Article 8 applies to both the child and the mother. It found that the child's vital interest in its personal development was widely recognised in the scheme of the Convention. On the other hand, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied. The two competing interests are not easily reconciled. Moreover, they did not concern an adult and a child but two adults each endowed with their own free will. The Court found that there was also the issue of the protection of third parties, essentially the adopted parents, the father and the other members of the natural family. As the applicant was now 38 years old, having being adopted at the age of 4, non consensual disclosure could entail substantial risks not only for the mother herself, but for the adopted family, her natural father and siblings etc. There was also a general interest at stake, that is the right to respect for life being pursued by the French government. The Court found that the choice of the means calculated to secure compliance with Article 8 is, in principle, a matter that falls within the Contracting State's margin of appreciation. In the present case, the applicant was given access to non identifying information about her mother and natural family that enabled her to trace some of her roots, while ensuring the protection of third party interests. The Court also found that the system set up in France improved the prospect of mothers agreeing to waive confidentiality and found that the legislation tried to seek a balance between the competing interests. Given that States must be allowed to determine the means it considers best suited to achieve the aim of reconciling these interests, the Court considered that France had not overstepped the margin of appreciation and that there had been no violation of Article 8.

Article 6 and procedural issues

There has been much litigation under the Human Rights legislation in England about the issue of the "in camera" rule in family cases. In the case of *Re. P.B. (a minor)* [1997] 1 All E.R., 58, Butler-Sloss L.J. in the Court of Appeal dealt with an application by a father to have an application for a residence order heard in open court. Butler -Sloss L.J. reviewed the rules and in particular Rule 4.16.7 of the Family Proceedings Rules 1991, which states that unless the court otherwise directs, a hearing of, or directions in proceedings to which this part applies (which included applications regarding children) shall be in chambers. Butler-Sloss L.J. stated that generally, child cases were to be heard in private. However, where issues of public interest do arise, it wouldn't seem entirely inappropriate to give judgment in open court providing, where desirable in the interests of the child, appropriate directions are given to avoid identification. If the case raised issues of principle or of law, the judgments are increasingly provided to the law reporters and are published in a large number of law reports, which report family cases. Gibson L.J. found that the Convention had not yet been incorporated into English Law and that the Article itself recognised that the right to a public trial was qualified. Both Butler-Sloss L.J. and Gibson L.J. found that the present practice was not inconsistent with Article 6.

This rule was examined by the Court of Human Rights in two linked cases of *B v. UK* and *P v. UK*, which were heard together [2002] 34 EHRR 529. The Court examined the rule in the context of Article 6 and recalled that it provides that in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing. The public character of the proceedings protects litigants against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the Courts can be maintained. However the requirement to hold a public hearing is subject to exceptions. This was apparent from the text of Article 6.1 itself which stated that "the press and the public may be excluded from all or part of the trial when the interests of juveniles or the private life of the parties so require..." The Court found that English procedural law was a specific reflection of the general exceptions provided by Article 6. The Court further found that English tribunals had a discretion to hold Children Act proceedings in public, if merited by the special features of the case and that the judge must consider whether or not to exercise his or her discretion in this respect, if requested by one of the parties. The Court found that the decision to hold an application for residence of a child in chambers was not a violation of Article 6.1. The Court then went on to examine the right to public pronouncement of judgment and referred to its long standing case law that the form of publicity given under the domestic law to a judgment must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6.1. The Court found that in view of the type of issues requiring to be examined in cases concerning the residence of children, domestic authorities were justified in conducting these proceedings in chambers, in order to protect the privacy of the children and the parties and to avoid prejudice in the interests of justice. To pronounce the judgment in public would to a large extent frustrate these aims. The Court went on to note that anyone who could establish an interest could consult or obtain a copy of the full text of the orders and that judgments of the Court of Appeal and of first instance courts in cases of special interest are routinely published.

Right to Information and Article 6

Article 6 was considered in the U.K. in the case of *Rose v. Secretary of State for Health* and prior to that in the context of adopted children in the case of *Gunn-Rosso v. Nugent Care Society and Secretary of State for Health* [2002] 1 FLR 1. In the *Gunn-Russo* case, an adult adoptee wished to have access to the full file concerning her adoption. It is noteworthy that she had previously obtained information about her birth mother under the Children Act 1975 and had located her birth mother and met with her. Her birth father had died prior to her contacting him. Her adopted parents had died and she wished full access to the file. In that case, Scott Baker J. in the Queens Bench Division dealt with the judicial review application. He looked at Article 8 and found that the law regarding access to information as existed in domestic law and in particular, in regulating 15(2)(a) of the Adoption Agencies Regulations 1983 was compliant with the Human Rights Act of 1998.

The right of disclosure was also referred to in the case of *S v. Plymouth City Council* [2002] 1 FLR 1177. In that case, the son now 27 years old, had learning and behavioral difficulties. His mother had been caring for him but as he got older, the professional view was that if he were cared for in a stable residential environment away from home, he would be better off. The Social Services authority approached the mother with the possibility of seeking guardianship under the Mental Health Act 1983. After a number of orders and renewals of guardianship, the mother objected. It was stated that if she did so, the authority would take steps to replace her as nearest relative on the basis that she would be exercising power to discharge the patient from guardianship, without due regard for the welfare of the patient or the interests of the public. The mother had never been shown documentation upon which the guardianship or its renewal had been based. She made a number of requests to have access to her son's files, all of which had been refused. The mother applied for judicial review of the decisions to refuse her access. The Court of Appeal found that both at common law and under the Human Rights Act 1998, a balance had to be struck between the public and private interests in maintaining the confidentiality of information and the public and private interests in permitting, indeed requiring its disclosure for certain purposes. It found that most, if not all, of the information sought by the mother was covered by a common law obligation of confidence. However, the Court found that the proper administration of justice normally required anything relevant to the court's decision to be seen by both sides. These basic principles of common law were reinforced by the rights of access to the courts and to respect of private life conferred by Article 6 and 8 of the European Convention. The Court found that on this basis, documents should be disclosed. The Court found that there was an obvious public and private interest in the mother having access to the best possible expert advice before she decided whether or not to exercise her power of discharge of guardianship. Therefore, the Court found that she should have access to the information. In its judgment, the Court found that the parent has a right under Article 8 to be involved in the decision making process. (See *W v. United Kingdom*, 20 E.H.R.R. 29, *McMichael v. United Kingdom* 20 E.H.R.R. 205, *TP and KM v. United Kingdom* and Ursula Kilkelly's artice [2000] 2 I.J.F.L. 12 for a useful review of these cases)

It is in the area of care proceedings where much reliance will be placed on the rights of disclosure and the rights of the family. In the case of *Re. S* (*minor*) [2002]1F.L.R. 815, the House of Lords was asked to determine the impact of the Human Rights Act 1998 on the Children Act 1989. There were two cases. In the Torbay case, care orders had been sought in respect of all three children, with a plan that one would remain in foster care and the other two would be rehabilitated with their mother. There had been huge issues in relation to whether care orders should be made in relation to the two younger children on the basis that they might not be rehabilitated or the care plan would not be implemented. The judge made final care orders but the Court of Appeal found that there was a striking and fundamental failure to implement the care plan regarding the younger two. The care plan had envisaged reunification within 6 to 8 months but in the 4 and a half months that had elapsed between the making of the care orders and the hearing of the appeal, nothing had happened. In the Bedfordshire case, the children were taken into care with the final care plan that they would be placed with the maternal grandparents, with continuing direct contact with both parents. In that case, the judge described the care plan as inchoate because of a number of uncertainties which were involved in it. The Judge made care orders for both children. Both appeals were heard by the Court of Appeal and dealt with the claims for a declaration that the Children Act 1989 was incompatible with the European Convention. The Court of Appeal developed two innovations:

1. The Court enunciated guide lines intended to give trial judges a wider discretion to make an interim care order rather than a final one and
2. The Court of Appeal propounded a new procedure by which, after making a care order, the essential milestones of a care plan would be identified and elevated. If a starred milestone was not achieved within a reasonable time after the date set at trial, the local authority was obliged to reactivate the interdisciplinary process that had contributed to the creation of a care plan. There would be a right to apply to the Court for further directions.

In the Torbay case, the Court starred various items. In relation to the Bedfordshire case, the Court of Appeal held that the care plan was insufficiently mature and allowed the appeal. It replaced the care order with an interim care order and remitted the case back. Eventually a final care order was made in that case. The Secretary of State and Health in the Bedfordshire Council appealed against the reasoning of the Court of Appeal on its two innovations and not against the substantive orders made. In the Torbay case, the mother of the children appealed against the order made by the Court of Appeal. The House of Lords found that:

a. Parliament had set out its clear intention in the Children Act 1989 that once a care order had been made, the responsibility for the child's care thereafter lay with the authority, not the court, and the courts were not empowered to intervene. Section 3 of the Human Rights Act 1998 required the primary legislation to be read and given effect to in a way compatible with Convention rights, as far as was possible. The judicial innovation of starred milestones passed well beyond the boundary of interpretation and would constitute amendment.

b. The Court found that the Children Act 1989 was not itself incompatible with or inconsistent with Article 8 of the Convention. Infringement of the right to respect for family and private life was only likely to arise if the local authority failed properly to discharge its responsibilities under the Children Act 1989. Those responsibilities were not in themselves an infringement of rights and Article 8.

c. Circumstances might arise in English law relating to some decisions by local authorities concerning care of children which would not satisfy the requirements of Article 6, that is the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Failure to provide access to a Court as guaranteed by Article 6.1 meant that English law might be incompatible with Article 6.1, but the absence of such a provision from a particular Statute did not mean that the Statute itself was incompatible with Article 6.1. The Court found that the inability of parents and children to challenge in court care decisions made by local authorities, however fundamental,

was a different matter. Apart from judicial review, the opportunity to challenge such decisions in Court would be in conflict with the scheme of the 1989 Act. The issue of whether, in this respect, the Children Act 1989 was incompatible did not arise in this case as the parties concerned had not lacked a court forum in which to express their concern at lack of progress.

d. Interim care orders are not intended to be used as a means by which the court might continue to exercise a supervisory role over the local authority in cases in which it was in the best interests of a child that a care order should be made.

In the case of *P, C* and *S v. United Kingdom* 35 E.H.R.R 1075, P was convicted of deliberately administering laxatives to her new son, endangering his health. The case was determined to be one of Munchausen Syndrome. In 1996, P moved to the UK and married C. Before the birth of their child S, the local authority expressed concern about P's conviction and sought to initiate care proceedings in relation to the unborn child. Upon birth, S was removed from P and C and freed for adoption. Despite initial legal representation, P chose to conduct her own affairs during the hearing. Based on P's actions with regard to her previous child, the judge ordered S to be removed from P and C's care. Subsequent appeals were dismissed. The applicants brought a case that the process had violated their rights under Article 6, Article 8 and Article 12 of the Convention.

The Court found that Article 6 of the Convention embodied the right of access to the court for a determination of civil rights and obligations. Failure to provide an applicant with the assistance of lawyers may breach this provision where such assistance is indispensable for effective access to court, either because legal representation is rendered compulsory or by reason of the complexity of the procedure of the type of case. The right of access to court is not absolute and may be subject to restrictions. The key principle governing the application of Article 6 is fairness. A party in civil proceedings must be able to participate effectively, including for example by being able to put forward the matters in support of his or her claims.

The complexity of the case along with the importance of what was at stake and the highly emotive nature of the subject matter led the Court to conclude that the principles of effective access to court and fairness required that P receive the assistance of a lawyer. There was no requirement to show actual prejudice from lack of legal representation as this would deprive an applicant of the guarantees of Article 6. Therefore, the Court found that the parents did not have fair and effective access to the court.

The Court also found that there had been a breach of Article 8. It stated that there must be extraordinarily compelling reasons before a baby can be physically removed from its mother against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner have been involved. The Court found that following any removal into care, the strictest scrutiny is called for in respect of any further limitations by the authorities, for example in parental rights of access, as such further restrictions entail the danger that the family relations between the parents and a young child are effectively curtailed. The taking into care of a child should normally be regarded as a temporary measure to be discontinued as soon as the circumstances allow. Also, any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child. In that regard, a fair balance had to be struck between the interests of the child remaining in care and those of the parent being united with the child.

As regards the extreme step of severing all parental links with the child, such a measure would cut a child from its roots and could only be justified in exceptional circumstances or by the overriding requirement of the child's best interests.

While Article 8 contains no explicit procedural requirements regarding the decision making process involved, measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8. It is essential that the parent has access to information, or otherwise they would not be able to participate effectively in the decision making process.

The applicants complained that the law governing adoption in the United Kingdom is in breach of the Convention in that it permits, if not facilitates, the removal of very young babies from their parents with subsequent adoption and severance of all legal links. The Court found it was not its role to examine domestic law in the abstract. There are circumstances which may be envisaged where a young baby might be adopted in conformity with Article 8 of the Convention. However, the Court found that the removal of a baby from its birth mother required exceptional justification, and the removal also deprived the father C of being close to his daughter after birth. In this case, the Court held that the draconian step of removing S from the mother was not supported by relevant and sufficient reasons and was therefore a breach of the applicants' parental rights under Article 8. The lack of legal representation of P during the care proceedings and of P and C during the adoption proceedings, together with the lack of any real lapse of time between the two procedures, deprived the applicants of a fair and effective hearing in Court. In this case, the Court awarded £12,000 for non-pecuniary loss to each of the applicants.

In *TP and KM v. U.K.* 34 E.H.R.R 42, a child who was alleged to have been sexually abused by the mother's partner was found by the Health authorities to have identified him in an interview. The mother was denied access to the video and only when her solicitors received a transcript of the interview did it become apparent that the man identified as the abuser, although sharing the same name as the mother's partner, was not the mother's partner. The Court found violations of Article 8 and Article 13 of the Convention. It found that a series of measures which separate parent and child requires that they should not last any longer than necessary for the pursuit of the child's rights and that the State should take measures to rehabilitate the child and the parent where possible. It found that there had been restrictions in access and a limitation on disclosure, which hampered the applicant's involvement in the decision making process concerning the care of her daughter. There was a breach of Article 8 and Article 6.

Article 14 and discrimination

Article 14 was considered in the case of *Sahin v. Germany* 36 E.H.R.R. 765. In that case, the father of a child born outside marriage challenged a German law which stated that the person having custody of a child shall determine the father's right of access to the child. Where appropriate, an official mediator could intervene between the father and the person who exercises the right of custody. The Court found that the fathers of children born out of wedlock were in a different and less favourable position than divorced fathers. Unlike the latter, natural fathers had no right of access to their children and the mother's refusal of access could only be overridden by a Court, when access was in the interest of the child. The Court found that as the German courts were convinced of the applicant's responsible motives, his attachment to his child and his genuine affection for her, the burden placed on him was heavier than the one on divorced fathers. The Court found violation of

Article 14 taken together with Article 8 of the Convention. The Court found that the German courts had, in applying the relevant section of the Civil Code, found that only special circumstances could justify the assumption that personal contacts with the father would have a permanently beneficial affect on the child's well being.

In *Frette v. France* [2003] 2 FLR 9, the applicant was a single homosexual man who had applied to the French authorities for prior authorisation to adopt a child. At that time, domestic French law gave single individuals over 30 years old the right to apply to adopt. The Social Services Department rejected the application on the basis that the applicant had no stable and maternal role model to offer and rejected a request that the decision be reconsidered, indicating that the applicant's choice of lifestyle did not appear to provide sufficient guarantees that he would offer a child a suitable home. The Social Services report described him as an individual with undoubted personal qualities and an aptitude for bringing up children and had found that a child would probably be happy with him. The sole question was whether his particular circumstances as a single homosexual man would allow him to be trusted with a child. The Paris Administrative Court set aside the decision. The Appeal Court in a decision on the merits again rejected the application to adopt on the basis that the applicant's lifestyle did not provide the requisite safeguards for adopting a child. The applicant alleged that this decision had been implicitly and exclusively based on his sexual orientation and was in breach of his Article 14 right to enjoy rights without discrimination on any ground, in conjunction with his right under Article 8 to respect for private and family life. The Court found that the rejection of the application for prior authorisation to adopt a child had been based decisively on the applicant's homosexuality. Although there was no right to adopt under the European Convention, the applicant had the right to apply for adoption under domestic law and that right fell within Article 8 which had been infringed under the decisive ground of his sexual orientation. Accordingly Article 14 of the European Convention taken in conjunction with Article 8 was applicable. The Court went on to find that the scope of the margin of appreciation was affected by the existence or non existence of common grounds between the laws of the contracting States. The Court found that although most of the contracting States where single persons might adopt, did not expressly prohibit homosexuals from adopting, it was not possible to find uniform principles to apply. The Court found that the law appeared to be in a transitional stage and therefore a wide margin of appreciation was allowed. It went on to find that the national authorities were legitimately and reasonably entitled to consider that the right to adopt was limited by the interests of the child and the refusal to authorise adoption did not infringe the principle of proportionality. It found that the scientific community was divided over the possible consequences of a child being adopted by one or more homosexual parents and there were wide differences in national and international opinion. The Court went on to find that the applicant had been denied a fair trial before the Appeal Court as he had not been notified of the hearing. Nor, since he was un-represented, had he been able to establish what the submissions of the State would be prior to the hearing. As a result, he had been denied the opportunity to submit a memorandum in reply and therefore, there had been a breach of Article 6.

Article 3

Article 3, which prohibits torture or inhuman or degrading treatment or punishment, has been considered by the European Court of Human Rights in two cases involving the health authorities in the U.K. In the first of these, *Z and Others v. UK* 34 E.H.R.R 97, four children had been brought to the attention of the Bedfordshire County Council in 1987. Despite an appalling litany of neglect and emotional abuse by their parents, no application was made in relation to taking them into care until 1993. The children had been starved, locked up and kept in appalling conditions for a number of years. For a large period of this time, the health authorities had notice of and indeed visited them regularly in these conditions. In the domestic case in England, the Official Solicitor acting as the applicants' next friend commenced proceedings against the local authority claiming damages for negligence and/or breach of statutory duty arguing that the authority failed to have regard for the welfare of the children as was required by Statute and should have acted more quickly and more effectively when appraised of their condition. That application was struck out as revealing no cause of action and on appeal to the Court of Appeal and thereafter in the House of Lords, the action was struck out. The House of Lords found that no action lay against a local authority in negligence or breach of statutory duty concerning the discharge of their duties in relation to the welfare of children under the Children Act 1989. The applicants applied to the Court of Human Rights claiming breaches of Article 3, 6, 8 and 13 of the Convention.

The Court found that Article 3 enshrined one of the most fundamental values of democratic society. It prohibited in absolute terms torture or inhuman or degrading treatment or punishment. The obligation of all contracting States was to secure to everyone the rights and freedoms defined in the Convention and that required States to take measures designed to ensure that individuals within the jurisdiction were not subjected to torture, or inhuman or degrading treatment, including such ill treatment administered by private individuals. Those measures should provide effective protection, in particular of children and other vulnerable persons, and should include reasonable steps to prevent ill treatment of which the authorities had or ought to have had knowledge. In that case, it was not disputed that the neglect and abuse suffered by the four child applicants reached the threshold of inhuman and degrading treatment. The treatment was brought to the local authority's attention at the earliest in October 1987. The children were only taken into emergency care in April 1992. Over the intervening period of four and a half years, the applicants had been subjected to horrific experiences. The Court found that there was a failure in the system to protect these child applicants from serious long term neglect and abuse and that there had been a violation of Article 3. In relation to the claim under Article 8 the Court found it was unnecessary to determine this as a separate issue.

In relation to the application under Article 6, the Court found that the right of access to the Court was protected by the Convention but that right was not absolute. The Court found that the applicants were not prevented in any practical manner from bringing their claim before the domestic courts. The Court was not persuaded that the House of Lords decision, that as a matter of law, there was no duty of care in the applicants' case, could be characterised as either an exclusionary rule or an immunity with which to deprive them of access to the court. The Court found that the outcome of the domestic proceedings was that the applicants could not sue the local authority in negligence for compensation, however foreseeable and severe the harm suffered and however unreasonable the conduct of the local authority in failing to take steps to prevent that harm. However, the Court found that this did not give rise to an issue under Article 6, but rather under Article 13. The Court went on to find that Article 13 guaranteed the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The State in this case conceded that the range of remedies at the disposal of the applicants was not sufficiently effective and pointed out that in the future, under the Human Rights Acts 1988, victims of human rights breaches would be able to bring

proceedings in courts with power to award damages. The Court found that Article 13 had been violated and awarded £10,000 each in respect of non pecuniary damage and £25,000 in respect of costs and expenses.

In the second case involving an alleged breach of Article 13, *E v. United Kingdom* 36 E.H.R.R 519, the four applicants had been sexually and physically abused by their step father over a long period of time. 1n 1997, he had been convicted of indecently assaulting two of them and was placed on probation but continued to have close contact with the family. In 1989, after three of the applicants reported to police that they had been abused by him, he was convicted of serious acts of indecency and the applicants were awarded compensation by the Criminal Injuries Compensation Board. However the ombudsman stated that he had no jurisdiction to investigate the applicants' allegations of negligence and maladministration by the local authority. The applicants relied on Articles 3, 8 and 13. The Court found that there was a violation of Article 3 and of Article 13 and it awarded £16,000 each to three of the applicants and £32,000 in relation to the fourth.

Conclusion

A number of questions emerge from this review of case law. The first point to note is that England does not have a written Constitution. Therefore, the availability of other remedies to redress perceived injustices or breaches of human rights is scarce. I believe that this accounts for the massive surge of litigation under the European Convention on Human Rights and doubt that there is similar justification for such litigation in Ireland.

However, I would like to specifically address the position of fathers of children born outside marriage and the adoption process. In this regard, in *Keegan v. Ireland*, 18 E.H.R.R. 341, it was found that there was a violation of Article 6 in that a natural father had no right under Irish law to challenge a decision to place for adoption, either before the Adoption Board or before the Courts. The delay in determination of his guardianship and custody proceedings where these were his only methods of challenging the decision to place for adoption was found to be in breach of Article 6. The Court found that particular diligence is required in cases concerning restrictions of access between a parent and a child. The breach of Article 6 established in *Keegan* has been dealt with by the Irish Government in the context of the Adoption Act 1998. Section 7(e)(ii) provides that when an adoption agency proposes to place a child for adoption and the identity of the father is known to the agency, the agency shall, before placing the child for adoption, take such steps are as reasonably practicable to consult the father.

However, Section 7(f)(2) provides that there is a discretion not to consult a father with regard to the adoption if the Board is satisfied that, having regard to the nature of the relationship between the father and the mother, it would be inappropriate for the adoption agency to contact him. In my opinion, there is a reasonable argument that this legislative provision does not adequately safeguard family life or the right to a fair trial as enunciated by the Court of Human Rights in *Keegan*.

It is also worth noting that the interpretation of the Act and the application of it must be subject to the Constitution. Will it be inconsistent with the Constitution for a Court to offer protection to the homosexual or the transsexual family? What will happen where there is a direct conflict between constitutionally protected rights and rights protected by the Convention? For example, the Domestic Violence Act 1996 does not offer protection to the mother of a child who has never lived with the father of that child (even in cases of extreme violence), or where the mother has less proprietary interests than the father in the property in which they live. The reasoning behind this approach was because legislators saw a potential conflict between the right to private property and rights of the extra marital family.

There is also potential for the in camera rule to be tested under the Convention. The English practice was considered to be compatible with the Convention, but that practice did not impose an absolute ban on all proceedings being held in camera and related primarily to matters involving children. Will an absolute in camera rule in divorce and judicial separation proceedings be held to be Convention compliant ?

Issues regarding the availability of legal aid and the delay in securing legal aid are all issues which can be tested under the Convention. However it is probably arguable that these rights could be enforced firstly by way of a constitutional action.

It is also likely that the Convention will have implications for the rights of adoptees to secure information about their natural parents. This has not been tested or found to be constitutionally deficient at present but it is clear from the judgments, both in domestic courts in the UK and in the European Court of Human Rights, that failure to provide any information and in some cases a failure to provide even identifying information, is not compatible with the Convention. It is notable that even though there is a wide margin of appreciation in relation to the State complying with the Convention in this regard, the Court will have cognizance of and look at the systems available across Europe in deciding what practice should be implemented.

Issues of consultation and representation of children in the context of care proceedings have been high on the agenda in the case law of the Court of Human Rights. The constitutional guarantees given by our Constitution in relation to fair trials probably outweigh, or are at least equivalent, to the guarantees given by virtue of the Convention and certainly our public law structure offers much more protection for the rights of the parents and children involved than appears to be the position in the UK or in other European countries. ●

Bogus Foreign Deposit Accounts Time Limits on Revenue Claims against the Estates of Deceased Persons

Joseph Hogan SC

Part II.

Since my earlier article in the Bar Review on this topic (Volume 9, Issue 1), some commentators have argued that notwithstanding section 1048 of the Taxes Consolidation Act, 1997, which imposes a time limit of 3 to 4 years from the death on raising assessments against the personal representatives of deceased persons, any fraud or neglect on the part of the deceased during his life will re-open the time without limitation. In my view, this is not correct. The only matter that will open the time limits is a misstatement of the assets of the deceased on the inland revenue affidavit, as provided by section 1048. If there is no misstatement, the time limits remain closed, notwithstanding any fraud or neglect on the part of the deceased.

The alternative argument is based upon a misunderstanding of section 924(2)(c) of the act, which provides that where any form of fraud or neglect has been committed by or on behalf of *any person* in connection with income tax, an assessment or an additional first assessment may be made at any time for any year for which, by reason of the fraud or neglect, income tax would otherwise be lost to the exchequer.

Firstly, this section is not of general application. It is limited to assessment cases. Self-assessment cases are excluded[1], because they have their own very different regime set out in section 955. Secondly, this argument depends on the meaning of the words "*any person*" in section 924(2)(c). The argument will work only if these words include a deceased person, and they plainly do not. Section 924(2)(c) applies only to living persons. This is obvious to a lawyer, so for the benefit of non-lawyers it may be useful to point out that when a person dies, the only part of his legal *persona* that survives is his assets and liabilities; that is to say, his estate. On death, the estate vests immediately in the President of the High Court, who then conveys it to the personal representative by way of a grant of probate or letters of administration, on condition that it is distributed in accordance with the will and the law of succession. Nothing else survives death. The only target that a creditor, including the Revenue, can aim for is the estate, via the personal representative. However, the personal representative is protected by section 1048. There is no other target. Therefore section 924(2)(c) of the Taxes Consolidation Act, 1997 will not operate to open any time limits in the case of a deceased person. The time limits in the Taxes Consolidation Act, 1997 are set by section 1048 only.

Thirdly, even in the case of a living person, section 924(2)(c) is of limited value to the Revenue. Fraud or neglect will not be presumed[2]; the Revenue must prove them before the extension of time will operate. Proof will always be more difficult in old cases, and all of these are old cases, where papers may be destroyed, mislaid or difficult to follow. A loss to the exchequer must also be proved before the time limit will open[3]. This involves a complete re-assessment of the income, expenses, reliefs and allowances for every suspect year. It is not limited merely to adding on any amounts discovered in foreign accounts. Even if the materials upon which to ground several years' complete new assessments are available, there is no certainty, even if fraud or neglect is proved, that the result will be a loss to the exchequer. Not every re-assessment produces a difference owed to the Revenue. The Revenue will have to take the risk of a long backdated repayment, softened only by the fact that the interest they pay is only one third of the rate they charge to the taxpayer.

The commentators have sought to back up their argument by pointing out that the Statute of Limitations does not apply to Revenue cases. This is correct[4]. But the implication in raising this point is that the time limit set by section 1048 can be opened up in some way. This is not correct. There has also been some deplorable scare mongering. Some commentators have suggested that the Revenue might not, as a concession, pursue personal representatives personally if they behave properly, the implication from this being an unlawful favouring by the Revenue. There are very few circumstances, theft of the assets being the main one, where a personal representative will be personally liable. But he is personally liable, if at all, only for his own defaults. He is never personally liable for the defaults of the deceased. To suggest otherwise is scare mongering.

1. By section 955(5)(b).
2. *Hurley v Taylor* [1999] STC 1.
3. Is there a circular argument here? Must one (unlawfully) open the time limit and prove two things before the time limit will open?
4. Sections 3(2)(a) and (b), Statute of Limitations, 1957.

So far, the discussion has centred mainly on revenue law and the traditional sources of succession law. But there is another great source of closure. This is section 9 of the Civil Liability Act, 1961, which provides that no proceedings shall be maintainable in respect of any cause of action whatsoever that has survived[5] against the estate of a deceased person, unless either proceedings were commenced within the normal limitation period and were pending at the date of his death, or are commenced within the normal limitation period, or within two years after his death, whichever period first expires. The normal limitation period is defined as the period prescribed by the Statute of Limitations or any other limitation enactment. Since the Taxes Acts are specifically excluded from the Statute of Limitations, the "limitation enactments" would perhaps be the Taxes Acts themselves. The Taxes Acts do not provide a special time bar on commencing actions against the estates of deceased persons. Section 1048 is not a bar on actions, but on raising assessments, which is a stage preliminary to actions. There may therefore be no interpretational conflict between the two statutes. This two-year time limit is not amenable[6] to extension for the usual reasons, such as minority, fraud, mistake etc. In any event, the words "*any cause of action whatsoever*" are sufficiently strong to bar an action for fraud or negligence, and an action for tracing[7]. Therefore, an action, that is to say, a court proceeding for the recovery of any Revenue debt, penalty, interest or other liability may not be commenced more than two years after the death of a deceased person, notwithstanding fraud or negligence, or whether or not an assessment may or not have been raised before, during or after that period.

O'Higgins CJ, discussing stale claims in delivering the judgment of the court in *Moynihan v Greensmyth*[8], stated:-

> "When it was decided to provide generally for the survival of causes of action, a general limitation period of two years was provided in s. 9, sub-s. 2(b), of the Civil Liability Act, 1961 .....Bearing in mind the State's duty to others, in particular those who represent the estate of the deceased, and the beneficiaries, some reasonable limitation on actions against the estate was obviously required. . The danger of stale claims [is] very real and could constitute a serious threat to the rights of beneficiaries of the estate of the deceased."

If the object of the legislation is to strike a balance in those terms, it is very difficult to see preferential treatment for the Revenue being fair, or being excluded from the operation of section 9 of the Civil Liability Act, 1961.

The textbooks, however, are notably silent on section 9. The case law is conducted on the basis that section 9 is restricted to cases of civil liability only[9], whatever that is. In any event the words of the section refer not to "*civil liability*" but to "*any cause of action whatsoever*". It is difficult to argue that these strong words exclude Revenue cases. It is true that the act is entitled the "Civil Liability Act"; but there are few circumstances where one may draw upon the title of an act to deny the meaning of its plain words. And the heading of the part of the act that contains this section refers not to civil liability, but to the *survival of certain causes of action against the estates of deceased persons*, which is an entirely different matter. The precursor of this provision, section 1(3) of the (UK) Law Reform (Miscellaneous Provisions) Act, 1934[10] reads "*No proceedings shall be maintainable in respect of a cause of action in tort*[11]". Note that O'Higgins, CJ., in the context of the judgment, a portion of which is quoted above, was discussing the survival of actions in tort[12]. This may give rise to the silent presumption in the Irish texts. It is not, however, supported by the words of section 9 of the Civil Liability Act, 1961, which follow the UK precursor only so far, reading: "*No proceedings shall be maintainable in respect of any cause of action whatsoever*[13]".

It therefore seems that all Revenue proceedings against the estates of deceased persons are absolutely barred against the executor, the administrator and the beneficiaries two years from the death, and may be barred earlier, within months, against the executor or administrator by *plene administravit* and the statutory advertisement for creditors. In these circumstances, section 1048 of the Taxes Consolidation Act, 1997 may be all but redundant.•

5. "It has been held that the right of the Crown to sue for a penalty in default of making a return of income for the purposes of taxation is a cause of action which will survive against the estate of the tax payer, *Attorney General v Canter* [1939] 1 Kings Bench 318.
6. [1997] IR 55.
7. *Bank of Ireland v O'Keefe* , [1987] IR 47.
8. *Moynihan v Greensmyth* [1997] IR 55 at 72, SC.
9. There is no easy definition of "civil liability."
10. Now repealed.
11. Bold emphasis added.
12. *Moynihan v Greensmyth* [1977] IR 55, at 67.
13. Bold emphasis added.

The Statute of Limitations and Discoverability

William Abrahamson BL

> "Whatever hardship there may be to a defendant in dealing with a claim years afterwards, it must be less than the hardship to a plaintiff whose action is barred before he knows he has one."[1]

In 1987, the Law Reform Commission considered the application of the limitation of actions to potential plaintiffs suffering from "latent" personal injuries, revealing themselves only after the elapse of the statutory limitation period.[2] The Commission recommended the introduction of a "discoverability test", whereby time would run from the date on which a plaintiff could reasonably have discovered the existence of his injury. Its recommendations were given statutory form in the Statute of Limitations (Amendment) Act, 1991. That Act provided that a plaintiff could bring proceedings in respect of personal injuries caused by negligence, nuisance or breach of duty within three years from the date on which the cause of action accrued *or the date of knowledge (if later) of the person injured*, and set out the facts of which the person must have knowledge in order to start time running.

In the recent case of *Gough v. Neary*[3], the Supreme Court was called upon to consider the circumstances in which a plaintiff could be said to have the requisite knowledge under the Act of 1991. The plaintiff in that case sued her consultant obstetrician and gynaecologist, together with the hospital to which she had been admitted, for carrying out an unnecessary hysterectomy. More than three years elapsed after the operation before the plaintiff learnt that it had been unnecessary and subsequently issued proceedings. The issue arose, therefore, as to when the plaintiff had the requisite knowledge to start time running. The majority of the Supreme Court held that the claim was not statute barred, as the date of knowledge was the date on which the plaintiff learnt that the operation was unnecessary. Hardiman J., in a dissenting judgment, considered that the statutory ingredients of the requisite knowledge in fact existed immediately after the operation and that the claim was, accordingly, out of time. This article ventures to suggest that, while the decision of the learned majority may appear to have met the requirements of justice in the unfortunate circumstances of the case, Hardiman J.'s approach is to be preferred as a more accurate and literal interpretation of the legislation.

The Statutes of Limitations (Amendment) Act, 1991

Section 3(1) of the Act of 1991 provides as follows:

> "An action, other than one to which section 6 of this Act applies, claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

Insofar as relevant to this article, section 2(1) of that Act provides as follows:

> "For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge ... references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:
>
> (a) that the person alleged to have been injured had been injured,
> (b) that the injury in question was significant,
> (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty
>
> and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

The constituent elements of the requisite knowledge will be analysed in the following paragraphs, after which their application in *Gough v. Neary* will be addressed.

"that the person alleged to have been injured had been injured"

The term "personal injury" is defined in the Statute of Limitations, 1957 as including "any disease and any impairment of a person's physical or mental condition".[4] However, this definition is not sufficient to identify the fact of which a potential plaintiff must be aware under section 2(1)(a) of the Act of 1991.

In *Maitland v. Swan*[5] Barr J. analysed this part of the section thus:

> "The key to the interpretation of section 2 is the meaning of the word 'injured', which is not defined in the Act [of 1991] or in the

1. Per Carroll J. in *Morgan v. Park Development Ltd.* [1983] I.L.R.M. 160.
2. Law Reform Commission, Report on the Statute of Limitations: Claims in respect of latent personal injuries (LRC 21-1987).
3. [2003] 3 I.R. 92.
4. Section 2(1) of the Statute of Limitations, 1957.
5. Unreported, High Court, Barr J., 6th April, 1992.

1957 Act. It seems to me that in the context of the Act it is synonymous with the word 'harmed'. In my view, a person who undergoes necessary surgery which is skilfully performed and is successful does not thereby suffer an injury in the context of the Act."[6]

This was expressly endorsed by Geoghegan J. in *Maguire v. Smithwick*[7]. However, the learned judge went on to refine Barr J.'s approach, by reference to the statutory definition of "personal injury":

> "In the context in which the expression appears, it was intended to cover, in my view, non-consensual impairment only. Therefore, the absolutely necessary damage caused in a medical operation would not be a 'personal injury'. But anything that went beyond that, including common but not necessary side effects of a damaging nature would be included in the expression."[8]

It must be borne in mind that each of the elements of the knowledge required by section 2(1) of the Act of 1991 is qualified by the closing words of that subsection. Accordingly, knowledge that one has been injured need not include knowledge that the damage in question was somehow negligently inflicted. In this context, Geoghegan J.'s reference to "non-consensual impairment" is useful, suggesting that the injury of which there must be knowledge is simply an unwanted one, rather than one which was wrongfully inflicted, in the sense that the person inflicting the damage is blameworthy.

"that the injury in question was significant"

Unlike the equivalent English provision[9], the Act of 1991 contains no definition of the term "significant". In its 1987 report on the subject, the Law Reform Commission said the following in relation to the extent of the injury:

> "A person may be conscious of some tiny impairment of his physical or mental condition but, in view of its triviality, let matters drift. Very gradually, the condition may worsen. It would seem unjust that time should be held to have started to run from the moment the person was aware of the tiny impairment. While it is difficult to provide a clearly defined reference point, we consider that the best approach would be for the legislation to require that, for time to begin to run, the plaintiff ought to have been aware that the injury is significant."[10]

Judges in this jurisdiction seem to have approached this part of the knowledge requirement simply on the basis that it was obvious, on the facts of the cases with which they were dealing, that the injury in question was significant.[11] In this author's view, it is unfortunate that the Oireachtas did not see fit to include a statutory definition of the term. Defining whether an injury is "significant" can be entirely subjective and the assistance of the legislature in determining an objective yardstick by which to measure the appropriate level of significance would have been most helpful. In this regard, the provisions of section 14(2) of the English Limitation Act, 1980 might be of interest:

> [A]n injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."

This subsection was considered by Sir Thomas Bingham M.R. in *Dobbie v. Medway Health Authority*[12], where he stated:

> "The requirement that the injury of which a plaintiff has knowledge should be 'significant' is, in my view, directed solely to the quantum of the injury and not to the plaintiff's evaluation of its cause, nature or usualness. Time does not run against a plaintiff, even if he is aware of the injury, if he would reasonably have considered it insufficiently serious to justify proceedings against an acquiescent and creditworthy defendant, if (in other words) he would reasonably have accepted it as a fact of life or not worth bothering about. It is otherwise if the injury is reasonably to be considered as sufficiently serious within the statutory definition: time then runs (subject to the requirement of attributability) even if the plaintiff believes the injury to be normal or properly caused."[13]

It is submitted that the English statutory provision, and Sir Thomas Bingham M.R.'s interpretation thereof, broadly represent an approach which would remedy the mischief which the Law Reform Commission set out to address in recommending the inclusion of a significance criterion. On this basis, the English authorities might prove to be of assistance in this jurisdiction in any future case where the significance of the injuries is less clear.

"that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty"

This is, undoubtedly, the most controversial aspect of the knowledge requirement. It is in interpreting this provision, that the proviso at the end of subsection 2(1), namely that "knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant", is most important. The majority of the case-law in this area addresses this complex issue.

The question of attribution was dealt with by May L.J. in *Davis v. Ministry of Defence*[14], in the context of the provisions of the English Limitation Act, 1980, which are practically identical to those of the Act of 1991. He held that "attributable to" meant "capable of being attributed to", rather than "caused by".

The words "which is alleged to constitute negligence, nuisance or breach of duty" seem, at first blush, to conflict with the end of the subsection, rendering knowledge of the torts irrelevant. This was

6. *Ibid*, at page 26.
7. Unreported, High Court, Geoghegan J., 27th June, 1997.
8. *Ibid*., at page 7.
9. Section 14 of the Limitation Act, 1980.
10. Law Reform Commission, *op. cit*., at page 43.
11. e.g. *Maguire v. Smithwick*, *op. cit*., at page 7.
12. [1994] 4 All E.R. 450.
13. *Ibid*., at page 457.
14. Times Law Reports, 7th August, 1985

addressed by the English Court of Appeal in *Broadley v. Guy Clapham & Co.*[15] Hoffman L.J. considered that the words "serve to *identify* the facts of which the plaintiff must have knowledge without implying that he should know that they constitute a breach of a rule, whether of law or some other code of behaviour".[16] Similarly, Leggatt L.J. said that the only function of the words was "to point to the relevant act or omission to which the injury was attributable".[17] In other words, the knowledge requirement in paragraph 2(1)(c) means only that the plaintiff must know that his injuries occurred as the result of some act or omission on the part of the proposed defendant. Time starts running at that point, regardless of whether the plaintiff believed that act or omission to be tortious. To hold otherwise would, in the words of Sir Thomas Bingham M.R. in *Dobbie v. Medway Health Authority*[18], "stultify the closing words of [section 2(1)] and would moreover flout the recommendation on which the legislation was admittedly founded".[19]

In that case, the plaintiff was admitted to hospital for the removal of a lump on her breast. In the course of the operation, the surgeon performed a mastectomy, believeing the lump to be cancerous. Subsequent analysis revealed the position to be otherwise, but it was not until some years later that the plaintiff realised that the removal of her breast had been unnecessary. The provisions of the English Limitation Act, 1980, arose for the consideration of the Court of Appeal. In holding that the plaintiff's claim was statute barred, Sir Thomas Bingham M.R. summarised the position as follows:

> "The personal injury on which the plaintiff seeks to found her claim is the removal of her breast and the psychological and physical harm which followed. She knew of the injury within hours, days or months of the operation and she, at all times, reasonably considered it to be significant. She knew from the beginning that the personal injury was capable of being attributed to, or more bluntly was the clear and direct result of, an act or omission of the health authority. What she did not appreciate until later was that the health authority's act or omission was (arguably) negligent or blameworthy. But her want of that knowledge did not stop time beginning to run."[20]

Further consideration was given to the section in *Hallam-Eames v. Merrett Syndicates Ltd.*[21] The trial judge in that case[22] had interpreted Broadley and Dobbie to mean that the plaintiff need know only that the damage was caused by the defendant's act or omission. Hoffmann L.J., in the Court of Appeal, found that this was "an oversimplification" of those judgments:

> "If all that was necessary was that a plaintiff should have known that the damage was attributable to an act or omission of the defendant, the statute would have said so. Instead, it speaks of the damage being attributable to 'the act or omission which is alleged to constitute negligence'. In other words, the act or omission of which the plaintiff must have knowledge must be that which is causally relevant for the purposes of an allegation of negligence."[23]

The learned judge went on to analyse *Dobbie* in terms of what he described as "common sense principles":

> "If one asks what is the principle of common sense on which one would identify Mrs. Dobbie's complaint as the removal of a healthy breast rather than simply the removal of a breast, it is that the additional fact is necessary to make the act something of which she would prima facie seem entitled to complain ... The plaintiff does not have to know that he has a cause of action or that the defendant's acts can be characterised in law as negligent or as falling short of some standard of professional or other behaviour. But ... the words 'which is alleged to constitute negligence' serve to identify the facts of which the plaintiff must have knowledge. He must have known the facts which can fairly be described as constituting the negligence of which he complains."[24]

It is respectfully submitted that, in this interpretation, the learned judge has strayed into the area which the legislature has expressly deemed irrelevant. Hoffman L.J.'s analysis effectively requires the plaintiff to know that there is a negligent or blameworthy quality to the act in question before time will begin to run. Even if this is putting the position too far, it is clear that the learned judge requires something other than what is set out in the section to be known by the plaintiff in order to start the limitation period. The English Law Reform Commission expressly rejected the inclusion of a statutory requirement that the plaintiff know that "the defendants were at fault", as "necessarily imprecise because it contains a considerable subjective element".[25]

Gough v. Neary

Section 2(1) most recently received the attention of the Supreme Court in *Gough v. Neary*[26], the essential facts of which were as follows: Immediately following the delivery of the plaintiff's child by caesarean section, the first defendant, her consultant obstetrician and gynaecologist, performed a hysterectomy. He afterwards informed the plaintiff and her general practitioner that she had been bleeding heavily following childbirth and that the operation had been urgently required to save her life. He suggested that the plaintiff would be better off not knowing any further details. It was some six years later, following allegations about the first defendant in the media, that the plaintiff became suspicious. She only then discovered that the first defendant had misled her and that her womb had been removed unnecessarily.

The majority of the Supreme Court[27] held that the plaintiff's claim was not statute barred. Geoghegan J. considered the relevant English authorities and effectively applied the reasoning of Hoffmann J. in *Hallam-Eames*. He also referred to a more recent English case, *North Essex DHA v. Spargo*,[28] in which Brooke L.J. set out the principles to be applied in determining whether the requisite knowledge is established. Geoghegan J. adopted the first of those principles, namely that a

15. [1994] 4 All E.R. 439.
16. *Ibid.*, at page 448 (emphasis in original).
17. *Ibid.*, at page 447.
18. *Op. cit.*
19. *Ibid.*, at page 456.
20. *Ibid.*, at page 459.
21. [1995] 7 Med. L.R. 122.
22. Gatehouse J.
23. *Hallam-Eames v. Merrett Syndicates Ltd.*, *op. cit.*, at page 125.
24. *Ibid.*, at pages 126 and 127 (emphasis in original).
25. English Law Reform Commission, Interim Report on Limitation of Actions in Personal Injury Claims (1971), at paragraph 54.
26. *Op. cit.*
27. Geoghegan and McCracken JJ.
28. [1997] 8 Med. L.R. 125.

potential plaintiff must have "broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable". The learned judge continued:

> "While it may not be necessary for the purposes of starting the statute to run to know enough detail to draft a statement of claim, a plaintiff in my opinion must know enough facts as would be capable, at least on further elaboration, of establishing a cause of action even if the plaintiff has no idea that those facts of which he has knowledge do in fact constitute a cause of action, as that particular knowledge is irrelevant under the Act ... Mere knowledge that a hysterectomy was carried out therefore is irrelevant ... It was only when she discovered that the operation was unnecessary that the period started to run ... [T]his plaintiff, in my view, had neither actual nor constructive notice within the ordinary period 'that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence'. That cannot be the hysterectomy itself, but rather the unnecessary hysterectomy. As I have already mentioned, the fact that the hysterectomy was unnecessary does not necessarily mean there was negligence and, therefore, knowledge that the hysterectomy was unnecessary is not 'irrelevant' under the last part of section 2."[29]

McCracken J. agreed, holding that the act or omission in question was not the hysterectomy *simpliciter*, but the unnecessary hysterectomy. Like Geoghegan J., the learned judge drew a distinction between knowing that the operation had been carried out *unnecessarily* and knowing that it had been carried out *negligently*.

In his dissenting judgment, Hardiman J. accepted the existence of a theoretical distinction between "negligent" and "unnecessary". However, he went on to advocate a literal interpretation of the Act of 1991:

> "It is certainly true that, by reason of the final words of section 2(1), knowledge of negligence as such is irrelevant to whether [the plaintiff] had the necessary state of knowledge. But the fact that knowledge of negligence is irrelevant does not mean that knowledge of something else, such as that the operation was unnecessary, is necessarily relevant. On the contrary, the question is whether the plaintiff had the state of knowledge set out in [section 2(1)]."[30]

The learned judge continued:

> "I believe that it is inadmissible to import the notions of non-necessity, or of something having gone wrong, into the plain words of section 2(1)(c). Importing the concept of negligence would clearly fly in the face of the final words of the subsection. But the fact that the concept of negligence is excluded by express words does not justify the importation of some other, extra-statutory, requirement to the subsection simply on the basis that it is something short of negligence."[31]

Hardiman J. analysed the English case-law set out above, drawing the conclusion that Hoffmann L.J.'s interpretation was not justified by the wording of the section or the foregoing judgments on which it was purportedly based.

The most basic cannon of statutory interpretation is that legislative provisions should be interpreted literally to ascertain the intention of the legislature, unless the literal meaning gives rise to some inconsistency or absurdity.[32] It is respectfully submitted that the interpretation put forward by the Geoghegan and McCracken JJ. is a strained construction of section 2(1). The requirement that the plaintiff be aware of "the essence of the causally relevant act" is not expressly included in section 2(1). It seems to require an appreciation on the part of the plaintiff of some qualitative element of the act in question - that there has been some degree of wrongdoing or blameworthiness. The distinction between this and knowledge that an act is negligent is quite artificial. It is noteworthy that the Law Reform Commission's recommendations stated as follows in relation to attributability:

> "[T]ime should begin to run only where the plaintiff becomes or ought to become aware that the injury is attributable, *in at least some degree*, to the conduct of another. It would be quite unjust for an injured person to be defeated by a limitation period merely because he was for a long time aware that he had an injury, in a case where he reasonably attributed his injury to *natural causes*".[33]

That formulation shows that very basic knowledge is required to start time running - merely that the injury was caused by somebody else's act or omission, rather than by natural causes.

I would respectfully submit that the decision of Hardiman J., which provides a more literal interpretation of the section is to be preferred to that of the majority. The provisions of section 2(1) of the Act of 1991 make quite clear what the Oireachtas intended. This author ventures to suggest the following interpretation: Time will begin once the plaintiff has actual or constructive notice of the following facts:

1. that he has suffered an unwanted injury;
2. that the injury is, or has become, sufficiently serious to justify the initiation of proceedings;
3. that the injury appears to have resulted from a particular act or omission on the part of someone else, rather than from natural causes.

That is all that must be known by the plaintiff to start time running. There is nothing in the wording of section 2(1) to justify the requirement of some extra element of knowledge before the limitation period will begin. It is clear from the report of the Law Reform Commission that the proviso in section 2(1) was intended to prevent a plaintiff relying on his own ignorance of the law, or that of an incompetent legal adviser, to defer the start of the limitation period.[34] The proviso seems to have been included essentially for the avoidance of doubt, to make clear the distinction between the factual knowledge required and legal knowledge, which is irrelevant. The essential objection to the *Hallam-Eames / Spargo* test adopted by Geoghegan J.

29. *Gough v. Neary, op. cit.*, at page 126.
30. *Ibid.*, at page 112.
31. *Ibid.*, at page 113.
32. Bennion, Statutory Interpretation (4th ed.), section 285.
33. Law Reform Commission, *op. cit.*, at page 44 (emphasis added).
34. *Ibid.*, at pages 45 and 46.

is, first, that it imports into section 2(1) an additional knowledge criterion not expressly provided for and, secondly, that in so doing, it comes perilously close to requiring the type of knowledge in fact expressly excluded by the Oireachtas in the proviso.

Fraud

It is beyond dispute that, immediately following her operation, the plaintiff knew that she had suffered a significant injury in that her womb had been removed. She also knew that this injury was attributable to an act on the part of her consultant obstetrician and gynaecologist. What she did not know, was that the consultant was deliberately concealing the fact that the operation was unnecessary. Hardiman J. drew attention to the existence of specific provision in the Statute of Limitations, 1957 to deal with such a situation. Section 71(1) of that Act provides as follows:

> "Where, in the case of an action for which a period of limitation is fixed by this Act, either-
>
> (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
>
> (b) the right of action is concealed by the fraud of any such person,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

As noted by Hardiman J., it was open to the plaintiff in *Gough* to frame her action under this section, so long as she specifically pleaded the fraud. The fact that she proceeded otherwise was unfortunate and, ultimately, ought to have been fatal to her claim on a literal reading of the Act of 1991. As Hardiman J. stated:

> "The Act of 1991 was a considerable easing in the position of plaintiffs suing in respect of diseases or impairments which were latent in their nature or true significance. Its wording is apt to meet the difficulties of such persons. It does not, in my view, extend to circumstances where the disease or impairment is all too painfully patent but some qualitative aspect of it has been concealed. In such circumstances, the law provides a remedy in respect of equitable fraud but not otherwise."[35]

Conclusion

It seems possible that the majority in *Gough v. Neary* approached the case from the humane standpoint of seeking to ascertain whether the Act of 1991 allowed of a construction which would enable the plaintiff to seek redress for the invidious treatment she had so clearly suffered. Indeed, it would be a harsh critic who could brand the outcome inequitable or unreasonable. However, it is respectfully submitted that *Gough v. Neary* is a case to which the unfortunately hackneyed phrase, "hard cases make bad law", might justly be applied. Hopefully some future case will afford the Supreme Court an opportunity to revisit the issue.

Section 33 of the English Limitation Act, 1980 gives the court discretion effectively to disapply the provisions of the Act, allowing an action to proceed notwithstanding that the limitation period has elapsed, where it is equitable to do so to prevent prejudice to the parties. The section specifies in some detail the matters to which the court must have regard in reaching such a conclusion. The Law Reform Commission in this jurisdiction expressly rejected the notion of judicial discretion to extend time limits on the basis that this would inevitably lead to uncertainty in the law.[36] Arguably *Gough v. Neary* provides a compelling case for an amendment to the legislation to allow judges discretion to extend or disapply time limits where necessary to meet the exigencies of justice.●

35. *Gough v. Neary, op. cit.*, per Hardiman J. at page 117.
36. Law Reform Commission, op. cit., at page 42.

NEWS

Lecture in Legal Bibliography

Pictured at the Tenth Hugh M. Fitzpatrick Lecture in Legal Bibliography held in the Kings Inns Benchers Room in March were (L to R) The Hon. Mr Justice Esmond Smyth; The Hon. Mr Justice Joseph Finnegan; The Hon Mr Justice Ronan Keane (Chairperson); Professor John McEldowney, School of Law, University of Warwick (speaker) and Hugh M. Fitzpatrick, Solicitor (Series founder and organiser).

European Law Congress

The 21st Congress of the International Federation for European Law (FIDE) will take place in Dublin between the 2nd and 5th of June, 2004. The topics of the Congress will include Criminal Law in the European Union, EU Competition Law Enforcement, EU Migration and Asylum Law and the New Constitution for Europe.

Over 500 lawyers from each of the EU (including new Member States), EFTA and EEA States will attend, including a large delegation from the European Court of Justice and the Court of First Instance. The Congress will be opened by President Skouris of the European Court of Justice. Full details and registration forms to be found at www.fide2004.org or by contacting Evelyn O'Sullivan, Ovation Group, 1, Clarinda Park North, Dun Laoghaire, Dublin, Ireland, telephone + 353 1 663556, fax + 353 1 280 5405, e-mail: eosullivan@ovation.ie.

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 9, Issue 1, March 2004

Edited by Desmond Mulhere, Law Library, Four Courts.

A directory of legislation, articles and written judgments received in the Law Library from the 26th January, 2004 to 22nd March, 2004.

Judgment information supplied by First Law's legal current awareness service, which is updated every working day. (Contact: bartdaly@www.firstlaw.ie)

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

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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
IJFL = Irish Journal of Family Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
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Video Recording of Accused Persons in Custody

Mary Rose Gearty BL*

Introduction

The video-taping of interviews is so plainly a good and necessary thing that this article should be a very short one. Unfortunately, persistence in engaging in obviously unjust practices and the legislative unwillingness to act against institutionalised abuse of process means that there are still a large number of inadequacies in this aspect of our criminal justice system. There is a certain irony in the conclusion of this paper, which is that we can learn some useful lessons from our neighbouring jurisdiction in the prevention of police corruption. The irony springs from the generally held assumption that, in this country, human rights are better protected than they are in the United Kingdom: we have a written constitution and a wealth of judicially defined, constitutionally protected rights, while the U.K. does not. Unfortunately, this assumption is not always correct.

With respect to the video-taping of interviews in Garda stations, it is instructive to examine a recent strain of UK cases. It is my contention that adoption of the principles expounded in these cases would enhance our own jurisprudence.

Historical and Legislative Background in Ireland

The background to our current system is well documented but I will provide a brief historical and legislative reminder in that regard:

Widespread detention for the purpose of interrogation was enabled by Section 4 of the Criminal Justice Act of 1984. Before this, the only legislative equivalent of section 4 detention was detention under s.30 of the Offences Against the State Act of 1939. This was the section that gave us *Trimbole*[1] and other gems of jurisprudence borne of (perhaps understandable) Garda frustration at the confines of the common law prohibitions on detention for investigative purposes - i.e. interrogation of suspects.

The regulations governing the video-taping of interviews came into operation on the 1st day of March, 1997.[2]

As long ago as 1999, the Garda Complaints Board recognised that the Garda Síochana (Complaints) Act of 1986 was not perceived as providing an "independent or effective system for dealing with complaints" against its members. The Board went on to recommend a number of changes and reforms to increase its autonomy and effectiveness[3].

The same Board reported in 2002 that Garda identification was necessary in the context of effective regulation of the force, and it called for greater video recording of Garda interviews and extension of the use of CCTV in Garda stations.[4]

Many of you will not need reminding that the historical backdrop to this increased criticism of the force was a sorry list of shameful cases.

On the 22nd of January, 2002, Mr. Colm Murphy was convicted by the Special Criminal Court of conspiracy charges in relation to the Omagh bombings. During the course of his detention he had been brought from Dundalk to a Garda station in Monaghan for questioning, despite the availability of recording facilities in many Dublin stations.

In the *DPP v. Paul Ward*,[5] the Court of Criminal Appeal recited in full some of the comments of the President of the Special Criminal Court regarding the circumstances in which the accused in that case had allegedly made admissions. These comments included the following:

> "The court is satisfied beyond reasonable doubt that the alleged admissions made by the accused in the course of his interrogation by [named gardai] on the night of 17th October (if in fact made by him) were induced by grievous psychological pressure"...

Even more tellingly, the Court went on to express a doubt as to whether any admissions at all had been made.

The tragic case of Dean Lyons, a heroin addict who admitted to a murder he did not commit, is another notorious instance of an unreliable admission.

Historical and Legislative Background in the UK

With the enactment of the Police and Criminal Evidence Act of 1984, our neighbours in the U.K. witnessed an erosion of various rights, notably (in this context) the right to silence and the right to a solicitor. The focus in the Act, and hence in subsequent case law, was on the reliability of confession evidence rather than fairness of procedures.

The introduction of video-taping of interviews in that jurisdiction witnessed a surge in admissions made outside the confines of the police station with one study noting that nearly one third of all admissions were made in circumstances where tape-recording facilities were unfortunately unavailable.[6] Likewise, when tape-recording was introduced in Scotland, the number of admissions so obtained surged.[7]

Recent English caselaw

Despite its relatively bleak history from a human rights perspective - notably in the light of the provisions of the Police and Criminal Evidence Act and similar attacks on the right to silence and the right of access to a solicitor - a rash of recent cases has shown the English courts in a favorable light in the context of their attitude to police corruption.

The first case worth examining is *Zomparelli*, a judgment of the Court of Appeal in January 1999. Two co-accused were convicted of robbery

*This paper was delivered at the Criminal law Conference organized by the Bar Council and held in the Distillery Building on 7th February, 2004.

1. *Trimbole, State v. Governor Mountjoy Prison* [1985] IR 550
2. The Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997, S.I. No. 74/1997.
3. See the Garda Siochana Complaints Board Annual Report 1999.
4. Garda Siochana Complaints Board Annual Report 2002.
5. 22nd March, 2002
6. See J. Vennard, "Disputes Within Trials Over the Admissibility and Accuracy of Incriminating Statements: Some Research Evidence" [1984] Crim. L. R. 15 at page 22.
7. McConville and Morrell, "Recording the Interrogation: Have the Police Got it Taped? [1983] Crim. L. R. 158

and firearms offences. The prosecution evidence included testimony of police officers being investigated for misconduct. The officers were members of the Flying Squad, Metropolitan Police. The alleged misconduct was the retaining in their station of a bag of tricks - which included balaclavas and an imitation firearm - for those cases in which the evidence was not quite strong enough to obtain a conviction. The bag was known as "the first aid kit".

The two accused successfully sought to have their convictions quashed. None of the officers had, at that stage, been convicted of any offence though many had been suspended from duty. A retrial was ordered despite defence submissions that the case was hopelessly compromised. By the time the retrial took place, a number of officers had been charged with criminal offences. These officers had given evidence at the first trial and the prosecution did not propose relying on their testimony at the retrial. There was, however, a decision not to charge a large number of those who, according to the Complaints Bureau[8], knew of the existence and purpose of the "first aid kit" and made no effort to prevent its use. Some of these officers were to give evidence in the retrial. The trial judge refused to stay the proceedings or to allow cross-examination of the officers on the subject of their involvement with the "first aid kit" as the allegations against them remained unresolved.[9]

This ruling led inexorably to the Court of Criminal Appeal[10]. In its second judgment on the matter, the Court again quashed Zomparelli's convictions and prohibited a retrial.

The very same officers featured in the trials of *Woodruff* and *Hickson* whose convictions were overturned in November 2000.[11] Here, a retrial was ordered and the proposal was that it should proceed without certain evidence being adduced at all and with permission to cross-examine those officers who had known of the "first aid kit". Again, those who had made use of the "kit" were not to be called as witnesses. The trial judge stayed the proceedings on the basis that no jury could assess the prosecution evidence in a satisfactory way without an opportunity to assess the evidence of key officers who would not even be witnesses at the trial. To proceed on that basis would, according to Grigson J., risk effectively removing "the stench of corruption" from the trial process.

In similar circumstances, retrials were prohibited in three further cases - in one the application was uncontested[12]. Each case involved members of the Flying Squad.

In a comprehensive article on the subject,[13] Jeremy Dein points out that in all of these judgments, reference was made to the case of *Maxine Edwards*.[14] Here the Court of Appeal had quashed a conviction obtained on the evidence of an officer whose evidence was "tainted and unreliable". Dein's conclusion is that the *Edwards* case has been interpreted widely by the Court of Appeal in the late 90's and that convictions must be quashed where what he calls a "potentially tainted officer" plays a material role in the prosecution of any offence.

Application in this Jurisdiction

The misconduct of officers most often noted by our judiciary has to date been oppressive conduct during interviews. Of specific interest is the following comment of the Court of Criminal Appeal in *Ward's* case:

> "It is difficult to see any circumstances in which a finding made in a subsequent case in any court, criminal or civil, as to the character or integrity of any witness or party could be made evidence on the appeal. However, there are extreme cases in which facts established in later cases may so undermine the basis on which an earlier case had been decided that it would be appropriate to have regard to the later case on an appeal in the former."

In other words, the fact that a witness has lied in a later, unrelated case should not, usually, affect an earlier conviction, though there may be cases in which the facts are so extreme as to affect his earlier testimony.

The Court went on to refer to an English case, reported in 1995, in which evidence of police fabrication of evidence in a separate, subsequent case was admissible at an appeal against conviction.[15]

Of particular interest here are the English decisions referred to above, quashing convictions and preventing retrials in a large number of cases.

Recently in *Lynch v. A.G., Chief State Solicitor and O'Toole*,[16] the Supreme Court considered the effect of Garda misconduct. The Garda in question had attempted to induce admissions and information from a suspect by promising not to execute warrants. Ms. Justice Denham commented:

> "I am not satisfied that the condemned behaviour of the Garda nullifies the proceedings. Condemned behaviour, if it occurred in a prosecution of an Irish case, and was such as to render a statement illegal, would have the consequences of rendering the statement illegal and not part of the evidence, but the prosecution would still proceed. The case would not be nullified. Similarly, in this case, although the conduct of the Garda is to be condemned it does not nullify the proceedings. The conduct of the Garda is not such as to justify the intervention of the courts so as to stop the whole process. That is not, of course, to determine that there may not be circumstances where conduct would be such as to nullify proceedings. That is not to say that if there has been unconscionable behaviour on behalf of a member of a State Agency that it would not be such circumstances as to stop proceedings".

Mr. Justice Hardiman added:

> "The finding, extending as it does to a rejection of the Detective Garda's sworn evidence is plainly not without consequences for his credibility and utility. He is gravely compromised."

Though not affecting the decision to extradite this applicant, the misconduct referred to should have the very consequences visited on the group of 25 in the *Zomparelli* case.

If the Gardai want to avoid this result, they will have to give serious consideration to the increased use of video facilities while interviewing detainees in Garda stations. It not only protects the detainee, but also renders any subsequent conviction a safer one and the previous convictions of the investigating gardai (if I may put it that way) remain untainted. If a Garda uses the kind of coercion or oppressive tactics referred to by the courts in *Ward*, all convictions in which he has played a part should be at risk thanks to his "malevolence, stupidity or a failure to recognise the importance of observing elementary legal principles"[17].●

8. The Complaints Investigation Bureau of the Metropolitan Police
9. Following decisions in *Edwards* [1996] 2 Cr. App. R. 345 and *Guney* [1998] 2 Cr. App. R. 242 both of which laid down the general rule that police officers ought not to be cross-examined on the basis of unresolved complaints.
10. The case was heard in March of 2000.
11. Unrep. 2nd November 1999, CA
12. *Sylvester*, February 11th 1999, *Shakes*, April 20th 1999 and *Rogers* February 11th 1999.
13. [2000] Crim L Rev. 801
14. [1996] 2 Cr. App. R. 345
15. *R. v. Williams: R. v. Smith* [1995] 1 Cr. App. R. 74
16. Judgment dated 24th July 2003
17. To borrow a phrase from Mr. Justice Hardiman in *Lynch*.

Single or Multiple Supplies for VAT- Mystic Twilight gives way to Morning Mist

Niall O'Hanlon BL

Introduction

The recent decision of the Supreme Court in *Cablelink*[1] represents the first opportunity that the Supreme Court has had to consider the criteria set out in the European Court of Justice decision of *Card Protection Plan*[2] for determining whether a package of services constitutes a single supply for VAT purposes or a number of separate supplies. The case is of added interest in that Fennelly J. who delivered the judgment of the Court in *Cablelink* was the Advocate General in *Card Protection Plan*.

The Question

Where a person, who is registered for VAT, supplies a package of services, the question arises as to whether, for VAT purposes, the transaction gives rise to multiple supplies or a single supply and, if the latter, the appropriate rate of VAT to apply to that single supply.

In considering this issue in *Card Protection Plan* the Advocate General stated:

> Special difficulties arise, in the mystic twilight of VAT legislation, where there is what in modern jargon is called "a package" of services, some of which may, and others of which may not, be within a VAT exemption.[3]

The Advocate General went on to note that this issue had been the source of much doubt and even confusion in the United Kingdom courts and that the VAT legislation contained no provisions concerning the treatment of mixed transactions.[4]

Why does the Answer matter?

Although this question raises highly technical issues on which there is a paucity of legislative guidance, it also has a number of important practical consequences including, *inter alia*, the following:

- If the package of services is to be treated as giving rise to multiple supplies, then it is possible that the VAT registered person will have to charge different rates of VAT for the various supplies which make up the package. Treating the package as giving rise to only one supply will be administratively convenient for the registered person.
- Customers of the registered person who are not registered for VAT will bear the cost of the VAT charged on the transaction - the higher the rate, the higher the cost for such customers. If the package is to be treated as giving rise to multiple supplies, the overall amount of VAT charged may be greater than would be the case if the package were to be treated as a single supply.
- If the package is to be treated as giving rise to a single supply, that supply may fall to be treated for VAT purposes as exempt, meaning that the VAT registered person will not be entitled to reclaim VAT incurred on goods and services acquired for the purposes of making such supply.

The Facts of Cablelink

The Supreme Court noted that the facts of *Cablelink* were that the respondents were suppliers of cable television and radio services, providing multi-channel viewing or listening. They charged under separate headings for the connection of the service and the service itself. The appeal in this case arose from a claim for a repayment of VAT paid in respect of the former type of service. The taxpayer claimed that it should have been charged at the lower rate applicable if such services were considered independently, whereas they were, in fact, charged at a higher rate on the basis that there was a single supply of a television or radio receiving service.

The respondents made claims for the repayment of VAT paid in respect of two periods, March/April 1989 and September/October 1991, which claim was rejected by the appellant. The Appeal Commissioners had to decide whether the fee received by the respondents in respect of the connection/reconnection of the customer to their cable television or MMDS (Multi-Channel Microwave Distribution) for the purposes of receiving telecommunications signals was in respect of the supply of a distinct and separable service, falling under one of a number of statutory descriptions or, in reality formed an inseparable part of the supply of the television cable service.

1. *D.A. MacCarthaigh, Inspector of Taxes (Appellant) v. Cablelink Limited, Cablelink Waterford Limited and Galway Cablevision (Respondents)* Unreported, Supreme Court, Fennelly J. (nem diss) 19th December 2003.
2. C-349/96 *Card Protection Plan v. Commissioners of Customs and Excise* [1999] E.C.R. I-973.
3. At paragraph 1.
4. At paragraphs 41 and 42.

The Statutory Provisions

The Supreme Court observed that VAT was introduced in 1972 and though it has since been much amended, the basic provisions of the VAT code are to be found in the Sixth Council Directive 77/388/EEC of the 17th May, 1977. The Sixth Directive requires Member States to subject to VAT all supplies of goods and services, and makes a number of special provisions, in particular, exempting the supply of certain goods and services. It does not however provide a detailed list of taxable goods and services. The Value Added Tax Act, 1972 as amended, provides, by way of schedules, a number of specific headings or descriptions of goods or services to be taxed at a special, usually, as in this case, a lower rate. Where tax is applied at the full or standard rate there is no need for special headings. These schedules have been amended on many occasions.

The Supreme Court went on to observe that unless they could be brought within one of the schedules, the connection/reconnection services supplied by the respondents were to be taxable at the standard rate - this rate was 25% for the first repayment claim period and 21% for the second. The respondents claimed that the services supplied came within one or other of two headings, each of which was amended, so that a slightly different version applied to the two periods:

- Paragraph (iii) of the Sixth Schedule - *services consisting of the development of immovable goods, and the maintenance and repair of immovable goods including the installation of fixtures, where the value of movable goods (if any) provided in pursuance of an agreement in relation to such services does not exceed two-thirds of the total amount on which tax is chargeable in respect of the agreement*; as inserted by section 51 of the Finance Act, 1985. This provision was in force for the first period of the repayment claim. This wording was removed from the Sixth Schedule and transferred with an amendment, immaterial to the present case, to the Third Schedule by section 86 of the Finance Act, 1991. The listed services were liable to VAT at the rate of 10% in respect of both of the relevant periods.
- Paragraph (xiib) of the Sixth Schedule - *services consisting of work on immovable goods, other than services consisting of such work specified in paragraph (xiv) and services specified in paragraph (iii)*; as inserted by section 91 of the Finance Act, 1986. This was the version in force for the period covered by the first repayment claim. The words after immovable goods were amended by section 87 (2) of the Finance Act, 1991, but not so as to materially affect the argument. The applicable rate was 10% during the first period and 12.5% for the second.

The Appeal Commissioners

The Supreme Court noted that the Appeal Commissioners had held that:

- There were two separate services, firstly, the supply of a connection/reconnection service and, secondly, the supply of television and radio signals.
- The appeal was concerned with the connection and reconnection service.
- The application of the provision of paragraph (iii) of the Sixth Schedule relating to the value of goods supplied not exceeding two-thirds of the total had not been argued before them and they accordingly made no determination concerning that issue.
- The service did not consist in the development or the maintenance and repair of immovable goods or the installation of fixtures.
- The service did consist of work on immovable goods.

After the determination, the Inspector of Taxes requested a case stated for the opinion of the High Court on the basis that the determination was erroneous in law. It was important to note that the High Court was asked only to decide whether there were two separate services and not whether the particular tax heading chosen by the Commissioners, based on the hypothesis that there were two services, was correct.

The Decision of the High Court

The Supreme Court observed that the High Court had upheld the determination of the Appeal Commissioners. Lavan J. stated that he was "satisfied that a rational approach to the supply of services by [the taxpayer] is to look at the contract ... and ascertain whether it encompasses a separate charging for connection and supply of services." He had held that there were two separate services.

The High Court had also stated that the question of whether the respondents had made one or two supplies was a question of law on which the Court was entitled and bound to form its own view. Customers paid an initial fee to obtain connection and then contracted annually for the supply of the signal. This connection could be maintained and remain as the property of the respondents notwithstanding the failure to continue to subscribe to the service. These were two distinct and separate services with two distinct and separate charges and consequently, two distinct and separate VAT rates.

The service with which this appeal was concerned was the supply of a connection/reconnection to the customers' premises.

The High Court was satisfied that the facts were consistent with the inference that the service consisted of work on immovable goods.

There was nothing in the finding of facts to support the contention that the service provided consisted of the development or maintenance and repair of immovable goods. Neither did it consist of the maintenance and repair of immovable goods including the installation of fixtures.

The Appeal to the Supreme Court

The Inspector appealed the decision of the High Court. The Supreme Court considered firstly the scope and extent of the appeal, having regard to a number of cases that identified limits on the power of the courts to review findings of fact made by the Appeal Commissioners.

The Approach of the Court to a Case Stated

The Supreme Court noted that the respondents had contended that findings of fact made by the Appeal Commissioners were not open to reversal on the grounds stated in *Mara (Inspector of Taxes) v. Hummingbird Ltd.*[5] This case was considered in *Ó Culachain v. McMullan Brothers Ltd*[6]. wherein the following principles were set out[7]:

5. [1982] I.L.R.M. 421.
6. [1995] I.R. 217.
7. At page 222.

- Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.
- Inferences from primary facts are mixed questions of fact and law.
- If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.
- If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.
- Some evidence will point to one conclusion, other evidence to the opposite; these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for the Court is are not re-trying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law.

Appeal Commissioners' Decision - One of Law or One of Fact?

In the present appeal, neither party had sought to question the Commissioners' primary findings of fact. There was much discussion about the proper characterisation of the conclusions of the Commissioners. Counsel for the taxpayer attached importance to Kenny J's remark in *Mara (Inspector of Taxes) v. Hummingbird Ltd* that the court should not set aside "inferences which [the Commissioners] made from the primary facts [unless they] were ones that no reasonable commissioner could draw." The Supreme Court stated that it was not clear whether the judge was using the word, inference, in its normal connotation, as, for example, where, for the purposes of the exercise of its appellate jurisdiction, this court draws a clear line between findings of primary fact and inferences from those facts. In the view of the Supreme Court, the question in the present case was whether the Appeal Commissioners decision was one of law or one of fact.

As already indicated, the primary findings were not in issue. What the Commissioners did was to reach a conclusion, based on those findings, but without making any additional findings or drawing any inferences of fact. Lavan J. considered that the question of the proper tax treatment of the services provided by the taxpayer was a matter of law. In this, he was supported by the views of two members of the Court of Appeal in *British Airways plc v. Customs and Excise Commissioners*[8], Stuart-Smith L.J; and Lord Donaldson, who cited the decision of the Court in *British Railways Board v. Customs and Excise Commissioners*[9] as establishing the proposition that the liability to tax depends on "the legal effect of the transaction considered in relation to the words of the statute. And that is a question of law."'[10]

The Supreme Court went on to hold that the conclusion of the Appeal Commissioners on the issue of whether there were one or two supplies was one of law and not of fact. It did not entail the drawing of any inferences of fact. However, it was a conclusion based on their appreciation of the facts that they had found, based on the evidence that they had heard. It behoved the Court therefore to be particularly careful to give full effect to those findings of fact and not to interpret them so as to diminish their value. They were clearly sufficient to convince the Commissioners that the connection and reconnection service involved actual and real work on immoveable property.

Law or Fact? – Post Card Protection Plan Decisions in the UK

There are a number of decisions in the UK since the judgment of the Court of Justice dealing with this issue. In *Dr. Benyon and Partners v. Custom & Excise Commissioners*[11] Lawrence Collins J. stated:[12]

> "Whether the exercise is one of law or fact (with the usual consequences for the appropriate approach on appeal) cannot be regarded as finally settled. It has frequently been said, following *British Airways v Customs and Excise Comrs* [1990] STC 643 at 646 that the question of a single supply or multiple supplies is a question of law (eg *Sea Containers Services Ltd v Customs and Excise Comrs* [2000] STC 82 at 87; *Appleby Bowers (a firm) v Customs and Excise Comrs* [2001] STC 185 at 188).
>
> "In both the *Card Protection Plan* and *British Telecom* cases Lord Slynn treated the question as one of law, but in each case emphasising that the decision turned on the contractual documents (see [2001] STC 174 at 183, [2001] 2 WLR 329 at 337 and [1999] STC 758 at 763, [1999] 1 WLR 1376 at 1380 - 1381). In the latter case Lord Hope said that the question was one of fact and degree taking into account all the circumstances, and in *Customs and Excise Comrs v FDR Ltd* [2000] 672 at 695, Laws LJ treated the question as one of fact for the tribunal capable of interference on appeal in accordance with *Wednesbury* principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223).
>
> "In light of these authorities I consider that the right approach on an appeal is to treat the question as one of fact, or more accurately, appreciation of the facts, unless the matter turns on the evaluation and appreciation of contractual documents."

However Lawrence Collins J. went on to state:[13]

> "That approach carries with it the risk that different tribunals may reasonably come to different conclusions on similar facts, and I will therefore also consider the question on the alternative basis that it is a question of law on which I should reach my own view."

Findings of the Appeal Commissioners

Counsel for the Inspector placed particular emphasis on the following findings of the Appeal Commissioners:

- That the objective of both systems (Cable and MMDS) was to deliver multi-channel T.V. reception.
- That the taxpayer would not install boxes or decoders without subscription for multi-channel service.
- That the installations remained the property of the taxpayer.
- That the installation work could not be done by other than the taxpayer or its agents.

Authorities cited by the Inspector

In *British Airways plc v. Customs and Excise Commissioners,* the issue was whether the airline supplied two services, air transportation (which was zero-rated) and in-flight catering (which

8. [1990] STC 643.
9. [1977] STC 221; [1977] WLR 588.
10. [1990] STC 643 at 645.
11. [2002] STC Ch. D. 699.
12. At 720.
13. At 721.

was taxable) on domestic routes within the U.K. One single ticket price was charged; no part of it was attributable to catering. Lord Donaldson M.R. thought that passengers chose from what was on offer and that the choice was between grades of air transportation and not between grades of transportation and separate grades of in-flight catering. He also thought that the matter might be one of first impression. It seemed that Lord Donaldson would exclude any consideration of the motive or intention of the person receiving the service as a relevant factor. The Supreme Court noted that this would appear to be at variance with the views of the Court of Justice. Stuart-Smith L.J. expressed himself in very similar terms. He also thought that the question was whether the in-flight catering was an integral part of the transport.

In *Customs and Excise Commissioners v. United Biscuits Ltd*[14] the Commissioners sought to tax decorative biscuit tins rather than allow them to benefit from the zero-rating of the biscuits they contained. The Inner House of the Scottish Court of Session rejected the argument - what was supplied was biscuits in a biscuit tin rather than a general purpose container with biscuits in it.

Counsel for the Inspector also cited the decision of the Court of Justice in *Card Protection Plan*. The Supreme Court noted that the last of the criteria set out in *Card Protection Plan*[15] would suggest that the Court of Justice, unlike Lord Donaldson, considered the intention of the consumer to be relevant. Counsel for the appellant relied on this passage also for the proposition that a service cannot be separate if it is merely a means "of better enjoying the principal service supplied."

The Card Protection Plan Criteria

Before considering the decision of the Supreme Court, it is useful to set out the criteria established by the Court of Justice in *Card Protection Plan* and the interpretation of those criteria by decisions of courts in the United Kingdom.

Card Protection Plan involved the supply of a package of services to holders of credit cards. It was a plan intended to protect purchasers of the service against financial loss and inconvenience resulting from the loss or theft of their cards or of certain other items such as car keys, passports and insurance documents. A key element of the package was insurance against certain financial loss. Insurance services were exempt from VAT.

The Court of Justice stated:

26. By its first two questions, which should be taken together, the national court essentially asks, with reference to a plan such as that offered by CPP to its customers, what the appropriate criteria are for deciding, for VAT purposes, whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately.
27. It must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or, as in the present case, the exemption provisions in the Sixth Directive. In addition, having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.
28. However, as the Court held in Case C-231/94 *Faaborg-Gelting Linien v. Finanzamt Flensburg* [1996] E.C.R. I-2395, paragraphs 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.

    In *Customs & Excise v. British Telecommunications plc*[16] Lord Hope observed:[17]

    "As regard must be had to all the circumstances, no single factor will provide the sole test as to whether the supply in question is a distinct and independent supply or is incidental or ancillary to another principal supply. The fact that the price for the supply in question has been or can be separately identified as having been charged for additionally, as the tribunal held after considering the sample transactions in this case, is not the test. Nor is the fact that the supply in question is an optional one which the taxable person could have provided for himself, and so did not need to take when as a matter of convenience he took the other supply to which it is said to have been ancillary...

    "Nor is the question to be resolved by asking, as the respondents contend, whether the two supplies are 'physically and economically dissociable.'

    "It may be said that before the supply can be regarded as a separate and distinct supply it must, at least to some degree, be physically and economically dissociable from the other supply. But it would not be right to take this factor as the sole criterion as to whether the supply was separate and distinct from the other supply or was merely incidental or ancillary to it."

The Court of Justice went on to state:

29. In this respect, taking into account, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
30. There is a single supply, in particular, in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but as a means of better enjoying the principal service supplied (Joined Cases C-308/96 and C-94/97 *Commissioners of Customs and Excise v. Madgett and Baldwin* [1998] E.C.R. I-6229, paragraph 24).

14. [1992] STC 325.
15. In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if the circumstances indicated that the customers intended to purchase two distinct services, then it would be necessary to identify the part of the single price which related to each supply. The simplest possible method of calculation or assessment should be used for this.
16. [1999] STC 758.
17. At pages 767 and 768.

In Customs & Excise *Commissioners v. Wellington Private Hospital Ltd.*[18] Millett J. held:[19]

"The issue is not whether one element of a complex commercial transaction is ancillary or incidental to, or even a necessary or integral part of, the whole, but whether one element of the transaction is merely ancillary or incidental to, or a necessary or integral part of, any other element of the transaction. The reason why the former is the wrong question is that it leaves the real issue unresolved; whether there is a single or multiple supply. The proper inquiry is whether one element of the transaction is so dominated by another element as to lose any separate identity as a supply for fiscal purposes, leaving the latter, the dominant element of the transaction, as the only supply. If the elements of the transaction are not in this relationship with each other, each remains as a supply in its own right with its own separate fiscal consequences."

The Court of Justice further stated:

31. In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances ... indicated that the customers intended to purchase two distinct services, ... then it would be necessary to identify the part of the single price which related [to each supply]. The simplest possible method of calculation or assessment should be used for this (see, to that effect, *Madgett and Baldwin*, paragraphs 45 and 46).

The Decision of the Supreme Court

The Court stated that none of the cases cited was sufficiently close to the facts of the present one to be of real assistance. In both *British Airways* and *United Biscuits,* the Revenue attempted to separate out elements of transactions that had been conducted as one. Services and goods respectively had been supplied for one price. The Revenue contention in *British Airways* was particularly far fetched. The Court seemed to have treated the matter as one of first impression. One could envisage a case, however, where, unlike in *United Biscuits*, the container of foodstuffs was of so great a value that it would be an abuse to claim a zero-rating, when what was really being sold was the container.

Whilst it was clear that whether single or separate prices were charged was not decisive, the Supreme Court had no doubt that in many cases it would be helpful. The charging of separate prices genuinely related to the nature, the cost or, perhaps, the optional nature, of different elements might point in the direction of more than one supply.

The English and Scottish courts in *British Airways* and *United Biscuits* made some attempt to develop general principles. Lord Donaldson considered that the correct question to ask was whether the supply of food and drink was incidental to the air transport, though he preferred the word integral. Stuart-Smith L.J. thought that "while something that is necessary for the supply will almost certainly be an integral part of it, the converse does not necessarily follow."

The Supreme Court was not convinced that it was possible to extract any principles of general application. The legislation provided no guidance. Community law had no relevance to decisions concerning the application of purely national headings of charge. However the Supreme Court found the approach of the Court of Justice persuasive. The Court of Justice had said that, "regard must first be had to all the circumstances in which that transaction takes place." It had attached particular weight to the economic character of the supply of services. A single economic service should not be artificially divided and ancillary elements should share the tax treatment of the principal service. A single price might not be decisive but might be indicative of a single service. Equally, in the opinion of the Supreme Court, separate prices might suggest separable supplies. The Supreme Court did not consider that the statement that, "service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied" should be regarded as laying down a principle of general application.

Before deciding whether there are distinct supplies here, namely the connection/reconnection service and the delivery of signal, it was necessary to refer to the findings upon which the Appeal Commissioners based their conclusion.

- The findings showed that the connection and reconnection service entailed the supply and installation of main cables, drop cables, junction boxes and connection boxes (in the case of the cable service) and antennae and down converters (in the case of MMDS). The specimen contracts showed that the respondents charged separately for connections and rental, meaning the supply of signal.
- The connection charges would vary depending on the number of points for which connections were required.

From all of this, it was clear that the supply of connection and reconnection services entailed the performance of substantial work and the supply of substantial quantities of goods. It was true, of course, that the sole purpose of the connection and reconnection service was to enable the television and radio service to be delivered and that the equipment remained the property of the respondents.

Several features of the entire service nonetheless warranted treating the connection and reconnection service as a distinct supply.

"Firstly, this work is physically and temporally distinguishable from the delivery of the signal itself. It must be performed before the service can be switched on and requires work on site. Secondly, and for the same reason, it is capable of being separately costed both in respect of the labour and materials. Thirdly, the extent to which a connection or reconnection service is required will vary over time and from one customer to another: a new customer will have to pay for a full connection only when it is made for the first time and not over ensuing periods, unless he is disconnected for non-payment and has to be reconnected; a customer moving into a house or flat already fitted with the service will not have to pay to the same extent as if the dwelling has to be newly cabled. This will make the charge proportionate to the service actually

18. [1997] STC 445.
19. At 462.

provided. Fourthly, it is hypothetically possible that the connection service could be performed by an independent company. In that case, there can be no doubt that there would be an independent supply."[20]

Commentary

The decision of the Supreme Court gives rises to a number of issues. Firstly, the Supreme Court held that the conclusion of the Appeal Commissioners on the question of whether there were one or two supplies was one of law and not of fact. As was observed in the English case *Dr. Benyon and Partners v. Custom & Excise Commissioners*, in both *Card Protection Plan* and *British Telecom*, Lord Slynn treated the question as one of law.

However, in *Benyon,* Lawrence Collins J, as already noted, was of the view that whether the exercise was one of law or fact could not be regarded as finally settled and went on to hold that the right approach was to treat the question as one of fact, or more accurately, appreciation of the facts unless the matter turned on the evaluation and appreciation of contractual documents. As the Supreme Court observed, Lavan J, (who was also of the view that the issue raised a question of law) had stated that the rational approach to the supply of services by the respondents was to look at the contract. Further, the Court in *Benyon* hedged its bets somewhat by going on to consider the issue on the alternative basis that it was a question of law.

Of greater import in this regard is the Supreme Court's own observation that whilst Lord Donaldson in *British Airways*, seemed to exclude any consideration of the motive or intention of the person receiving the service as a relevant factor (as had Lord Denning in *British Railways Board* in concluding that the matter at issue involved a question of law), this appeared to be at variance with the views of the Court of Justice.

Secondly, the observation of the Supreme Court that it was not possible to extract any principles of general application, if taken to refer to the question of determining whether a transaction gives rise to single or multiple supplies, is probably best understood in the context of the Court's discussion of the pre-*Card Protection Plan* decisions. After all, the Court of Justice did not eschew setting out what it regarded as appropriate criteria, it merely stated that it was not possible to give comprehensive guidance.

Thirdly, the Supreme Court's statement that the test for identifying ancillary supplies, set out in the second sentence of Paragraph 30 in the ECJ decision, should not be regarded as laying down a principle of general application is somewhat surprising. True, the first sentence in Paragraph 30 does contain the words in *particular* however, arguably that is a statement of one particular instance where, in the view of the Court of Justice, there is a single supply. The proposition that the test propounded by the Court of Justice, for determining whether that particular instance arises, does not lay down a principle of general application, is not immediately obvious from a consideration of the terms of Paragraph 30. Of course, the Court of Justice did state that it was not possible to give comprehensive guidance. However, the Supreme Court, in giving judgment, did not explicitly state that *Cablelink* fell outside the criteria set out in *Card Protection Plan*.

Fourthly, it is not clear whether the four factors, identified by the Supreme Court as warranting treating the connection and reconnection service as a distinct supply, are to be regarded as general tests additional to the criteria set out by the Court of Justice in *Card Protection Plan*, which may be applicable in other cases, or are simply to be treated as coming within the guidance of the Court of Justice, in Paragraph 28, that regard must be had to all the circumstances of the transaction.

Finally, it remains to be seen whether the Court's observation, in relation to the proper approach to be taken to a case stated, that it was not clear whether Kenny J. was using the word inference in its normal connotation, will give rise to further refinement of the principles set out in *Mara v. Hummingbird*.

Conclusion

Fennelly J, as Advocate General, observed that the issue of single or multiple supplies subsisted in a mystic twilight. The decision of the Court of Justice in *Card Protection Plan* may have heralded the rising sun but for practitioners at least, it seems that some morning fog patches persist.●

20. At page 18 of the transcript.

The European Convention on Human Rights Act 2003, a *Cause Célèbre* for Privacy Rights in Ireland?

Martin Canny BL and Anthony Lowry BL

Introduction

Respect for personal privacy has long been valued in modern society. "At least for the fortunate, modern life has improved the chances of solitude and intimacy, while swelling the means by which they may be interrupted."[1] Invasions of privacy may involve personal confrontation, surreptitious spying, interference with personal property, or simply the acquisition and revelation of information. The focus of this article will be on media intrusion into the private lives of individuals generally and public figures in particular. This issue has a long lineage - in a celebrated article written over a hundred year ago, Warren and Brandeis discussed how "instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life... The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery."[2] They advocated the creation of a tort of invasion of privacy, a call that has been heeded by a majority of US states. However, the conservative British judiciary has steadfastly resisted such a development.[3] Instead, they have left litigants to rely on an array of causes of action, chief among which are those for breach of confidence and defamation.

Only a few Irish cases have had to decide what level of press intrusion is acceptable. These cases have involved the judiciary determining the extent of the unenumerated constitutional right to privacy. But whatever the label given to the cause of action in such cases, the two interests that will be in opposition will be the individual's right to privacy and the press' freedom of expression.[4] Because of this, it is fundamental to an understanding of the area to examine what effect the European Convention on Human Rights (the "ECHR") will have in Irish law following its incorporation into domestic law by the European Convention on Human Rights Act 2003 (the "ECHRA").

In Part I of this article, the authors will examine whether, and to what extent, the European Convention on Human Rights forms part of our domestic law following the commencement of the 2003 Act. In Part II the authors will examine whether the breach of confidence cause of action is adequate for the protection of personal privacy under the Convention and the possible constitutional alternative.

Part I: The status of the European Convention on Human Rights following the adoption of the European Convention on Human Rights Act 2003.

In considering whether the E.C.H.R.A. can have any effect on the development of the Irish law relating to privacy in this context, it must first be established what effect the Act will have in cases involving private parties - i.e. when applied horizontally. This issue bifurcates into two discrete matters. In the first place, it must be established that the Convention itself, according to the case law of the European Court of Human Rights, applies to cases between private parties. This, in turn, is dependant upon two factors, the substantive content of Article 8 E.C.H.R. and the potential horizontal application of the Convention. If the Convention itself does not cover, substantively, the publication of private information or if the Convention has no horizontal application, it logically follows that the 2003 Act can have no such application since this legislation is intended to implement Convention norms.

In the second place, it must be established that the European Convention on Human Rights Act 2003 can be relied upon horizontally against private parties. This is essentially a matter of statutory interpretation. The approach taken by the UK courts in relation to the horizontal application of the Human Rights Act 1998 provides a reference point for this analysis. However, as will be seen, there are a number of important textual differences between the two statutory schemes[5].

1. Cornish, *Intellectual Property* (5th ed., 2003, Sweet and Maxwell), at para [8-55].
2. Warren and Brandeis, "*The Right to Privacy*" (1890) 4 Harv. L.R. 193, at 195.
3. It is an - almost notorious - feature of UK law that "in English lawthere is no right to privacy, and accordingly there is no cause of action for breach of a person's privacy," per Glidewell L.J in *Kaye v. Robertson* [1991] F.S.R. 62, at 66. This was most recently reaffirmed by the House of Lords in *Wainwright v. Home Office* [2003] 3 W.L.R. 1137 (HL).
4. This article will focus on the right to privacy alone, and not consider in depth how it should be balanced with the right to freedom of expression. For a fuller discussion see O'Dell, "When two tribes go to war: Privacy Interests and Free Speech" in *Law and the Media: Views of Journalists and Lawyers* (Dublin, Sweet and Maxwell, 1997).
5. For example, the courts have been excluded under the 2003 Act from the definition of 'organs of the state' upon whom an obligation to act in a manner compatible with the Convention provisions has been imposed under Section 1(1) of the European Convention on Human Rights Act 2003.

The Substantive Scope of Article 8 ECHR:

In respect of the substantive scope of the protection of privacy under the Convention, Article 8(1) of the European Convention on Human Rights provides:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."[6]

Media intrusion into the lives of individuals primarily relates to the publication of information of a private nature. *Phillipson and Fenwick*[7] usefully distinguish between "substantive" and "informational" autonomy as specific sub-categories of the right to privacy[8]. The former invests individuals with certain substantive rights enabling them to act in a particular manner within the sphere of their private lives and prevents others from restricting the exercise of those substantive rights, e.g. the right to prevent arbitrary searches of an individual's home[9]. The latter encompasses the notion of the individual's right to control information relating to their private life, e.g. the right to prevent publication of confidential communications between a married couple[10].

This latter concept of informational autonomy, the pertinent sub-category for present purposes, has been justified on the grounds that the intimacy of social relationships is predicated on the individual's capacity to prevent information that they choose to circulate in one sphere from entering into another sphere[11]. In this respect, the right to informational autonomy differs fundamentally from the right to protection of an individual's reputation as protected by the law of defamation[12].

Such theoretical justifications also underpin the protection of privacy under the European Convention on Human Rights. The Commission, echoing the aforementioned academic authorities, has held that Article 8(1) includes the protection of individuals from publicity concerning their family life and "the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfillment of one's own personality"[13].

Notwithstanding the sparse nature of the wording of Article 8(1), the European Court of Human Rights has interpreted broadly the protection afforded by this Article such that the right to privacy may now be said to include "elements such as gender identification, name, sexual orientation and sexual life...[t]he Article also protects a right to identity and personal development and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'"[14]

Moreover, the Court has consistently stated that the collection, storing[15] and disclosure[16] of personal information engages Article 8(1) and requires justification, in the case of public authorities' activities, pursuant to Article 8(2) of the ECHR[17]. Personal information in this context has not been exhaustively defined by the Court, but can be said to include all information relating to the different elements of the right to privacy outlined by the court above.

Indeed, the publication of personal information obtained from the public domain can, in certain circumstances, offend Article 8(1). This point is illustrated by the case of *Peck v. United Kingdom*[18], where CCTV captured a suicidal man on a public street. Brentwood Borough Council released the footage to the media whereupon the footage was subsequently published in both print and audiovisual form. In response to arguments led by counsel for the United Kingdom, to the effect that publication of such public information could not interfere with an individual's private life, the Court cited with approval the case of *PG and JH v. United Kingdom*[19] which provided that an individual's *reasonable* expectations of privacy will be protected once any *permanent*[20] record of information from the public domain comes into existence. What privacy one may reasonably expect when in public will, naturally, depend on the circumstances. For example, a celebrity actor can have few complaints should photographs of his or her arrival at a film premier find their way into a national newspaper[21]. Indeed this may well be the object of the exercise. By contrast, one could argue that an actor sunbathing at a public beach can reasonably expect their privacy rights to be protected, notwithstanding the fact that those rights will have to be balanced against the freedom of expression of the media[22].

In summary, it appears that the publication in print, photographic or audiovisual form, of personal information by a public authority may infringe an individual's right to privacy under Article 8(1) of the Convention even where that information is obtained from the public domain. However, in order for this substantive right to be enforceable against the media, who act predominantly within the private sphere, it must also be established that the Convention generally, and Article 8(1) in particular, applies horizontally to the actions of private parties.

6. The parameter of the present discussion is, generally, the horizontal application of Article 8 of the ECHR. Therefore, Article 8(2) is not directly at issue, concerned as it is with the relationship between individuals and the State, as opposed to the relationship between individuals *inter se*. Nevertheless, Article 8(2) is not wholly irrelevant in the present context, a matter that is given further consideration below.
7. "Breach of Confidence as a Privacy Remedy in the Human Rights Era" (2000) 63 MLR 660.
8. *Ibid*, at p.662-663. See further Gallagher, "Privacy, Anonymity and Freedom of Expression: the not so common law?" (Paper delivered at a Symposium on Freedom of Expression, 5th-6th Dec. 2003, TCD). The issue of press intrusion, *simpliciter*, will not be considered in this article, because the press are rarely involved in harassing individuals except with an eye to publication.
9. *Chappell v. United Kingdom* (1990) 12 EHRR 1
10. See *Argyll v. Argyll* [1967] Ch. 302
11. See note 7 above, at p. 663. See also Feldman, *Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty*, 47(2) CLP 42, at p. 54
12. Since the former is concerned with preventing the publication of accurate information in unwanted spheres, see, in an Irish Constitutional context, *X v. Flynn & ors*, HC unreported May 19, 1994, and the latter protects the individual against the publication of inaccurate information detrimental to their reputation generally, see Gatley on *Libel and Slander*, Milmo and Rogers Eds, 10th Ed, at para. 1.3.
13. App. 6825/74, *X v. Iceland* (1976) 5 DR 86
14. *Peck v. United Kingdom*, [2003] 36 ECHR 719, at para.57
15. *McVeigh v. United Kingdom* March 18 1981, 25 DR 15
16. *Z v. Finland*, February 25 1997, RJD, 1997-I, No. 31
17. See, for example, *Leander v. Sweden* (1987) 9 EHRR 433 and *Rotaru v. Romania*, [2000] (21) EHRLR 231
18. See note 14 above
19. [2002] (2) EHRLR 262, at para. 56
20. In terms of what constitutes a *permanent* record for these purposes, photographs, written documents and audiovisual material all fall within this category. See *Peck v. United Kingdom*, note 14 above, *Amann v. Switzerland*, [2000] 30 EHHR 843 and *Jersild v. Denmark*, [1994] ECHR 1
21. Another example can be seen in the Commission decision in *Friedl v. Austria*, judgment of 31 January 1995, Series A no 305-B, where it was held that the use of photographs taken at a public demonstration did not constitute an interference with the individual's privacy rights
22. In *Peck*, see note 14 above, the Court found an interference with the applicant's privacy rights, stressing the fact that the individual, although on a public street, had not been there for the purposes of participating in a public demonstration or in the capacity of a public figure, see para. 62 of the judgment.

The Horizontal Effect of the European Convention on Human Rights:

The European Convention on Human Rights is an international agreement governed by the rules of Public International Law. The general rules of treaty interpretation provide that such instruments do not create rights and obligations for private individuals as against other private parties[23]. Nevertheless, the predecessor of the International Court of Justice, the Permanent Court of International Justice, has stated:

> "It cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts."[24]

Therefore, in order to assess whether the Convention is capable of horizontal application, it is necessary to ascertain the intention of the parties, the High Contracting Parties, a matter of treaty interpretation[25]. In this regard, the European Court of Human Rights is the body invested with ultimate responsibility for the interpretation of the Convention[26] and, therefore, the case law of the Court is obviously of paramount importance. However, prior to discussing this jurisprudence, it is useful to briefly consider the horizontal application of the Convention as a matter of first principles. According to Article 1 of the Convention:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

Section 1 contains the catalogue of human rights protected by the Convention, including the right to privacy[27]. Clearly, the obligation to secure Convention rights is imposed upon Contracting States and this, combined with the fact that actions under the system established by the Convention may only be brought against Contracting States[28], has traditionally been considered to limit an individual's right to invoke Convention rights to so-called vertical situations[29], that is, where the violation is by a public body[30].

Clapham[31] challenges this conclusion on two grounds, firstly on the basis that International Law, as discussed above, envisages treaties creating rights in certain circumstances. This first branch of *Clapham's* argument relies upon a contextual analysis of the terms of the Convention and is discussed in further detail below in the context of the case law of the European Court of Human Rights.

The second branch of *Clapham's* argument is a pragmatic one, founded on the contention that 'in practice it is impossible to differentiate the private from the public sphere'[32]. This observation is re-enforced by *Cane*[33] who points to the modern tendency in English Administrative Law to "stress the similarities and analogies between governmental and private activity and play down the public-private distinction; *what matters for questions of legal liabilities is the nature of the activity not the identity of the person or body conducting it*; and since activities are not by their nature either public or private, the distinction is irrelevant to the regulation and control of human activity"[34]

Since private parties appear capable, in substantive terms, of infringing rights under the Convention[35], Contracting States risk violating the Convention, where those States fail, in reliance upon the public-private dichotomy, to regulate the activities of private parties that are capable of impinging upon the Convention rights of individuals.

In practical terms, concentration upon the nature of the activity rather than the identity of the perpetrator appears to remove this uncertainty for Contracting States and arbitrariness for individuals that arises from reliance upon the aforementioned dichotomy in the enforcement of the European Convention on Human Rights.

Furthermore, and returning to the first branch of *Clapham's* argument, a contextual analysis of the European Convention on Human Rights re-enforces this proposition. Although the Convention system does not allow applications to be taken against individuals *per se*, the nature of the rights contained therein lends itself to horizontal effect. As *van Dijk and van Hoof*[36] observe:

> "Precisely on account of the fundamental character of [Convention] rights it is difficult to appreciate why they deserve protection in relation to the public authorities, but not in relation to private individuals."

The authors underline their point, by specifically referring to the last words of Article 13 of the Convention[37] which states that the obligation to provide an effective remedy for violations of Convention rights applies "notwithstanding that the violation has been committed by persons acting in their official capacity", thereby implicitly obliging Contracting States to provide a remedy in respect of violations committed by individuals[38].

23. Brownlie, *Principles of Public International Law*, 4th Ed., at p.555
24. *Danzig Railway Officials*, PCIJ, Series B, no. 15 (1928). The EC Treaties are a case in point.
25. See Oppenheim, *International Law*, 9th Ed., Vol. 1, at p. 1267
26. See Article 55 in conjunction with Article 32 of the European Convention on Human Rights.
27. See Articles 2-18 of the European Convention on human Rights
28. See Articles 33 and 34 of the European Convention on Human Rights. See also *X v. United Kingdom*, D & R 8 (1978)
29. See Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd Ed. pp. 15-20.
30. See Goslong, *Das Rechtsschutzsystem der Europaischen Menschenrechtskonvention*, (1958)
31. *Human Rights in the Private Sphere*, Oxford, (1993), Brownlie Ed., at p.93-133.
32. *Ibid*, at p. 94. The author also refers to the ubiquitous modern acronyms 'quago' (quasi-autonomous governmental organisations) and 'quango' (quasi-autonomous non-governmental organisations) as further examples of the near impossibility in logically differentiating between the public and private sphere.
33. *Public and Private Law*: *A Study of the analysis and use of a legal concept*, in Eekelaar and Bell (1987)
34. *Ibid*, p.6, emphasis added. The authors' contention is not the elimination of the distinction between public and private law generally. There are obviously areas of law where the distinction retains its vitality. For example, the remedies available under Judicial Review would be wholly inappropriate in a private law context.
35. See *Earl Spencer v. United Kingdom* 25 EHRR CD 105 (1998)
36. See note 29, 2nd Ed., at p. 17.
37. Unlike the Human Rights Act 1998, Article 13 was one of the Convention rights incorporated by the European Convention on Human Rights Act 2003.
38. See note 29 above, at p. 17. See also Eissen, The European Convention on Human Rights and the duties of the Individulal, 32 Nordisk Tidsskrift for International Ret, 229 and Raymond, A contribution to the interpretation of Article 13 of the European Convention on Human Rights, 5 HRR 161

Additionally, while it must be accepted that the horizontal effect of the Convention cannot be considered in general terms and must depend upon the nature and formulation of each individual provision[39], the Parliamentary Assembly of the Council of Europe has resolved that "[t]he right to privacy afforded by Article 8 of the Convention of Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons including the mass media. National legislations should comprise provisions guaranteeing this protection"[40]

Does the case law under the Convention necessitate the Horizontal Application of the Convention?

Although there have been, as yet, no specific decisions of the European Court of Human Rights on whether the Convention applies horizontally between private parties, recent developments have indicated that the Convention is capable of such effect[41]. According to one commentator, while "[it] remains unclear just how far the activities of [private bodies] can be brought within the scope of the Convention...the case law is beginning to suggest that few areas of activity will escape scrutiny where Article 8 rights are legitimately at issue"[42]

The argument favouring the horizontal application of the Convention is said to stem from the positive obligations imposed by certain Convention provisions including, *inter alia*, Article 8(1). This form of *Drittwirkung*[43] may be described as creating indirect horizontal effect, since the horizontality operates via the Contracting State[44].

According to one leading commentator[45], these positive obligations may be divided into two categories. The first requires States to take some action to secure respect for the rights included in the Article, as distinct from simply refraining from interfering with the rights protected and the second imposes a duty upon Contracting States to protect an individual from interferences by other individuals. For the authors' purposes, the second of these categories is of greater importance. The seminal judgment in this area is the case of *X & Y v. The Netherlands*[46] wherein, the Court stated as follows:

> "The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."

The facts of the X & Y case[47] are far removed from the subject matter of the present article[48]. Nevertheless, the case is important for the broad statement of principle that the Convention can have some application to the actions of private parties *inter se*. Since the Convention is an instrument of Public International Law, this obligation to take positive measures is imposed upon the State. However, the domestic courts are included within the definition of the State for these purposes[49]. The logical corollary of this position is, of course, that the domestic courts are also under a positive obligation to uphold the Convention *even in cases solely involving private parties* and failure by the domestic courts to take positive action on behalf of the State constitutes a breach of the Convention in just the same way as a failure on the part of the legislature to adopt legislation securing Convention rights.

Another case of importance is the decision of the Commission in *Earl Spencer v. United Kingdom*[50] involving the publication by a number of national newspapers in the United Kingdom of allegations concerning Princess Diana's sister-in-law, Victoria, relating to her alleged treatment for an eating disorder and alcoholism and the detrimental affect her illness was having on her marriage to Earl Spencer[51].

The applicants brought an action to Strasbourg complaining that the United Kingdom's failure to prevent the publication and re-publication of information, including Victoria's photograph, relating to their private lives or to provide a legal remedy to prevent, or to seek compensation for, that publication breached Articles 8 and 13 of the Convention. The Commission found no difficulty in the Convention applying, in principle[52], to such cases involving private individuals, relying upon the positive obligations flowing from Article 1 ECHR and acknowledging that such privacy rights would have to be balanced against the freedom of expression enshrined in Article 10 of the Convention[53].

While Article 8(2) has no direct application in such cases[54], the Commission's decision illustrates that privacy rights will not be absolute in such a context and may have to be balanced against other Convention rights. Freedom of expression will be of particular significance in cases of media intrusion into the private lives of individuals. Furthermore, the court has stated that in cases where positive obligations are imposed on the State, a balance must be struck between those individual privacy rights and the public interest.[55] Therefore, qualified Convention rights, such as Article 8(1) may be limited in accordance with the principle of proportionality, the latter by now a doctrine familiar in Irish constitutional law[56].

39. See Alkema, The third-party applicability or 'Drittwirkung' of the European Convention on Human Rights, in Protecting Human Rights; The European Dimension, Koln 1988, see also, Van Dijk and Van Hoof, note 29 above, at p.18.
40. Resolution 428 (1970), para. C7, text adopted 23 January 1970.
41. For a fuller discussion of this issue, see Clapham, *Human Rights in the Private sphere* (Oxford, 1993)
42. Jacobs and White, *The European Convention on Human Rights*, (Oxford 2002) 3rd Ed. At p. 219
43. Horizontal effect.
44. See Van *Dijk and Van Hoof*, note 29 above, at p. 20.
45. See note 42 at p. 219
46. 27 February 1985. See also, regarding Article 11 of the Convention, *National Union of Belgian Police*, Judgment of 27 October 1975, Series A 19, (1975) and *Swedish Engine Drivers' Union*, Judgment of 6 February 1976, Series A. 20, (1976).
47. The facts related to a lacuna in the Dutch criminal legislation that precluded Ms. Y from pursuing an allegation of rape against a Mr. B.
48. See also, the admissibility decision *Barclay v. United Kingdom*, App. No. 35712/97, 18 May 1999, a case more relevant, in factual terms to the current discussion. This case involved a complaint against the broadcasting by the BBC of a program containing unauthorised footage of a journalist landing on the applicant's private island, Brecqhou in the Channel Islands. The Court accepted that an interference with an applicant's private life could, in principle, result from an unauthorised entry into and filming on premises where the applicant had established his home life although the court found no violation on the facts.
49. See Jacobs and Whyte, note 42 above, at p. 16.
50. See note 35 above
51. The articles derived, *inter alia*, from the private correspondence of the Earl, and included a photograph of Victoria on the private grounds of the clinic where she was receiving treatment.
52. The parties' application was ultimately dismissed on the basis of a failure to exhaust domestic remedies, a matter discussed further in the context of breach of confidence below.
53. See note 35 above. Since the action was declared inadmissible, the European Court of Human Rights obviously had no opportunity to rule directly on the issues raised. However, when the Commission's decision was subsequently raised in the case of *Peck v. United Kingdom*, the Court appeared to accept the Commission's reasoning in relation to the substance of the latter's decision.
54. Article 8(2) concerns the relationship between individuals and the State, as opposed to the relationship between individuals inter se.
55. See *Hatton v. United Kingdom* (2002) 34 EHRR 1 at para. 96.
56. See *Heaney v. Ireland* [1994] 3 I.R. 593.

The existing jurisprudence indicates that Article 8(1) is capable of applying horizontally to cases involving media intrusion into the private lives of individuals. The right to privacy in this context is not absolute and will have to be balanced against competing Convention rights and, moreover, may be proportionately limited in the interests of the community as a whole. The next stage of our inquiry requires a consideration of the potential horizontal application of the European Convention on Human Rights Act 2003.

The Horizontal Effect of the European Convention on Human Rights Act 2003:

The 2003 Act incorporated the Convention by way of the 'interpretative' model, based upon the United Kingdom's Human Rights Act 1998[57]. However, there are a number of significant textual differences between the two regimes, which must be borne in mind when discussing the potential horizontal application of the 2003 Act[58]. The operation of the Act has been summarized as follows:

> "In general, the 2003 Act imposes a duty, pursuant to Section 3(1), on 'organs of the state' to act in a manner compatible with the Convention, unless that body is acting pursuant to statute or a rule of law. Section 2(1) imposes an obligation on the courts to interpret all legislation and rules of law, i*nsofar as is possible*, in a manner compatible with the 'convention provisions'[59]. In the event that no "convention compatible" interpretation of the rule of law or statutory provision is possible, the latter legal rule will prevail against the ECHR and the organ of the state will no longer be under a duty to comply with the Convention. In such a case, the only avenue of redress open against the material organ of the state will be to seek a declaration of incompatibility pursuant to Section 5(1) of the Act."[60]

The Exclusion of the Courts from the obligation to act in a manner compatible with the Convention.

One of the primary distinctions between the two regimes concerns the government's decision to exclude the courts from the obligation contained in Section 3(1) of the 2003 Act. This is also one of the most important policy decisions taken in the chosen method of incorporation of the Convention. The government believed that excluding the courts from the obligation under section 3(1) and casting the duty contained in that section on organs of the State would avoid the horizontal effect of the Convention's provisions. The Minister expressed the view that such horizontal effect could lead to the creation of a new cause of action based on the fact that the courts got it wrong[61] leading to a never ending set of appeals.[62]

The Minister's hypothesis seems to be that if the courts were included in the section 3(1) duty, then, in the event that the Irish courts failed to apply Convention law correctly, this would create an *independent* cause of action based on a *separate* breach of the Convention by the courts. This hypothesis appears ill conceived since any subsequent action would be based on the same subject matter and have become *res judicata*.[63] In particular, the State could defend any such action pursuant to the doctrine of non-mutual defensive estoppel[64]. Thus, the exclusion of the courts appears wholly superfluous to the objective pursued by Minister McDowell[65].

In assessing the effect of this exclusion, the position under the 1998 UK Act provides guidance. The interpretive obligation under Section 3(1) of the 1998 Act applies only to legislation, and, no express reference is made to the application of the interpretive duty to the common law. Nevertheless, under section 6(1) of the 1998 Act, public authorities are similarly placed under an obligation to act in a manner compatible with the Convention and, unlike the 2003 Act, the definition of a public authority under the UK legislation expressly includes the courts. As a result of this inclusion, during the Bill's Committee Stage in the House of Lords, the Lord Chancellor expressed the view that it was "right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals"[66].

However, the Lord Chancellor also felt that the obligation under section 6(1) could not be applied directly to private individuals, but was limited to the actions of public authorities.[67] This position appears to rule out the possibility of direct horizontal application.[68] Instead, the influence of the 1998 Act in private actions would be limited, pursuant to the duty imposed on the Courts under Section 6(1) of the Act, to the development of the common law in accordance with Convention norms. *Hunt*[69] cites the example of an all male golf club, which excludes women from its premises. In the event that the club physically ejects a woman on foot of this policy, the latter could sue for assault and claim that since the defence of common law trespass to an assault claim must now be interpreted in accordance with Articles 11 and 14 of the Convention, that defence is no longer available to the golf club.

If a similar situation were to arise in Ireland under the 2003 Act, it seems that an Irish court would be under no duty to apply Convention law pursuant to Section 3(1), to exclude the golf club's common law defence of trespass. This arises from the fact that, as referred to above, the courts are excluded from the definition of 'organs of the state' for the purposes of Section 3(1). Indeed, one interpretation of Section 3(1) open to the courts would be that since the golf course, in the above example, is under no duty pursuant to section 3(1) to act in a manner compatible with the Convention, the interpretive obligation under Section 2(1) does not even apply[70].

57. For a general discussion of the Human Rights Act 1998, see Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 M.L.R. 79.
58. For example, the 2003 Act incorporated Article 13 of the Convention whereas the UK Act did not.
59. The Act does not incorporate all the Convention rights but limits incorporation to the Convention Provisions as defined including Articles 2 to 14 ECHR and Protocol 1.
60. Lowry, "Practice and Procedure under the European Convention on Human Rights Act 2003" (2003) 8(5)Bar Review 183.
61. Select Committee on Justice, Equality, Defence and Womens' Rights, Tuesday 18 February 2003 at p.154.
62. Ibid. According to the Minister: "The system of justice would snarl up and become a paradise for lawyers but a nightmare for the rest of us. What I am doing is a case of poacher turning gamekeeper.". The view of the Minister was echoed by Deputy O'Donovan at p.155 where the Deputy expressed the view that inclusion of the courts would open up the floodgates of litigation.
63. See Paul A. McDermott, Res Judicata - Double Jeopardy, Butterworths (1999) and K.R. Handley, The Doctrine of Res Judicata, Butterworths (1996).
64. See McDermott, Footnote 36 above, at chapter 9. McDermott describes the operation of this doctrine, at paragraphs 9.02 - 9.03. McDermott describes the doctrine as applying, in effect, in this jurisdiction following the cases of McCauley v McDermott [1997] 1 ILRM 486 and Bula (in Receivership) v Crowley, High Court, unreported, 28 April 1997, Barr J.
65. That is, to prevent new causes of action based on the court's failure to apply Convention law correctly.
66. HL Deb. November 24, 1997, column 783.
67. HL Deb. November 13, 1997 columns 1231 - 1232.
68. See Hunt, "The Horizontal Effect of the Human Rights Act 1998" [1998] PL 423, at p.438.
69. Ibid at p. 442
70. The logic behind excluding horizontal applicability in such a context is difficult to discern, not least considering that the Superior Courts have consistently viewed the personal rights under the Constitution as having horizontal effect and this may well be a by-product of the Government's desire to exclude the liability of the State for the failure by the courts to apply Convention law correctly. See, for example, *Meskell v Coras Iompair Eireann* [1973] IR 121; *Murtagh Properties v Cleary* [1972] IR 330; and *Lovett v Gogan* [1995] ILRM 12.

The inclusion of the common law as a "rule of law" under the 2003 Act.

Notwithstanding this line of reasoning, an alternative interpretation of Section 2(1) stems from the fact that the obligation imposed on the courts to interpret legislation *and the common law*, insofar as possible, in a manner compatible with the Convention is stated in normative terms and contains no express limitations. Therefore, the Convention provisions are capable of having indirect horizontal effect between individuals arising from the Section 2(1) interpretive duty. This may be contrasted with the position under the Human Rights Act 1998 wherein the interpretive obligation applies only to legislation.

In accordance with this reading of the 2003 Act, one could argue that in the example of the woman in the golf club set out above, the Irish courts would be obliged to interpret, in accordance with Section 2(1) of the 2003 Act, the common law of trespass, insofar as possible, in a manner compatible with the State's obligations under the Convention provisions in a similar fashion to the operation of the 1998 Act.[71]

In addition to the possible application of the interpretive obligation to the development of the common law in cases involving private parties, *Collins and O'Reilly*[72] highlight the potential for this obligation to similarly apply to legislation arguing that "in circumstances where the State has adopted legislation imposing obligations on private parties that have the effect of securing the protection of a Convention right...it is difficult to see why the interpretive obligation should not be invoked in proceedings between private parties concerning its application and interpretation"[73]

In this regard, Section 2(2) of the 2003 Act expressly provides that the interpretive obligation applies to legislation enacted before and after the entry into force of the 2003 Act. The obligation could, therefore, apply both prospectively to future legislation and retrospectively to existing legislation, post-dating and predating respectively, the commencement of the 2003 Act.

This interpretation of the 2003 Act appears to accord with the State's obligations under the Convention, which, as noted above, arguably require Contracting States to afford Convention rights horizontal effect.

The significance of the non-incorporation of Article 1 ECHR

However, the analysis does not end there. A further point of importance concerns the omission, by the Irish legislature, of Article 1 from the 'Convention Provisions' incorporated by the 2003 Act. Under Article 1, the contracting States are bound to secure to everyone within their jurisdiction the rights and freedoms set forth in the Convention. In the *Earl Spencer v. United Kingdom*[74] admissibility decision, the Commission relied upon this Article as support for the proposition that Convention rights imposed positive obligations upon the Contracting States, even in cases involving private parties. The failure to incorporate this Article could, therefore, be seen as excluding the potential for the Convention provisions to have horizontal effect in this jurisdiction, pursuant to the 2003 Act.

In challenging this assertion, the first point that must be made is that it is unclear whether the positive obligations that flow from the terms of the Convention stem entirely from Article 1 of the Convention. No reference is made to that provision by the Court in the seminal judgment of *X and Y v. The Netherlands*[75] where the positive obligations are said to stem from Article 8 *simpliciter*. Furthermore, as *van Dijk and van Hoof* point out, "one cannot deduce from Article 1 whether the contracting States are obliged to secure the rights and freedoms only in relation to public authorities or also in relation to other individuals"[76].

Moreover, the omission of Article 1 from the Convention rights incorporated by the Human Rights Act 1998 was not considered by Brooke L.J. speaking *obiter*, in *Douglas v. Hello*, to preclude horizontal effect on the basis that the 1998 Act imposed a duty on the courts to take account of decisions of the European Court of Human Rights[77].

The 2003 Act imposes a similar obligation on courts in this jurisdiction, pursuant to Section 4, to take judicial notice of the judgments of the Court and the Commission interpreting the Convention provisions. Thus, Brooke L.J.'s reasoning appears equally valid in relation to the Irish legislation.

Furthermore, it is objectionable, as matter of principle, to allow a two-stream system of common law rights to develop by excluding consideration of human rights altogether in cases between private parties while simultaneously developing the common law in line with the Convention provisions in cases involving 'organs of the state'.

The importance of Article 13.

There is also a practical reason for the courts extending the application of the interpretive obligation to actions between private parties *inter se*. This arises from the fact that, in contrast to the United Kingdom legislation, Article 13 was amongst the Convention provisions incorporated by the 2003 Act. According to this provision:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Although the implications of this inclusion are difficult to predict, *Collins and O'Reilly* point to the potential impact in the following terms:

> "Even if the Convention provisions do not have [horizontal] effect, the incorporation of Article 13 of the Convention into Irish law

71. This is to be contrasted with the provision under the corresponding provision of the 1998 UK Act which limits the interpretive obligation to primary legislation and subordinate legislation. See section 3(1) of the Human Rights Act 1998.
72. Civil Proceedings and the State, 2nd Ed.
73. *Ibid*, at para. 11-21
74. See note 35 above.
75. See note 46 above.
76. See note 29 above, at p. 17.
77. [2001] 2 WLR 992, at p.1017

> appears to contemplate an action in damages against the State arising from an error by the judiciary in applying its provisions."[78]

The doctrine of non-mutual defensive estoppel appears, as noted above, to apply in circumstances where the Convention right has been pleaded in full before the domestic courts. However, there seems to be no logical basis for invoking the doctrine in circumstances where the courts have refused to entertain a claim under the Convention on the basis that the 2003 Act is incapable of having horizontal effect, since the courts will merely have ruled upon the enforceability of the Section 3(1) duty rather than the merits of the plaintiff's claim under Article 8(1)[79].

As stated above, it appears that the courts can be held responsible for a breach of the European Convention on Human Rights[80]. In the event that the Irish Courts refused to apply Article 8(1) horizontally, as appears to be necessary as a matter of Convention law, that failure would leave an injured party without an effective remedy against the private party responsible for breaching their Convention rights.

In such circumstances, Article 13 comes into operation rendering the State liable for failure to provide an adequate remedy for those infringements. The basis of the claim will not be the original breach of the Convention rights *per se* but, rather, the action will be based on the failure to provide an effective remedy for that breach.

Conclusion of Part 1

In conclusion, as illustrated by the above analysis, there are cogent jurisprudential and pragmatic reasons to extend the operation of the 2003 Act to the actions of private parties *inter se*. In addition to ensuring observance of the State's obligations under the Convention, the indirect horizontal application of the 2003 Act seems apposite as a matter of statutory interpretation. The question that then arises relates to the appropriate mechanism the courts should employ to enforce the right to privacy under Irish law, a matter examined in part two of this article. Specifically, the authors will critically analyze developments in the United Kingdom following the commencement of the Human Rights Act, where the action for breach of confidence has been employed for the purposes of enforcing Article 8 of the Convention. We will also attempt to highlight the weaknesses in this approach and assess whether the Irish Constitution offers a more coherent alternative in this jurisdiction.●

*The authors wish to acknowledge the kind assistance of James O'Reilly SC and Anthony Moore BL in the writing of this article.

78. See note 72 above, at para. 11-18.
79. For example, the directly effective provisions of non-implemented directives may only be invoked against 'emanations of the state' pursuant to EC law. However, this limitation cannot be said to alter the content of directives themselves, rather, this represents a limitation on the enforceability of the directive. Indeed, if a party found that they could not enforce the directly effective provisions of a directive because that body was not 'an emanation of the state', the aggrieved party could still sue the Member State for loss suffered as a result of the non-implementation of the directive.
80. See note 49 above.

The Call to the Bar in Other Jurisdictions

Arran Dowling Hussey BL

A number of members of the Law Library have been called to the Bar in other jurisdictions.[1] In the main (although there are exceptions[2]), members are admitted in common law jurisdictions where English is one of the official languages. Some members will have qualified as a lawyer and then have decided to move to the Republic of Ireland, but most will first qualify here and then be called abroad. It is of course the case that many successful members of this Bar have never been called anywhere other than this state and a number of Irish barristers will not consider being called abroad until they are called to the Inner Bar. Moreover the vast majority of Irish barristers admitted abroad would likely never practice outside this state. Nonetheless, this route will be relevant and attractive to some regardless of the length of time they have practised.

Having passed the necessary examinations for the call in this state, the additional requirements to be called in another country are often low. However, certain common law jurisdictions set requirements that are impossible to meet without emigration and/ or naturalisation. The main other jurisdictions to which members belong require neither of these steps - the bar of Northern Ireland[3], various state bars in America[4], the bar of England and Wales[5] and state bars in Australia[6]. It is possible to remain at the Irish Bar and be called in one or more of the places just mentioned.

The United States of America is a popular but difficult jurisdiction for current members of the Irish bar to be called in. It is necessary to be called in a particular state in America. Current members of this Bar have been called in California, Massachusetts, New York and Washington DC and the rules and regulations that govern call are set by each individual Bar association. In short, regardless of the length of time at the Irish Bar, any prospective candidate is required to sit a number of examinations.

It is possible to prepare for the Californian and New York Bar exams in Dublin.[7] One of the preparatory course's advertising material states that these two states are the most favourable for overseas lawyers. California is said to be most attractive for those Irish barristers who do not have a law degree; New York, it is stated, is most suitable for Irish barristers who are law graduates. The preparatory lectures are held in Dublin but the exams must be sat in America.
It is somewhat more straightforward to be called to a state Bar association in Australia. There are no requirements for examinations when a member of the Irish Bar has been in practice more than five years. When a member has been in practice here for less than that period, they are required to take an examination in Australian Constitutional Law. This exam must be taken in Australia. The author is not aware of any Irish based preparation course for the Constitutional Law exam. Most Australian State associations, such as the Northern Territory, New South Wales, Queensland, Southern Australia, Tasmania, Victoria and Western Australia have called current members of the Law Library. The state Legal Practitioners Admission Board should be contacted in this regard, as it, rather than the bar association, is responsible for bar admission.[8]

Nearer to home, members may be called in Northern Ireland and England and Wales. It is necessary in England and Wales to be called as a member of one of the four English Inns of Court: Lincoln's Inn, Gray's Inn, Inner Temple or the Middle Temple.[9]

If you have been in practice in the Republic of Ireland for three years or more, it is a relatively pro-forma matter to be called in England and Wales. If you wish to be called in Northern Ireland, it is again easier if you have been in practice in this state for three years or more.

It is also possible to utilise European Union directive 98/5/EC.[10] However, to do so, a lawyer must move to one of the fifteen EU member states,[11] register with the law or Bar association and has to practice under the professional title used in their home state. When they appear in court, they must be attended by a lawyer from the country they have moved to. Three years on, an Irish barrister or solicitor can be admitted as a lawyer in the country they have moved to, without taking an aptitude test.

There are a number of other common law jurisdictions such as Canada[12], Hong Kong[13], Singapore[14], South Africa[15], and Jamaica[16] where English is an official language. There are currently no members of this bar who are members in any of these jurisdictions. Various matters exist which make it more difficult for an Irish barrister to be called in these jurisdictions. In Hong Kong, regardless of whether you have been admitted as a lawyer elsewhere in the world, you must complete a pupilage. In many Caribbean jurisdictions, difficulties arise. In the British Virgin Islands, it is likely that an Irish barrister of six months call would be admitted to that bar once the lawyer has moved to the BVI.[17] One must have Bermudan nationality to be admitted as a lawyer there.[18]

Members are advised to make their own inquiries and to note that the contents of this article should not be relied on.●

1. The author estimates that 198 members out of the 1357 listed in the Bar Council yearbook have been called in one or more jurisdictions other than the Republic of Ireland. This is 14.5% of the Bar.
2. One counsel listed in Bar yearbook practices in Dublin, London and Munich.
3. www.barlibrary.com
4. www.nysba.org; www.calbar.org
5. www.barcouncil.org.uk
6. www.qldbar.asn.au; www.vicbar.com.au
7. Courses organised in Dublin. 1. Mr Oliver J Connolly B.L Oconnolly@lawlibrary.ie and 2. Griffith College Dublin www.gcd.ie
8. www.lawlink.nsw.gov.au/lpab; www.supremecourt.act.gov.au
9. www.middletemple.org.uk
10. EU lawyers permitted to represent clients here. Kieron Wood. Sunday Business Post, January 18 2004.
11. The EU will increase later in the year to 25 member states. The Cypriot Ministry of Justice informed the author, in February 2004, that they would be in a position to deal with lawyers looking to utilise directive 98/5/EC.
12. www.cba.org
13. www.hkba.org
14. www.lawsoc.org.sg
15. www.sabar.co.za
16. Jamaican Bar Association, 78-80 Harbour Street, Kingston.
17. President British Virgin Islands Bar Association 6th.January 2004.
18. Bermuda Bar Association 6th January 2004.