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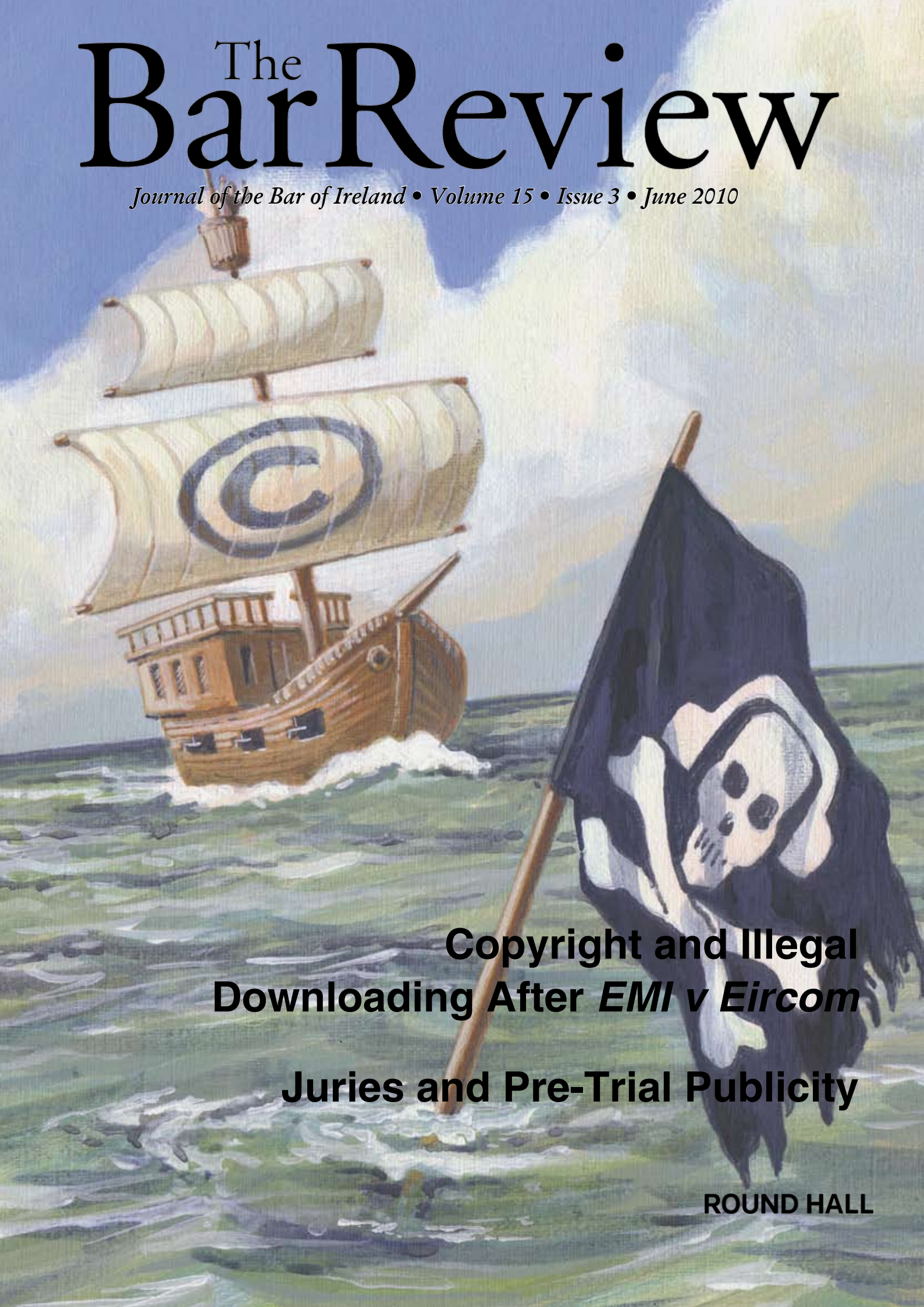

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Juries and Pre-Trial Publicity

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Cover Illustration: Brian Gallagher T: 01 4973389
E: bdgallagher@eircom.net W: www.bdgart.com
Typeset by Gough Typesetting Services, Dublin
shane@goughtypesetting.ie T: 01 8727305

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ROUND HALL THOMSON REUTERS

Editorial Correspondence to:

Eilis Brennan BL
The Editor
Bar Review
Law Library
Four Courts
Dublin 7
DX 813154
Telephone: 353-1-817 5505
Fax: 353-1-872 0455
E: eilisebrennan@eircom.net

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For all subscription queries contact:
Round Hall
Thomson Reuters (Professional)
Ireland Limited
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301
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For all advertising queries contact:
Sean Duffy,
Direct line: + 44 20 7393 7602
E: sean.duffy@thomsonreuters.com
Directories Unit. Sweet & Maxwell
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In Jurors we Trust: the Futility of Research into Pre-Trial Publicity

Nora Pat Stewart*

Introduction

The vexed issue of pre-trial publicity, its potential to prejudice juries, and as a consequence interfere with the constitutional right to fair trial for an accused, has exercised the Irish courts in recent years. Judicial pronouncement from the Supreme Court in 2008 in *Rattigan v. DPP,*[1] which was an appeal from an order of the High Court refusing an injunction against the DPP proceeding with a murder prosecution, highlighted the dearth of empirical evidence for this jurisdiction on pre-trial publicity.[2]

The issue with pre-trial publicity is not the level of media coverage a case may attract, but its effect on jurors.[3]The question is how courts can assess when publicity is so prejudicial that it merits prohibition of a trial on the grounds of interfering with the individual's right to a fair trial.[4]In *Rattigan* Hardiman J. noted that while freedom of expression gave the media, among others, the right to publish material that is 'wrongheaded, ignorant, biased, prejudiced or simply wrong',[5]it did not extend to material which states, or implies, that a defendant in a criminal case is guilty of the offence with which he is charged. The basis for this, he held, was that it would interfere with the right of every citizen to a fair trial, 'before a jury unaffected by loud, unreasoned assertions of the defendant's guilt'.[6]

Hardiman J. also held in *Rattigan* that he did not accept many of the assumptions about pre-trial publicity. For example he did not accept that jurors would not remember publications, nor read them in the first place. Nor did he accept the assumption that juries would be able to comply with directions. There was considerable need for serious research held Hardiman J., and to 'cease relying on guess work or vague impression'.[7]

Unlike other jurisdictions, notably England and Wales, where an accused who seeks to stay his trial must do so by way of an abuse of process application at the start of a trial itself,[8]the procedure in this jurisdiction is that an accused must apply by way of judicial review in the High Court for a prohibition of his trial.[9]The burden of proof is on the applicant who must prove that there is a real, serious and unavoidable risk he will not receive a fair trial.

The test to this effect was set down over two seminal cases *D v DPP* [10] and *Z v. DPP* [11] in 1994 by the Supreme Court. In *D* the Court first laid down the principle that there must be a 'real and serious risk' of unfair trial before the courts would prohibit a trial.[12]In *Z* Finlay CJ refined the test further by adding that the 'real and serious risk' must be unavoidable, that no warning or direction from the trial judge could avert the risk of an unfair trial.[13]To date this test has proved an insurmountable hurdle for those seeking to prohibit their trial on grounds of pre-trial publicity. No applicant has succeeded in establishing the judicially-required threshold.[14]Two trials have been adjourned, though not permanently stayed, on these grounds,[15]but the courts have indicated that should the right circumstances present, they would be prepared to prohibit a trial,.[16] a view endorsed by Hardiman J. in *Rattigan.*[17]

Whether this is a rhetorical commitment remains unclear however, because in the seventeen years since the test was first set down it would appear that the courts, despite engaging on occasion in risk assessment,[18]have not given applicants a realistic indication of where the threshold might lie in order to obtain a prohibition of trial on pre-trial publicity grounds. Although the courts have acknowledged that adverse publicity can present a risk to the guarantee of fair trial,[19]the approach of the judiciary has been to refuse such applications on the basis of proclaiming utmost faith in both the ability of trial judges to give appropriate direction to juries, and their confidence in jurors' abilities to undertake this important civic duty.[20]

Two questions emerge in any assessment of pre-trial

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* LLB, LLM (Public Law) candidate, NUI Galway. My thanks to Charles O'Mahony, Law Faculty NUIG and Dr Anthony White for their assistance. Any errors or omissions are the author's own.

1 [2008] 4 I.R. 639.
2 *Ibid per* Hardiman J. at 650.
3 *Montgomery v. HM Advocate* [2003] 1 AC 641 at 466.
4 [2008] 4 I.R. 639 per Geoghegan J.
5 *Ibid* at 648.
6 *Ibid.* at 649
7 [2008] 4 I.R. 639 at 650. A similar view is expressed in Coonan G. and Foley B. *The Judges Charge in Criminal Trials* (Round Hall, Dublin 2008) at p.512; O'Malley, *Op cit* at p.630.
8 *R. v. Derby Justices ex p. Brookes* [1985] 80 C.A.R. 164 at 168; *R. v. Horseferry Road Magistrates Court, ex p. Bennett* [1994] A.C. 42 at 116.
9 *State (O'Connell) v. Fawsitt* [1986] I.R. 362.
10 [1994] 2 I.R. 465
11 [1994] 2 I.R. 476
12 [1994] 2 I.R. 465 *per* Finlay CJ
13 [1994] 2 I.R. 476 at 507.
14 O'Malley T. *The Criminal Process* (Round Hall, Dublin 2009) at p.611.
15 *DPP v. Haugh No. 2* [2001] 1 I.R. 162; *Zoe Developments* (Unrep. High Court, Geoghegan J. 3 March 1999).
16 *DPP v. Nevin* [2003] 3 I.R. 321 at 334 *per* Geoghegan J.
17 [2008] 4 I.R. 639 at 645, 646.
18 *Redmond v. DPP* [2002] 4 I.R. 133; *Rattigan v. DPP* [2008] 4 I.R. 639 *per* Geoghegan J.
19 *Z v. DPP* [1994] 2 I.R. 476; Redmond *v. DPP* [2000] 4 I.R. 135; Rattigan *v. DPP* [2008] 4 I.R. 639.
20 *Z v. DPP* [1994] 2 I.R. 476 at 496 *per* Hamilton P (High Court); *Kelly v. O'Neill and Brady* [2000] 1 I.R. 354 *per* Denham J.

publicity in this jurisdiction. First since research into jury deliberation is precluded by jury secrecy, is it actually possible to assess risk of an unfair trial? Secondly, is it ever possible to know if juror prejudice survives judicial warning?

It is submitted that empirical research carried out here in Ireland will not provide answers to what is essentially an intractable problem. A number of reasons support this contention including technological convergence and the way media is consumed in the twenty first century. This not only makes the task of assessing pre-trial publicity virtually impossible, it also renders the current approach of the judiciary in assessment of the risk outdated. Second, despite the considerable body of existing international research on pre-trial publicity, the methods of assessment employed are questionable and reveal contradictory results. Finally, since researchers are attempting to glean evidence based on nebulous concepts such as prejudice and impartiality, findings can never be conclusively relied upon. Consequently the only way forward is through continuing support for jurors in undertaking their role.

Rights in Conflict

Constitutional and ECHR rights

The Constitution and the European Convention on Human Rights' guarantee the right to a fair trial[21]and the courts have consistently taken an unequivocal stance on the importance of protecting that right over the years.[22]Article 38.5 states that the right to a fair trial for a person charged with a criminal offence extends to a jury trial and across common law jurisdictions jurors are accorded the presumption of impartiality.[23]

The Constitution also guarantees open justice.[24]The Strasbourg Court has held that a public hearing is a fundamental element of a trial.[25]Within the concept of open justice lies a role for the media in reporting court proceedings.[26]In *Irish Times v. Ireland*[27]the Supreme Court acknowledged the importance of the role of the media in informing the public of court proceedings, but also noted that the right was not absolute. [28]Allied to the constitutional guarantee of open justice, is the principle of freedom of expression set out under both Article 40.6.1 of the Constitution and Article 10 of the Convention. Freedom of expression extends beyond an individual's right, in that it incorporates the publics' right to receive and the media's right to impart information. In both provisions this freedom is qualified, subject to limitations and the democratic rights of others and so is constrained by laws of defamation and contempt.

There is no doubt as to how Irish courts prioritise rights. In *D* a hierarchy of rights was recognised, with an individual's right to fair trial considered superior to the community's right to prosecute.[29]The Supreme Court has also held that fair procedures under Article 40.3 incorporated the requirement of trial by jury unprejudiced by pre-trial publicity.[30]When a criminal offence is committed and media attention is drawn to the case, this conflict between rights is brought into sharp relief. Pre-trial publicity can vary in scope and range, from saturation coverage to a sustained media campaign waged against the alleged accused, to potentially prejudicial material. In *Rattigan* the types of publication that tend to prejudice the right to a fair trial were explored by Hardiman J.[31]

Contemporary Approach of Judiciary to Pre-Trial Publicity

The 'real, serious and unavoidable risk' test for prohibition of trial has been consistently applied by the courts since first framed in *D* and *Z*. The approach of the judiciary has been to express confidence in the ability of trial judges to direct the trial when applicants have sought prohibition of their trial on pre-trial publicity grounds. That direction extends to reminding jurors of their oath,[32]warning them to disregard extraneous material and of a jury's duty to return a verdict based only on admissible evidence.[33]

It appears that the superior courts have been prepared to accept that whatever warnings and directions trial judges feel are necessary to obviate potential prejudices, are appropriate. Whether direction is given at the outset of a trial,[34]during a trial[35]or throughout a trial,[36]all such approaches have received approval. Also the need to move beyond the formulaic, by varying warnings in accordance with the type of publication and the specific facts of a particular case has been recognised.[37]The courts have been vocal too in

21 Article 38 Constitution of Ireland 1937; Article 6.1 ECHR states that a trial should be by an independent and impartial tribunal, fair and public tribunal.

22 *O'Callaghan v. Attorney General* [1993] 2 I.R. 17 *per* O'Flaherty J.; *Z v. DPP* [1994] 2 I.R. 476 endorsed in *Kelly v. O'Neill* [2000] 1 I.R. 354 at 367 *per* Denham J; 'In due course of law' has been interpreted by the courts as including the right to an independent, impartial and unbiased tribunal, *Kelly v. O'Neill* [2000] 1 I.R. 354. *Irish Times v Ireland*, [1998] I.R. 359 at 409 *per* Denham J., Article 40.3 included the constitutional right to both a fair trial and to fair procedures.

23 *Rattigan v. DPP* [2008] 4 I.R. 639 at 651 *per* Hardiman J., presumption of innocence is not a procedural rule, but a fundamental principle of substantive law. *Pullar v. United Kingdom* (1996) E.H.H.R. 391 at 403 para [32] and 409.

24 Article 34.1 *In re R* [1989] I.R. 126 at 134 *per* Walsh J.

25 *Reipan v Austria* (2000) E.H.H.R. 573 at [27].

26 *Irish Times v. Ireland* [1998] I.R. 359 at 396 *per* O'Flaherty J.

27 [1998] I.R.59.

28 *Ibid. per* Hamilton CJ at 372 in exceptional cases the trial judge had discretion to impose a ban on contemporary reporting to protect the right to fair trial of an accused. Endorsed by Clarke J. in *Irish Independent v. Anderson* [2006] 3 I.R. 341 at 349. See also Barendt E. *Freedom of Speech* (Oxford, 2ed. 2007) at p. 332.

29 *Ibid* at 474 *per* Denham J., approved by Finlay CJ in *Z v. DPP* [1994] 2 I.R. 476 at 507.

30 *D v. DPP* [1994] 2 I.R. 465 *per* Denham J; *Irish Times v. Ireland* [1998] 1 I.R. 359 at 400 *per* Denham J.

31 [2008] 4 I.R. 639 at 649.

32 *D v. DPP* [1994] 2 I.R. 465 at 472 per Blayney J; *DPP v. Laide and Ryan* [2005] I I.R. 209 at 220.

33 *D v. DPP* [1994] 2 I.R. 465; *Z v DPP* [1994] 2 I.R. 476 at 496 per Hamilton P*; DPP v. Nevin* [2003] 3 I.R. 321; *DPP v. Laide and Ryan* [2005] 1 I.R. 209.

34 Section 15 (3) of the Jury's Act 1976. In *DPP v. Haugh* No 1[2000] 1 I.R. 184 *per* Carney J.,approved by Kearns J. in *Redmond v. DPP* [2002] 4 I.R. 135.

35 *DPP v. Laide and Ryan* [2005] 1 I.R. 209 at 220.

36 *D. v. DPP* [1994] 2 I.R. 465 *per* Blayney J; *Rattigan v. DPP* [2008] 4 I.R. 639.

37 *Z v. DPP* [1994] 2 I.R. 476; *People v. Nevin* [2003] 3 I.R. 321. *DPP v. Laide and Ryan* [2005] 1 I.R. 209 at 220. Also *R.v. Hamza (Abu)* [2006] E.W.C.A. Crim. 2918 at [99].

espousing faith in jurors' abilities to carry out their duties assiduously.[38]

The idea of trial by media is inherently undesirable. To tolerate publication of incriminating information is to undermine evidential rules, yet it is widely accepted that if prohibition of trial were easily obtainable on these grounds, many serious offences might never come to trial and public confidence in the criminal justice system would be severely undermined.[39]Despite the circumstances (the '*X*' case) that gave rise to the prosecution on charges of unlawful carnal knowledge and sexual assault of the applicant in *Z,* a case that attracted more publicity than any other in the history of the state, [40]the application to prohibit the trial failed as the court still felt that a fair trial could be obtained.

Rattigan is the most recent case where pre-trial publicity was assessed by the Supreme Court. Geoghegan J. in his judgment observed that it was impossible to avoid some risk of prejudice since every eventuality could not be catered for with a panel of jurors.[41]He also placed considerable emphasis on the 'fade factor', holding that when a reasonable amount of time had lapsed between publication and trial, the risk of prejudice would decrease correspondingly.[42]Furthermore he noted that the seriousness of the offence could be relevant in that a serious crime would usually entail a longer trial and so give jurors time to become accustomed to their role.[43]In the instant case Geoghegan J. held the presence of strong forensic evidence militated against the grant of prohibition,[44]and that since there was no evidence that jurors do not exercise their function properly with the required independence of mind, he would dismiss the application. Finally he commented that prohibition of a trial by a court could not be adopted simply to punish the media.[45]

Despite the lack of prohibitions granted to date, the media are still susceptible to being found in contempt of court.[46]Courts have held that it is possible to find media organisations in contempt of court, yet not grant prohibition of trial on pre-trial publicity grounds in the same case.[47]Interestingly in *Rattigan* the Court urged the DPP to take a more pro-active role in contempt of court proceedings where adverse publicity was concerned.[48]

In the event of conviction the Court of Criminal Appeal has recognised publicity as a mitigating factor in sentencing.[49]Most recently the murder trial *DPP v. Lillis*[50]attracted considerable publicity, so much so that the trial judge specifically took both past and likely future media attention on the convicted into account as a mitigating factor, and reduced the sentence from ten to seven years.[51]Unsurprisingly this particular mitigating factor for sentence reduction was not one the media went to any great length to report.

Judicial reception of pre-trial publicity in England and Wales

The courts in England and Wales have shown reluctance in the past to admit that pre-trial publicity could create such a risk that a trial would be abandoned, or a conviction quashed, on these grounds.[52] Historically they have relied on contempt of court law to ensure media restraint and discipline. Since the 1990s it has been judicially accepted that on occasion pre-trial publicity can render a trial unfair.[53]In *R. v. McCann*,[54]the Court of Appeal quashed the conviction of alleged IRA terrorists on the basis that the trial judge failed to discharge the jury following a wave of publicity just as the jury were about to retire to deliberate.[55]

In the 1994 murder trial *R. v. Taylor*[56]the conviction was quashed on grounds of sensational publicity. While *McCann* was applied in *Taylor,* [57]arguably it is distinguishable on its facts, since the publicity had emanated from authoritative figures. The *Taylor* case is cited by commentators as being of far greater significance in terms of pre-trial publicity,[58]as the conviction was quashed despite repeated warnings from the trial judge to the jury to ignore the publicity. Also the Court of Appeal had refused to permit a retrial despite the fact the trial had taken place eleven months earlier. One of the rare cases where the trial judge, opposed to an appeal judge, accepted that the publicity was such that a fair trial could not be obtained was in the case of the detectives who had investigated the Birmingham Six.[59]

Risk assessment

Towards the latter end of the 1990s in *Attorney General v. MGN,* [60]Schiemann LJ undertook a comprehensive

38 *Z v DPP* [1994] 2 I.R. 476 at 468 *per* Finlay CJ. *People v. Nevin* [2003] 3 I.R. 321; *DPP v. Laide and Ryan* [2005] 1 I.R. 209. Also, *R. v. Kray* [1969] 53 Cr App R 412 at 415; *R. v. West* [1996] 2 Cr App R 374 at 386. *Ex p. The Telegraph plc* [1993] 1 W.L.R. 980 at 987. In *Rattigan* Hardiman J. threw doubt on the faith of judges to remain unaffected by publicity at 650.

39 *Z v. DPP* [1994] 2 I.R.476 *per* Finlay CJ.

40 Twelve volumes of publicity were presented to the High Court by the applicant in *Z,* [1994] 2 I.R. 476 at 489. For clear background to *Z* see O'Malley, *Op cit* at p. 613.

41 [2008] 4 I.R. 639 at 659, 667.

42 *Ibid.* at 658

43 *Ibid.* at 659

44 *Ibid.* at 667

45 *Ibid.* at 667

46 The difference between contempt of court proceedings and seeking to stay a trial on grounds of pre-trial publicity was set out in *R. v. Glennon* [1992] 173 C.L.R. 592 at 605, referred to in *Rattigan per* Geoghegan J at 665,666. It is irrelevant whether the material does in fact prejudice the jury or court: *Worm v. Austria* (1997) 25 E.H.H. R 454 at [54].

47 *R v. Glennon* [1992] 173 C.L.R. 592 re *Hinch v. A-G (Victoria)* (1987) 164 C.L.R. 15 at [37] - [40]. In *D v. DPP* [1994] 2 I.R. 465 the trial judge discharged the jury yet summoned editors to court in connection with false and misleading reporting that resulted in a financial penalty. See also Barendt *Op cit* at p. 333.

48 [2008] 4 I.R. 639 *per* Geoghegan J. at 667.

49 *DPP v. Payne* (Unreported, Court of Criminal Appeal, July 27 1999).

50 *DPP v. Lillis,* Irish Times, 6 February 2010.

51 *Ibid.*

52 *R v. Malik* (1968) 1 WLR 353 CA; *R v. Savundranayagan* [1968] 1 WLR 1761 CA

53 Lord Taylor CJ "Justice in the Media Age" Speech to the Commonwealth Judges and Magistrates Association, April 15, 1995.

54 [1991] 92 Cr App Rep 239 CA.

55 *Ibid.* at 253 *per* Beldam LJ.

56 [1994] 98 C.A.R. 361

57 *Ibid.* at 369.

58 Levi, M., and Corker, D."Pre-trial publicity and its treatment in the English Courts" (1996) *Criminal Law Review* 622 -632.

59 *R. v. Reade and Others*, The Times 16 October 1993.

60 [1997] 1 All E.R. 456.

assessment of the criteria he thought ought to be considered when evaluating the risk attached to pre-trial publicity. He premised this test on the likely effects and residual impact of publicity on the mind of the notional juror.[61] Included in the factors he set out were, the likelihood of the publication coming to the attention of the potential juror, whether the publication circulated in the area from which the juror is drawn, the circulation count and the prominence of the article. Schiemann LJ held that the court must also consider the length of time between publication and trial date, the focussing effect of the juror listening over a prolonged period to evidence, and the likely effect of the judge's directions. This test has since been cited with approval.[62]

Criticisms of risk assessment

Schiemann LJ's test is open to two main criticisms. First, seeking to rely on such criteria is outdated as it ignores the reality of how news is consumed today. At the turn of the twenty first century, digitalisation led to technological convergence and this, together with developments in the internet revolutionised the communications industry. Consequently media consumption has changed dramatically since Schiemann LJ set out his risk assessment test in *MGN* back in 1997. Increasingly people access media on-line and there has been an explosion in participation in social networking and blogging sites. According to OCED, the fastest growing item in household consumption is communications goods and services.[63] In reality therefore, jurors have instant access to vast amounts of information, both regulated and unregulated, from increasingly smaller and more portable devices. Further, that information no longer becomes old news, it remains on-line and can be easily accessed at any time, even years later.[64]

The effect of these trends is already in evidence. There is a growing body of case law involving accusations of jurors undertaking independent research.[65] In an appeal against a murder conviction which was ultimately unsuccessful, the Court of Criminal Appeal in *DPP v. Cunningham*[66] noted that during the trial, attention had been drawn to the existence of a website containing information and commentary on the case. This in turn had been the subject of radio discussion and newspaper coverage. The trial judge had refused to discharge the jury, accepting in good faith that the jury had not consulted the website either prior to his instruction, nor would they, he held, following judicial warning. In Australia, two states have taken a punitive approach to the issue and enacted laws making it an offence for jurors to carry out independent research.[67]In light of the afore-mentioned changes in the communications industry, this approach seems a futile exercise.

The second criticism of Schiemann LJ's risk assessment exercise in *MGN* is that despite his engagement in an exercise to assess the effect of publicity on the mind of the notional juror, it still does not provide any answer to the question which lies at the heart of the pre-trial publicity issue, which is, how to know whether prejudice survives judicial direction and warning. A similar point could be made in relation to *Rattigan*, despite the comprehensive treatment of pre-trial publicity at the hands of both Hardiman J. and Geoghegan J., the ruling does not develop the law on the issue any further than *Z* did seventeen years ago.

Calls for Research

Trusting a jury to forget publicity but to remember all that they hear in court is something of a leap of faith.[68] Indeed as far back as 1985, scepticism had been expressed about the validity of the assumptions surrounding jury reasoning and fairness.[69]Geoghegan J. in *Rattigan* also expressed reservations in this regard. While he acknowledged the assumption that trial judges would give appropriate directions and any failure to do so would be corrected by the Court of Criminal Appeal,[70]in his view, the range of delayed sex abuse cases coming before the courts had led to an emphasis on the issue of directions and appropriate warnings. Geoghegan J. suggested that there was no such thing as a potentially unfair trial which could be made fair by appropriate warnings. If it could be, he reasoned, it was not unfair in the first place.[71]

Coonan and Foley also contend that in the absence of evidence, judicial blind faith in jurors fully accepting warnings and directions is hard to accept.[72] Therefore the call by Hardiman J. in *Rattigan* to desist from relying on 'guess work or vague impressions'[73] and engage in research in pre-trial publicity is not without merit. However, it does not take account of the fact that there is a substantial body of literature from other jurisdictions already in existence.

Much of the available research emanates from the United States and it has been suggested that since criminal jury systems vary significantly across common law jurisdictions, this literature is not applicable.[74]However since this research

61 *Ibid.* at 461[a]-[c]:

62 *Montgomery v. HM Advocate* [2003] 1 AC 641 at 665.

63 *Convergence and Next Generation Networks*, (OECD 2008) at p. 6 Available on www.oecd.org/dataoecd/25/11/761101.pdf

64 This also renders redundant fears concerning s.58 Civil Law (Miscellaneous Provisions) Act 2008 which allows jurors to disperse during deliberation.

65 *R v. K* [2003] 59 NSW LR 431. The accused appealed his murder conviction on grounds that the verdict was a miscarriage of justice when it came to light information had been sourced from the internet. The Chief Justice allowed the appeal and warned the jurors to confine their decisions to the evidence heard in court. Also, *R. v. Skaff* [2004] 60 NSW LR 82.

66 [2007] I.E.C.C.A. 49.

67 New South Wales s.68 (c) Jury Amendment Act 2004 makes it an offence for jurors to conduct independent research. Breach will incur a $5.550 fine and/or 2 years imprisonment. In Queensland, s.69A Jury Act1995 makes it an offence to conduct independent research including an internet investigation.

68 Barendt *Op cit.* at p. 324.

69 *Attorney General for New South Wales v. John Fairfax and Sons Ltd* 6 N.S.W. L. R. 695.

70 [2008] 4 I.R. 639 at 656.

71 *Ibid.* at 655; Also *per* Hardiman J. at 651.

72 Coonan and Foley, *Op cit* at p.512.

73 [2008] 4 I.R. 639 at 650.

74 Appeals against convictions have been granted on grounds of violation of the 14th Amendment where there has been significant prejudicial publicity: *Sheppard v. Maxwell* 384 US 333 (1966). Unlike Ireland, which expressly disallows any form of questioning of the jury: *DPP v Haugh (No 2)* [2000] 1 I.R. 184, the *voir dire* is a tool used to achieve the constitutional right to an impartial jury in the USA and has been held as preferable to publication bans which are incompatible with the 1st Amendment; *Nebraska Press Association v. Stuart* 427 US 539, 563-5 919760 *per* Burger CJ. Change of trial

is multidisciplinary and interdisciplinary, as such, the findings should be of general application. Yet the question remains as to whether the available data is really of any value.

Methods of research and futility of findings

The secrecy of jury deliberations means that research on juries must encompass different approaches. The modern roots of empirical jury research can be traced to the late 1950s, notably the University of Chicago's *Chicago Jury Project* which resulted in over 70 publications. The best known of these was *The American Jury* by Kalven & Zeisel whose methodology was to study questionnaires completed by trial judges who indicated their satisfaction with the jury's verdict.[75] The limitation in interviewing other professionals involved in the trial process however is that it is questionable to assume that jurors ought to decide cases in ways lawyers decide them.[76]Another form of research popularly employed is that of mock and shadow juries but these modes of research have come in for much criticism.[77] Findings from both mock and shadow jury projects have considerable shortcomings claim critics, in that they miss the vital elements of stress and responsibility attached to judging real life issues.[78]

A major review of research on pre-trial publicity dating from the 1960s was undertaken in 1994.[79] Included in this was a study involving a survey of 130 registered voters in relation to publicity surrounding a pending murder case. Results concluded that those exposed to publicity admitted that they were more likely to describe their feelings as pro-prosecution. However while they felt that the defendant was less likely to receive a fair trial, they also believed that they personally could hear the evidence with an open mind.[80] This finding exposes the inherent contradiction of pre-trial publicity research: survey participants acknowledged that pre-trial publicity is associated with prejudgment of a defendant, yet are convinced that they themselves would be impartial jurors.

Another finding cited in this review concluded that judicial instruction did little to 'cure' the effect of prejudicial material.[81] This is consistent with research findings from the general social psychology field that show that in drawing attention to an issue hoped to be forgotten, the opposite effect may be achieved. Yet this is at odds with judicially-held faith that jurors will put out of their minds any prejudicial material as directed by the trial judge.[82] Research has led to the belief among legal schools and behavioural scientists that a panel of jurors will act as on a check on any individual bias, but other researchers commonly conclude that the usual effect of group discussion is to polarise bias.[83]

More recently, the New Zealand Law Commission commissioned a research project involving close analysis of 48 trials, including interviews with many of the jurors sitting on those cases. The results concluded that publicity before and during the trial had little effect on jurors.[84]

So published research on the jury presents a mixed picture and it brings us no closer to finding out whether jury prejudice will survive judicial warning. The question is therefore whether it is feasible for applicants to rely on any such research, when seeking prohibition of a trial on pre-trial publicity grounds.[85]

Nebulous concepts

The American Bar Association in 1978 suggested that empirical studies evidence was an inadequate understanding of the way pre-trial publicity influenced the thought process of prospective jurors.[86] This issue was later explored by Moran and Cutler who contend that since the law is disinterested in general rules and concentrates instead on specific cases, from a legal perspective it is impossible to operate a uniform methodology for the determination of prejudice.[87] The United States Supreme Court has found that mere knowledge, mere abhorrence of an offence or existence of a pre-conceived notion is insufficient to ensure prejudice. Prejudice in this context was defined as 'the ability to serve as a fair and impartial juror' but impartiality is not a total concept,[88] it is a state of mind.[89]

The concept of juror impartiality was the focus of ECHR deliberation in *Pullar v. United Kingdom*, [90]where a conviction decided upon by a Scottish jury, was appealed on grounds that one of the jurors was an employee of a key prosecution witness. The Court's approach to examining impartiality was framed by two aspects. First the court presumed that individual jury members are impartial unless there is evidence to the contrary, therefore the collective jury is subjectively impartial. Secondly, the Court held that the jury itself must be objectively impartial, in that it must offer 'sufficient' guarantees and the exclusion of 'legitimate doubt' in that

venue is another option employed in the USA, *Rubenstein v. The State of Texas* [1963]; *US v. McVeigh* (1996), though rejected by the Irish judiciary on grounds of expense, inconvenience and the size of the jurisdiction; *Kelly v. O'Neill* [2001] 1 I.R. 354 at 375 *per* Keane J.

75 Derbyshire P. Maughan A. Stewart A. (2000) "What can the English Legal system can learn from jury research published up to 2001?" at p.20.

76 *Ibid.* at p. 20

77 See Hans V. & Doob A. N. S "Section 12 of the Canada Evidence Act and the deliberation of simulated juries" (1976) 18 *Criminal Law Quarterly* 231; TM Honess *et al* in "Empirical and legal perspectives on the impact of pre-trial publicity" [2002] *Criminal Law Review* 719 at 721-2.; Matsch J. in *US v. McVeigh* (1996) at p.1475.

78 Derbyshire et al*., Op. cit.* at p.10-11

79 Kerr, "The Effects of Pre-trial Publicity on Jurors" (1994-1995) 78 *Judicature* 120.

80 *Ibid.* at 121-122.

81 Kerr, *Op. cit* at 127.

82 See *fn.44*

83 Kerr, *Op. cit* at 127.

84 Young, Cameron & Tinsley, *Juries in Criminal Trials*: Part Two, Vol.1 Chapter 9, para [287], (New Zealand Law Commission, preliminary paper 37,Vol 2 1999); See also Young, "Summing up to juries in criminal cases –What jury research says about current rules and practice" **(**2003) *Criminal Law Review* 665 at 689.

85 Different jurors draw different conclusions about the right verdict on the basis of exactly the same evidence according to Ellsworth, PC 'Some steps between attitude and verdicts'; Key attitudes change not only with geography but with the passage of time or when a new case activates new issues contend Saks and Hastie in Hastie, R. (Ed), *Inside the Juror*, cited by Derbyshire et al. *Op. cit.* at p.12.

86 Moran G. and Cutler B. "The Prejudicial Impact of Pre-trial Publicity" (1995) 52 *Guild Practitioner* 1 at 2.

87 *Ibid.*

88 *Ibid.*

89 *US v. Wade* 1936 US Law Reports 295 123- 151 *per* Hughes J.

90 (1996) 22 E.H.H.R. 391.

respect.[91] The Strasbourg Court has not set out a precise test, but what is evident is that impartiality is assessed on the basis that regard must be had both to the facts of the case, and the availability of safeguards such as judicial directions and the jury oath. Therefore, account is taken of the fact that certainty is not achievable and any 'guarantee' of impartiality is premised on fact and degree in an instant case.[92]

Whether prejudice exists also depends upon specific circumstances. However findings by a trial judge in a particular case might not necessarily coincide with findings of social scientists or psychologists on the notion of prejudice towards an issue. In other words, both prejudice and impartiality are incapable of being defined by formula and so the likely effect of judicial warnings or directions given to a jury will, in most cases, be the critical issue. Therefore it is the trial judge who must ultimately decide whether pre-trial publicity has prejudiced jurors.[93] Hence the default position that common law jurisdictions are committed to, comes back to the notion of trust.

The Way Forward

The judicial approach in *R. v. Hamza,*[94] where the appellant had been convicted of soliciting persons to commit murder abroad, together with the House of Lords ruling in *R. v. Coutts,*[95]an appeal against a murder conviction, reflect a realistic contemporary approach to pre-trial publicity. In *Hamza,* the Court of Appeal held that risk of jury prejudice from media reporting was a 'growth area'[96] That while the jury might disregard directions, this did not displace the judicial policy of trust in the jury,[97] rather it leads to emphasising the importance of taking steps to decrease the impact of likely prejudice on jury decision-making.[98]

The *Hamza* case had attracted more than 600 pages of adverse press coverage, yet it was still felt that a fair trial could be obtained. Strenuous efforts had been made by the trial court to diminish the potential prejudice, by way of detailed directions and by adjourning the trial once the 7/7 London bombing occurred. So, while the Court recognised that risk of prejudice could not be wholly eliminated, this did not mean that a fair trial was impossible.[99] In *Coutts,* the Law Lords recognised that a jury will not always do as it is told.[100]

Conclusion

The entire system of trial by jury is based on the assumption that the jury will follow the instructions they receive from the trial judge[101] Even when risk assessment is carried out, issues such as impartiality or prejudice of a jury cannot be reliably determined. In *DPP v. Dundon*[102], the Court held that the very survival of the jury system depends on the assumption that jurors will heed judicial warnings.[103] The expectation of both society and the trial courts is that juries will deliver a verdict based only on admissible evidence. Belief in this expectation must come down to trust, because quite simply, there is no other option. ■

91 *Ibid.* at [30] - [40]
92 *Ibid* at [37]-[41].
93 Moran G and Cutler B, *Op cit.* at 3.
94 [2006] EWCA Crim 2918.
95 [2006] UKHL 39
96 [2006] EWCA Crim 2918 at [89]
97 *Ibid.* at [92]
98 *Ibid.* at [92]-[99]
99 *Ibid.* at [92]-[99]
100 [2006] UKHL 39
101 *Montgomery v. HM Advocate* [2003] 1 A.C. 641.
102 [2007] I.E.C.C.A 64
103 *Ibid.* at [48].

Defamation Reform and the 2009 Act: Part II

Hugh I. Mohan SC and Mark William Murphy BL

Introduction

Part I of this Article examined some of the key elements of defamation reform contained in the recently commenced[1] Defamation Act 2009, and began looking at the defences - old and new - available under the new regime. It left the most significant of those defences for discussion in this part of the article. Part II addresses the defence of fair and reasonable publication on a matter of public interest, as well as a number of miscellaneous defences and the question of submissions and directions to the jury on the matter of damages.

Fair and Reasonable Publication on a Matter of Public Interest

Without question, the defence of 'fair and reasonable publication' is the most important product of the Defamation Act 2009[2]. Designed to facilitate public discussion where there is a public benefit in such discussion, it enshrines in statute a defence akin to - though not identical to - that developed by the House of Lords in the seminal case of *Reynolds v Times Newspapers*[3].

Reynolds had already been gradually incorporated into Irish law to some degree through a number of decisions of the Superior Courts. In *Hunter v Duckworth* [2003] IEHC 81, Ó Caoimh J considered that:

> the flexible approach adopted in *Reynolds v. Times Newspapers Ltd.* is the best way in which the Courts, in the absence of legislative reform in this area, can protect the constitutional rights of parties coming before the Court where the rights such as those at issue in these proceedings are at issue.

Similarly, in *Leech v Independent Newspapers (Ireland) Ltd*[4], Charleton J explicitly adopted the *Reynolds/Jameel*[5] defence into Irish law, holding that a public interest defence can arise where the subject matter of a publication, "considered as a whole, was a matter of public interest" and that the question as to "whether a newspaper, or a television channel or radio channel, on the evidence behaved fairly and responsibly in gathering and publishing the information" would potentially "take into account some of the tests set out by Lord Nicholls in the *Reynolds* case … [i]n particular no. 8, whether the article contained the gist of the plaintiff's side of the story, and whether the plaintiff was contacted for comment". Charleton J and held that a publisher seeking to invoke the public interest defence had to demonstrate (1) that the subject-matter of the publication was a matter of public interest; and (2) that (s)he acted as responsibly in accordance with proper standards of journalism.

In order to rely on the new defence of fair and reasonable publication, a defendant must establish that the statement was published:

1. in good faith;
2. in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit;
3. in a manner and to an extent which did not exceed what was reasonably sufficient, in all the circumstances.

There follows a circular criterion provision in s.26(1)(c) which requires the defendant to prove that "in all of the circumstances of the case, it was fair and reasonable to publish the statement", which is then fleshed out in s.26(2) which lists 10 factors which - insofar as they are pertinent - shall be taken into account by the court[6] in assessing whether it was fair and reasonable to publish the statement. The 10 *Reynolds*-like factors are as follows:

(a) the extent to which the statement concerned refers to the performance by the person of his or her public functions;
(b) the seriousness of any allegations made in the statement;
(c) the context and content (including the language used) of the statement;
(d) the extent to which the statement drew a distinction between suspicions, allegations and facts;
(e) the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication;
(f) in the case of a statement published in a periodical by a person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsman and determinations of the Press Council;
(g) in the case of a statement published in a periodical by a person who, at the time of publication, was not a member of the Press Council, the extent to

1 Defamation Act 2009 (Commencement) Order, S.I. 517 of 2009
2 S.26(1) Defamation Act 2009.
3 *Reynolds v Times Newspapers* [1999] 4 All ER 609.
4 *Leech v Independent Newspapers (Ireland) Ltd* [2007] IEHC 223
5 *Jameel v Wall Street Journal* [2006] 3 WLR 642
6 I.e. the jury, where the High Court is sitting with a jury.

which the publisher of the periodical adhered to standards equivalent to the standards specified in paragraph (f);

(h) the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence as was given to the statement concerned;

(i) if the plaintiff's version of events was not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person; and

(j) the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement.

Although it creates a new long-awaited statutory defence to defamation, it would be a mistake to assume that s.26 is a great panacea for all of a defendant's ills. Just as *Reynolds* "did not have as great an effect on defamation law in the UK as might have been anticipated"[7], our s.26 as enacted is quite circumspect, and imposes quite stringent restrictions on the invocation of the defence of fair and reasonable publication.

For a start, the long list of factors in s.26(2) creates a requirement for the defendant to act in a very fair manner towards the plaintiff. The reference in s.26(2)(c) to the context, content and language of a statement may well prove to be a restrictive one from the defence's point of view at trial. It demands a tempered and constrained approach to publication from a defendant, and restricts the manner in which an allegation may be made. The invocation in s.26(2)(e) of the concept of "exceptional circumstances" necessitating the publication of a statement on the date it was in fact published seems to assume that immediate publication will not usually be justifiable: a stance arguably at variance with the fast-paced culture of the press-room and the relatively short lifespan of most news items.

Furthermore, the requirement in s.26(1)(b) to show that the manner and extent of publication "did not exceed what was reasonably sufficient, in all the circumstances", may evolve to be a quite onerous burden on defendants in the future.

Protecting the plaintiff's position even further, s.26(3) goes on to provide that a plaintiff's failure to respond to attempts by the defendant to elicit the plaintiff's version of events shall not imply consent to publication or entitle the court (jury) to draw any inference therefrom.

As was the case with the 10 *Reynolds* factors in both the UK[8] and Irish[9] jurisdictions, the 10 factors in our new s.26 do not represent cumulative requirements. S.26(2) declares that a court (jury) may "take into account such matters as [it] considers relevant including <u>any or all</u> of the following..." (emphasis added).

Notably, s.26 does not refer to political discussion *per se*. In *Reynolds*, Lord Nicholls refrained from classifying political material as a separate category of speech deserving special protection or which would always enjoy public interest privilege under the new *Reynolds* regime. However, he noted that "[t]he press discharges vital functions as a bloodhound as well as a watchdog" and that a court "should be slow to conclude that a publication was not in the public interest ... <u>especially when the information is in the field of political discussion</u>" (emphasis added). Our new defence of fair and reasonable publication does not create any special category of political discussion, and it will fall to the case-law to establish whether, in practice, political speech enjoys any accepted quasi-presumption of protection.

As with *Reynolds*, the new defence of fair and reasonable publication is not confined to journalists. At common law it was always the *occasion* of publication that was privileged, rather than the publisher (although *Reynolds* was certainly concerned with the role of the press, and the post-*Reynolds* case-law certainly saw many judges focussing on their new role as the guardians of responsible journalism). Whereas journalists are not singled out for special protection in the 2009 Act, compliance (or a lack thereof) by journalist-defendants with the code of standards of the Press Council[10] (and with determinations of that Council or of the Press Ombudsman) is one of the factors going to whether the decision to publish was fair and reasonable. The jurisprudence of the Ombudsman which is sure to develop over the coming years may yet become an important gauge of fairness and reasonableness in this respect.

Finally, it should be remembered that the reception of a public interest defence (based on *Reynolds*) into Irish law via *Hunter* and (more particularly) *Leech* is now redundant. As noted at the outset of this paper, s.15(1) of the 2009 Act wipes the slate clean in terms of the common law defences available to a defamation action. Defendants therefore either satisfy s.26 or they do not.

Miscellaneous Defences

Offer to Make Amends

A defendant who has published an allegedly defamatory statement may make an offer of amends[11]. Unlike under the 1961 Act, whereby only an innocent publisher or a publisher of an unintentional defamation could offer to make amends, now <u>any</u> defendant may do so. The defendant must offer to do 3 things:

1. to make a suitable correction of the statement concerned and a sufficient apology to the person to whom the statement refers or is alleged to refer;
2. to publish that correction and apology in such manner as is reasonable and practicable in the circumstances; and

7 Cox, n.4 *supra*, 317

8 See *Jameel v Wall Street Journal* [2006] 3 WLR 642

9 See *Leech v Independent Newspapers (Ireland) Ltd* [2007] IEHC 223, where Charleton J considered that:

> "…it seems that errors have been made [post-*Reynolds*] by people referring to the ten separate indicia of the existence of public interest and by indicating that if one or other of them is absent, or if a decision as to fact might go against a newspaper in relation to one or other, that the entire defence is destroyed."

10 The Press Council's Code of Practice for Newspapers and Periodicals is available at: http://www.presscouncil.ie/v2/presscouncil/portal.php?content=_includes/codeofpractice.php

11 S.22 Defamation Act 2009.

3. to pay to the person such sum in compensation or damages (if any), and such costs, as may be agreed by them or as may be determined to be payable.

An offer must be (a) in writing; (b) described as an offer to make amends; (c) described as either in respect of the entire statement or a part or a particular meaning thereof; and (d) cannot be made after delivery of a defence. An offer may be withdrawn prior to acceptance (and a new offer made if so desired).

A potentially significant tactical opportunity for the defendant arises by virtue of the fact that an unaccepted offer to make amends is a defence to a defamation action, unless the plaintiff proves that the defendant knew at the time of publication that the statement referred to the plaintiff (or would likely be understood as such) and was false and defamatory of the plaintiff[12].

However, there are a number of factors which render the offer to make amends an unattractive option from the defence perspective. Firstly, an offer cannot be made after a defence has been delivered[13]. Secondly, where there is no agreement by the parties, the amount of damages or compensation, as well as the extent or adequacy of the apology, will fall to be decided by the court[14]. This defence appears to hand almost all tactical advantage over to the plaintiff, and on that basis would be unlikely to excite any great enthusiasm amongst defendants, particularly media organisations (save, perhaps, in the most egregious cases of defamation).

Apology

A defendant may give evidence in mitigation of damage that he/she made (or offered to make) and published (or offered to publish) an apology[15]. A new requirement is that the apology be published "in such a manner as ensured that the apology was given the same or similar prominence as was given to [the] statement", and that it be published "as soon as practicable after the plaintiff makes complaint to the defendant … or after the bringing of the action, whichever is earlier"[16].

The most significant change regarding apologies, however, is that evidence of an apology made by or on behalf of a person in respect of a statement to which the action relates "is not admissible in any civil proceedings as evidence of liability of the defendant"[17]. Previously, such an apology was routinely employed by plaintiffs as evidence of liability in defamation proceedings. This may not produce much of a practical difference in the trial context, however, in that the very fact of an apology will be seen as an acknowledgment of wrongdoing (though never so stated).

Consent

The common law defence of consent is put on a statutory footing[18]. Consent by the plaintiff to publication is a defence to an action for defamation in respect of that publication.

Innocent Publication

The question of innocent publication has long been a serious issue for publishing houses. Prior to the 2009 Act, a publishing house was just as guilty as any other defendant, even though it merely facilitated publication of the defamatory words, as opposed to having written them.

S.27 of the 2009 Act changes the common law position quite dramatically. It creates a defence of innocent publication for the defendant who is not the author/editor/publisher of the statement, and who both (a) "took reasonable care in relation to its publication"; and (b) neither knew nor had reason to believe that what (s)he did caused or contributed to the defamatory publication.

Innocent publishers now have a defence provided they did not act negligently, i.e. provided they took reasonable care in how they operated. In determining whether reasonable care was taken, the court will consider:

1. the extent of the defendant's responsibility for the actual content of the statement or the decision to publish it;
2. the nature or circumstances of the publication;
3. the previous conduct or character of the defendant.

Whereas, at common law, the plaintiff would shoulder the burden of proving publication, the 2009 Act places the burden on the defendant to show he was not the publisher: it is for the defendant to prove that he was not the author, editor or publisher of the statement[19]. There is no proper definition of "author, editor or publisher" in the 2009 Act, but certain categories of persons who escape that description include:

- distributors/sellers of printed material
- distributors/sellers of film and sound recordings
- processors/copiers/distributors/sellers of electronic media, or operators of equipment by which the statement is made available[20].

Interestingly, live TV broadcasters are not listed. The position prior to the 2009 Act was a notoriously difficult one from the perspective of such broadcasters, who were liable for the statements even of guests on TV shows who might utter spontaneous defamatory comments over which the broadcaster would have relatively little control. Whilst the above list is not expressed to be exhaustive, the omission of live broadcasters may mean that the common law position in respect of them will remain unchanged.

Submissions and Directions on Damages

Up until now, the issue of quantum of damages in defamation has been the exclusive preserve and discretion of the jury

12 S.22(2) Defamation Act 2009.
13 S.22(3) Defamation Act 2009.
14 S.23 Defamation Act 2009.
15 S.24 Defamation Act 2009.
16 s.24(1) Defamation Act 2009.
17 S.24(4) Defamation Act 2009.
18 S.25 Defamation Act 2009.
19 S.27(1) Defamation Act 2009.
20 S.27(2) Defamation Act 2009.

following on the decision of the Supreme Court in *Barrett v Independent Newspapers*[21]. Juries could be given very basic guidance in assessing damages, such as that an award should represent fair and reasonable compensation for the injury actually suffered by the plaintiff, and that its decision on quantum should be based on the facts before it. However, suggestions of actual figures were strictly off limits. *De Rossa v Independent Newspapers*[22] confirmed that providing figures to juries would confuse them and "even though only by way of guideline, would constitute an unjustifiable invasion of the province or domain of the jury" and *O'Brien v Mirror Group Newspapers*[23] upheld that judgment (although it saw the Supreme Court hold that an award of damages was excessive and remit the matter to the High Court for hearing on the basis of comparisons with personal injuries awards and awards in other defamation actions).

Now, for the first time in Irish defamation law, parties to a defamation action may make submissions to the court (jury) in relation to the matter of damages[24]. The trial judge shall also give directions to the jury on the question of damages[25].

It is not entirely clear how this new procedure shall operate in practice. It may be that the parties address the jury generally as to quantum, or that they address the judge who then directs the jury on the subject. Equally, the Act fails to clarify the specific question as to whether counsel is to be permitted to suggest a figure to the jury. On the basis of the broad language used in s.31(1) and s.31(8) combined, it seems that the parties will be making submissions directly to the jury, and it also appears that counsel may be at large as regards their submissions to the jury regarding damages, although the Act could have gone further in regulating this situation.

There are 11 factors to which the jury will have regard in assessing damages[26]. Those factors are:

(*a*) the nature and gravity of any allegation in the defamatory statement concerned,
(*b*) the means of publication of the defamatory statement including the enduring nature of those means,
(*c*) the extent to which the defamatory statement was circulated,
(*d*) the offering or making of any apology, correction or retraction by the defendant to the plaintiff in respect of the defamatory statement,
(*e*) the making of any offer to make amends under section 22 by the defendant, whether or not the making of that offer was pleaded as a defence,
(*f*) the importance to the plaintiff of his or her reputation in the eyes of particular or all recipients of the defamatory statement,
(*g*) the extent (if at all) to which the plaintiff caused or contributed to, or acquiesced in, the publication of the defamatory statement,
(*h*) evidence given concerning the reputation of the plaintiff,
(*i*) if the defence of truth is pleaded and the defendant proves the truth of part but not the whole of the defamatory statement, the extent to which that defence is successfully pleaded in relation to the statement
(*j*) if the defence of qualified privilege is pleaded, the extent to which the defendant has acceded to the request of the plaintiff to publish a reasonable statement by way of explanation or contradiction, and
(*k*) any order made under section 33, or any order under that section or correction order that the court proposes to make or, where the action is tried by the High Court sitting with a jury, would propose to make in the event of there being a finding of defamation.

A defendant may give evidence, in mitigation of damage, of any matter having a bearing on the plaintiff's reputation which is related to the defamatory statement, or of an award of damages to the plaintiff in another action taken in respect of a statement which "contained substantially the same allegations as are contained in the defamatory statement" published by the defendant[27].

Following the 2009 Act, then, juries in Irish defamation actions are no longer "sheep without a shepherd", to borrow the description used in *John v Mirror Group Newspapers*[28]. It seems that the dissenting judgment of Denham J in *De Rossa* (supra) - where she argued that the common law position of leaving damages solely to the jury's discretion was incompatible with Article 10 of the European Convention on Human Rights - has received a belated statutory blessing. Denham J's position was subsequently reinforced by the clear indication given by the European Court of Human Rights in *Tolstoy Miloslavsky v UK*[29] that the preclusion of judicial direction to juries on the issue of damages would be inconsistent with Article 10. However, since it is not clear that parties will be permitted, in practice, to provide juries with a suggested appropriate figure, the actual scope of the submissions that may properly be given to a jury remains to be finally defined in due course.

In this context it may be noted that the Supreme Court is given specific power to substitute its own calculation on quantum of damages in place of an award made to the plaintiff by the High Court (together with any other order it sees fit to make)[30].

Conclusion

There is much to be praised in the new Defamation Act. The new remedies outlined at the outset of this Article will undoubtedly modernise Irish defamation litigation and render it more efficient. The decision to consolidate and codify the defences to defamation is a particularly welcome one. On the whole, this ambitious new act allows both parties a

21 *Barrett v Independent Newspapers* [1986] IR 13
22 *De Rossa v Independent Newspapers* [1999] 4 IR 432
23 *O'Brien v Mirror Group Newspapers* [2001] 1 IR 1
24 S.31(1) Defamation Act 2009.
25 S.31(2) Defamation Act 2009.
26 S.31(4) Defamation Act 2009.
27 S.31(6) Defamation Act 2009.
28 *John v Mirror Group Newspapers* [1997] QB 586.
29 *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442.
30 S.13(1) Defamation Act 2009.

greater range of procedures and remedies than was previously the case. The substantive new defences are not altogether as radical as some have suggested, however, and in some instances may ultimately be much more restrictively applied than might be expected. There is 'devil in the detail' of these new defences, and significant novel aspects that remain to be tried and tested. Indeed, some might suggest that, far from reducing the lawyer's workload, the 2009 Act may in fact have the reverse effect. ■

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COMPANY LAW

Charge

Debenture – Nature of charge - Whether fixed or floating charge created - Construction of debenture - Description and characterisation of charge – Whether words conclusive – Intention of instrument as whole - Intention of parties – Extent of security – Whether first fixed charge on property created - *Re Holidair Ltd* [1994] 1 IR 416 and *In Re Keenan Brothers Ltd* [1985] IR 401 considered - Application for well charging order dismissed (2003/9018P - Clarke J - 17/7/2009) [2009] IEHC 367
Moorview Developments Ltd v First Active plc

Directors

Disqualification - Activity designed to conceal funds from revenue commissioners - Test for disqualification - Whether person engaged in conduct making him unfit to be concerned in management of company - Purpose of section – Whether commercial misjudgement sufficient to justify disqualification - Whether conduct displayed lack of commercial probity - Deterrent element – Whether period of disqualification must reflect gravity of offence - *Cahill v Grimes* [2002] 1 IR 372, *Re NIB Ltd: Director of Corporate Enforcement v Seymour* [2007] IEHC 102, (Unrep, HC, Murphy J, 20/3/2007), *Re NIB Ltd: Director of Corporate Enforcement v D'arcy* [2005] IEHC 333, [2006] 2 IR 163, *Re Ansbacher: Director of Corporate Enforcement v Collery* [2006] IEHC 67, [2007] 1 IR 580, *Countyglen v Carway* [1998] 2 IR 540, *Glackin v Trustee Savings Bank* [1994] 3 IR 55 and *Re Westmid Packing* [1998] 2 All ER 124, [1998] BCLC 646 considered - *Re Lo-line Limited* [1988] Ch 477, [1988] 3 WLR 26, [1988] 2 All ER 692 applied - Companies Act 1990 (No 33), ss 22 and 160(2)(e) - Disqualification order granted for period of five years (**2006/81 COS** - McGovern J - 31/7/2007) [2007] IEHC 486
Director of Corporate Enforcement v Stakelum

Examinership

Repudiation of contract – Lease – Effect of repudiation – Performance of contractual element other than payment – Whether court should approve repudiation – Companies Act 1963 (No 33), s 290(8) – Companies (Amendment) Act 1990 (No 27), s 20 – Repudiation refused (2009/557Cos – Ryan J – 16/10/2009) [2009] IEHC 465
Re O'Brien's Irish Sandwich Bars Ltd

Winding up

Petition – Substitution of petitioner – Whether *locus standi* for substitution without advertisement – Companies Act 1963 (No 33), ss 214, 215, 216, 218 and 220 – Rules of the Superior Courts 1986 (SI 15/1986), O 74, r 18 – Petitioner substituted (2009/169Cos – Laffoy j – 13/5/2009) [2009] IEHC 264
In re Lycatel (Ireland) Limited

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CONSUMER LAW

Article

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CONTRACT

Breach

Settlement agreement – Repudiation - Fraudulent misrepresentation – Undertakings – Whether fundamental or subsidiary to contract - Whether undertakings unfulfilled by plaintiff justified repudiation of contract – Seizure of cattle pursuant to provisions of European Communities (Protection of Animals Kept for Farming Purposes) Regulations 2000 – Whether failure by defendant to return cattle as *per* clause in settlement agreement constituted repudiatory breach of contract – Whether defendant's sale of cattle amounted to breach of contract and/or negligence causing damage to plaintiff – *Smyth v Lynn* [1951] 85 ILTR 57 - European Communities (Protection of Animals Kept for Farming Purposes) Regulations 2000 (S/I 127/2000) - Liability found against defendant (2006/1811P – McMahon J – 24/6/2009) [2009] IEHC 304
Hanrahan v Minister for Agriculture, Fisheries and Food

Interpretation

Loan agreement – Construction - Term of contract – Intention of parties – Surrounding circumstances – Claimant bank entering into facility agreement with defendant - Demand for repayment of sums outstanding under agreement - Whether loan contract constituted a term loan - Contractual status of repayment date – Whether relevant date determined at close of business or continued up to stroke of midnight – Clause obligating defendant to maintain 70 *per cent* debt to security ratio – Whether plaintiff's failure to invoke clause relating to debt to security ratio by close of business on repayment date released defendant from obligations under main agreement – Whether plaintiff entitled to summary judgment – Complexity - Whether plenary hearing necessitated - *McGrath v O'Driscoll* [2006] IEHC 195 (Unrep, Clarke J, 14/6/2006), *Cow v Casey* [1949] 1 KB 474, *Igote Ltd v Badsey Ltd* [2001] 4 IR 511 followed; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, *Bank of Ireland v AMCD (Property Holdings) Ltd* [2001] 2 All ER (Comm) 894, *Antaios Compania Naviera SA v Salan Rederiena AB* [1985] AC 191 and *Analog Devices v Zurich Insurance* [2005] 1 IR 274 considered – Plaintiff granted judgment jointly and severally for amounts stated in summary summons as against all defendants (2009/915S & 1501S – Charleton J - 26/6/2009) [2009] IEHC 278
Danske Bank A/S v Durkan New Homes

Sale of land

Specific performance – Contract - Special conditions - Vacant possession - Completion notice - Whether contract had come to end - Alleged inability to deliver vacant possession in accordance with terms of contract - Whether contract conditional on vacant possession - Whether plaintiff able, ready and willing to complete - Reasonable advice of intention to close - Proper construction of general condition 40(g) of law society general conditions of sale - Whether defendants failed to crystallise date on which actual vacant possession had to be made available - Whether vacant possession could have been provided had reasonable advice of intention to close been given - Whether court in position to order decree of specific performance – Whether inequitable if defendants able to escape from obligations by reason of own default - *Jackson v Stokes* [2008] IEHC 276, (Unrep, HC, McCarthy J, 25/7/2008) considered - Damages *in lieu* of specific performance be assessed by judge sitting alone ordered (2008/5932P - Clarke J - 16/7/2009) [2009] IEHC 359
Windham v Maguire

Specific performance

Sale of land – Terms – Interpretation – Closing date – Completion notice – Whether completion notice valid – Relevant date – Whether plaintiff entitled to enforce contract – Whether specific performance appropriate remedy – Equitable principles – *Analog Devices BV v Zurich Insurance Co* [2005] IESC 12, [2005] 1 IR 274, *O'Neill v Ryan (No.3)* [1992] 1 IR 166, *Mount Kennett Investment Co v O'Meara &* ors [2007] IEHC 420, (Unrep, Smyth J, 21/11/2007) and *Duffy v Ridley Properties Ltd* [2008] IESC 23, [2008] 4 IR 282 applied; *Investors Compensation Scheme Ltd v West Bromwich Building Society (No1)* [1998] 1 All ER 98 and *Woods v MacKenzie Hill Ltd* [1975] 2 All ER 170 – Specific performance granted (2008/8910P – Kelly J – 24/06/2009) [2009] IEHC 305
Murphy v Ryan, McGreevy and McGreevy Enterprises

Terms

Intention of parties – Non–contractual documentation – Construction contract – R.I.A.I. standard form contract – Description of works – Tender conducted by reference to bill of quantities – Standard form contract precluded reliance on bill of quantities – Other contractual documents inadequate – Quantum meruit – Whether concluded contract – Whether bill of quantities remained a contractual document once R.I.A.I. contract signed - *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 followed; *Clare Taverns v Gill* [2001] 1 IR 286, *Leo Laboratories Ltd v Crompton BV* [2005] IESC 31, [2005] 2 IR 225, *Collen v Dublin Co Council* [1908] 1 IR 503 and *English Industrial Estates Corporation v George Wimpey & Co Ltd* (1972) 7 BLR 122 considered – Defendants'

appeal allowed (2/2008 – SC – 1/4/2009) [2009] IESC 31
McCabe Builders (Dublin) Ltd v Sagamu Developments Ltd

Undue influence

Loan agreement - Purpose of acquiring property – Agreement with solicitor to purchase property – True purpose of loan not disclosed – Second agreement entered into over subject property with another financial institution by solicitor – Retention of monies by solicitor – Application to set aside agreement – Solicitor and client relationship – Whether undue influence – Whether independent legal advice required – Whether actual or constructive knowledge of undue influence – Whether reasonable inquiries made – *Bank of Ireland v Rockfield* [1979] 1 IR 21 and *Northern Bank Ltd v Henry* [1981] IR 1 distinguished – Judgment for plaintiff (2008/1255S – McGovern J – 3/7/2009) [2009] IEHC 319
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Judiciary

Bias – Fair procedures - Judge – Settlement terms – Statements made – Factors which gave rise to real risk of bias – Whether reasonable apprehension of pre-judgment of issue – Distinction from bias – Principles to be adopted – Objective test – Whether clean hands in relation to disclosure – Whether appeal appropriate remedy – *(Madan) v Secretary of State for the Home Department* [2007] 1 WLR 2891, *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, *Webb v The Queen* (1993-1994) 181 CLR 41, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 WLR 870, *Vakauta v Kelly* (1989) 167 CLR 568, *The King (M'Swiggan) v Justices of Londonderry* [1905] 2 IR 318, *R v Stafford Justices* [1940] 2 KB 33, *Leary v National Union of Vehicle Builders* [1974] 1 Ch 34 considered; *Bula Ltd v Tara Mines Ltd* (No 6) [2000] 4 IR 412, *O'Neill v Beaumont Hospital Board* [1990] ILRM 419, *Orange Ltd v Director of Telecoms (No 2)* [2000] 4 IR 159, *O'Reilly v Cassidy* [1995] 1 ILRM 306, *Dublin Well Woman Centre Ltd v Ireland* [1995] 1 ILRM 408, *Kenny v Trinity College* [2007] IESC 42, [2008] 2 IR 40, *Bambrick v Cobley* [2005] IEHC 43, [2006] ILRM 81, *Freney v Freney* [2008] IEHC 330 (Unrep, Laffoy J, 22/10/2008), *State (Vozza) v Ó Floinn* [1957] IR 227, *State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381, *Gill v Connellan* [1987] IR 541 and *F v Judge O'Donnell* [2009] IEHC 142 (Unrep, O'Neill J, 27/3/2009) applied – Courts of Justice Act 1936, (No 48), s 38 – Family Law Divorce Act 1996 (No 23), s 5 – Relief granted (2008/1190 JR – Clarke J – 10/7/2009) [2009] IEHC 316
P v Judge McDonagh

Judiciary

Fair procedures – Natural justice – Bias – Objective bias – Principles to be applied where application made to judge to recuse himself on grounds of objective bias – Whether previous interlocutory decision by judge in matter between parties can ground objective bias claim against judge – Application granted (2008/303JR – Hedigan J – 16/12/2008) [2008] IEHC 432
I (EP) v Minister for Justice, Equality and Law Reform

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CRIMINAL LAW

Animals

Ill treatment – Encouragement – Mere presence – Whether presence at dog fight sufficient - *R v Coney* (1881-2) 8 LR QBD 534 and *People (DPP) v Jordan* [2006] IECCA 71 [2006] 3 IR 425 followed – Conviction quashed (179/2007 – CCA – 12/3/2008) [2008] IECCA 41
People (DPP) v Breen

Appeal

Exceptional importance – General point – Particular circumstances – Exercise of discretion by trial judge – Policy to exclude appeals – Courts of Justice Act 1924 (No 10) , s 29 – leave to appeal refused (14/2007 – CCA – 24/4/2008) [2008] IECCA 114
People (DPP) v Hui

Appeal

Exceptional public importance – Video recording of interview – Failure to record – Non-mandatory – Admissibility of statement – identification issue – Whether dock identification – Leave to appeal refused (169/2006 – CCA 14/4/2008) [2008] IECCA 68
People (DPP) v Batista

Appeal

Unstateable ground – Leave to appeal – Evidence – Admissibility – Discretion of court – Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (SI 74/1997) - Leave to appeal refused (162/2008 – CCA – 25/7/2008) [2008] IECCA 115
People (DPP) v A (P)

Arrest

Application for inquiry into lawfulness of detention – Arrest warrant issued in respect of same charge on foot of which applicant previously arrested, charged and released from detention – Re-arrest on foot of new warrant - Remand in custody – Whether any statutory or other lawful basis for re-arrest - No further or new information or facts which justified issue of warrant leading to re-arrest- Whether any lawful basis for detention of applicant on foot of warrant - *People (DPP) v Cooney* [1997] 3 IR 205, *Ward v DPP* [2005] IEHC 383, [2007] 1 IR 421, *DPP (McTiernan) v Bradley* [2000] 1 IR 420, *State (Trimbole) v Governor of Mountjoy Prison* [1985] IR 550 considered; *State (McDonagh) v Frawley* [1978] IR 131 distinguished - Offences Against the State Act 1939 (No 13), s 30 - Criminal Justice Act 1984 (No 22), ss 4 and 10 - District Court Rules 1997 (SI 93/1997), O 16 - Release ordered (2009/1250SS - Peart J - 29/7/2009) [2009] IEHC 376
Stokes v Governor of Cloverhill Prison

Bail

Conditions – House arrest order– Jurisdiction to impose condition of house arrest - Whether condition imposed referable to terms of Bail Act - Whether conditions of bail imposed in excess of jurisdiction – Whether deprivation of liberty by virtue of house arrest order in contravention of the European Convention on Human Rights – *Ronan v Coughlan* [2005] 4 IR 274and *People (Attorney General) v O'Callaghan* [1966] IR 501 considered - Bail Act 1997 (No 16), s 6 - Relief granted (2009/50JR – Peart J – 18/6/2009) [2009] IEHC 303
Brennan v Brennan

Bail

Evidence - Hearsay rule – Whether hearsay evidence admissible – *Viva voce* evidence unavailable – Standard of proof – Proportionality test – *People (DPP) v McGinley* [1998] 2 IR 408 followed - Bail Act 1997 (No 16), s 2 – Applicant's appeal dismissed (238/2009 – SC – 27/7/2009) [2009] IESC 58
Vickers v Director of Public Prosecutions

Committal warrants

Re-issued warrants - Delay in executing warrants – Decision to re-issue warrants — Whether adequate evidence before court to re-issue warrants – Whether all material facts disclosed to trial judge – Efforts made to execute warrants – Whether delay justified – *Brennan v Windle* [2003] 3 IR 494, *Dunne v*

DPP (Unrep, Carney J, 6/6/1996), *Bazoka v Judge Dublin District Court* [2004] IEHC 126 (Unrep, Peart J, 14/7/2004), *Casey v Governor of Cork Prison* [2000] IEHC 64 (Unrep, Herbert J, 13/09/00) applied - Road Traffic Act 1961 (No 24), s 56 – Criminal Justice Act 1984 (No 22), s13 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 17 – Rules of the District Court 1997 (SI 93/1997), O 26, r 11 - Warrants quashed as invalid (2006/1468 JR – Hedigan J – 30/6/2009) [2009] IEHC 309
O'Rourke v Judges of the District Court

Evidence

Admissibility – Admissions - Free will – Mental health – Medical evidence – Videotape of demeanour – Whether statements should have been excluded – Sentence partly served – personal circumstances – *People (DPP) v Shaw* [1982] IR 1 considered - Appeal allowed; retrial not ordered (133/2007 – CCA – 25/2/2008) [2008] IECCA 31
People (DPP) v Bukoshi

Evidence

Admissibility - Constitutional right of access to solicitor - Applicant not informed that gardaí failed to make contact with solicitor - Hair sample taken from applicant's head for DNA analysis - Whether deliberate and conscious violation of rights - Discretion of trial judge as to whether particular evidence obtained should be admitted or not – Whether applicant required solicitor where hair sample could be procured without consent – *People v Healy* [1990] 2 IR 73, *People v Buck* [2002] 2 IR 268, *People (DPP) v O'Brien* [2005] IESC 29, [2005] 2 IR 206, *People v McCrea* [2009] IEHC 39, (Unrep, Edwards J, 28/1/2009) and *People v Kenny* [1990] 2 IR 110 considered - Criminal Justice Act, 1984 (No 24), s 4 - Criminal Justice (Forensic Evidence) Act 1990 (No 34) - Whether case should have been withdrawn from jury - Significant gaps in chain of evidence - Whether trial judge correct in allowing evidence go to jury - Whether open to jury to convict - *R v Galbraith* [1981] 1 WLR 1039 applied - Whether any defect in trial judge's charge to jury - No requisitions made at trial - *People (DPP) v Cronin (No 2)* [2006] 4 IR 329 applied - Leave to appeal refused (161/2008 – CCA - 31/7/2009) [2009] IECCA 95
People (DPP) v Creed

Evidence

Admissibility - Statements – Inculpatory and exculpatory – Direction of trial judge – Whether jury directed as to weight to be attached to statements - *The People (Director of Public Prosecutions) v. Clarke* [1994] 3 I.R. 289 and *People (DPP) v McCormack* [2008] IECCA 124, [2009] 2 IR 124 considered – Leave to appeal refused (67/2008 – CCA 8/5/2008) [2008] IECCA 70
People (DPP) v Allingham

Evidence

Preservation of evidence – Fair trial in due course of law - Duty to seek out and preserve potentially relevant evidence – Rape - Forensic testing – Unavailability of material evidence - Character of complainant – Failure to re-interview complainant and other key witnesses in the context of subsequently disclosed information about the complainant's psychiatric condition, life circumstances and personal history of false allegations – Whether real risk of unfair trial - *Scully v DPP* [2005] 1 IR 242 followed; *DPP v Wall* [2005] IECCA 140 (Unrep, CCA, 16/12/2005) considered – Relief refused (2008/289JR – Herbert J – 30/6/2009) [2009] IEHC 294
McG v DPP

Fitness to plead

Retrial - Accused found unfit to plead by trial judge – Matter adjourned – *Nolle prosequi* entered – Fresh proceedings issued relating to same offence – Restraint of prosecution – Discretion – Test to be applied – Delay – Gravity of offences – Whether real risk of unfair trial – Whether accused prejudiced – Whether fair procedures – *O'C v Judges of Dublin Metropolitan District Court* [1994] 3 IR 246, *Kelly v DPP* [1996] 2 IR 596 and *Eviston v DPP* [2002] 3 IR 282 considered; *Z v DPP* [1994] 2 IR 476 and *D v DPP* [1994] 2 IR 465 applied; *State (O'Callaghan) v Oì hUadhaigh* [1977] IR 42 and *S(D) v Judges of Cork Circuit* [2008] IESC 37, [2008] 4 IR 379 distinguished – Criminal Law (Insanity) Act 2006 (No 11) – Relief refused (2008/743JR – Hedigan J – 1/07/2009) [2009] IEHC 310
O' Callaghan v Director of Public Prosecutions

Jury

Bias – Objective bias of juror – Juror raised in same housing estate as accused – Neighbour – Accused unaware could object to jurors – Accused unaware of foreman's identity during trial – Accused recognised foreman of jury upon conviction – Whether knowledge of accused by member of jury give reasonable apprehension of bias – Whether real danger of bias – Whether irregularity lead to risk of unfair trial – *People (DPP v Tobin* [2001] 3 IR 469, *Reg v Gough* [1993] AC 646 and *O'Callaghan v Mahon* [2007] IESC 17, [2008] 2 IR 514 followed; *Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 approved - Constitution of Ireland 1937, Article 38 – European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, article 6(1) (5/2008 – CCA – 2/4/2009) [2009] IECCA 27
People (DPP) v Norris

Procedure

Director of Public Prosecutions – Prosecution - Reversal of decision of Director not to prosecute applicant - Whether reversal of decision of Director not to prosecute applicant in breach of fair procedures - Applicant not warned that decision could be reversed - Whether applicant deemed to be aware of fact of potential for review -Whether new circumstances or evidence necessary to justify change of decision - Whether prejudice caused by change of decision – Estoppel – Detriment – Legitimate expectation - Admissions by applicant - Relevance of admissions – Whether risk of unfair trial - Prejudice in defence of proceedings - *Eviston v DPP* [2002] 3 IR 260 distinguished, *MQ v Judges of the Northern Circuit* (Unrep, McKechnie J, 14/11/2003) not followed; *Hobson v DPP* [2005] IEHC 368, [2006] 4 IR 239, *LO'N v DPP* [2006] IEHC 184, [2007] 4 IR 481, *State (McCormack) v Curran* [1987] ILRM 225, *H v DPP* [1984] 2 IR 589, *State (O'Callaghan) v Ó hUadhaigh* [1977] IR 42, *McFarlane v DPP* [2008] IESC 7, [2008] 4 IR 117, *B v DPP* [1997] 3 IR 140, *SA v DPP* [2007] IESC 43, (Unrep, SC, 17/10/2007), *DPP (Quigley) v Monaghan* [2007] IEHC 92, (Unrep, HC, Charleton J, 14/3/2007), *Dunphy v DPP* [2005] IESC 75, [2005] 3 IR 585 and *Brennan v Windle* [2003] 3 IR 494 considered - Constitution of Ireland 1937, Article 34.1 – Application for prohibition of trial refused (2006/888 JR – McCarthy J – 17/12/2008) [2008] IEHC 451
M (J) v DPP & Judge McBride

Proceeds of crime

Forfeiture – Money seized – Procedure – Application made – Time limit – Whether application made when motion issued or oral application to court – *FMcK v AF* [2005] IESC 6 (Unrep, SC 23/2/2005) followed – Criminal Justice Act 1994 (No 15), ss 38 & 39 – Proceeds of Crime Act 1996 (No 30), ss 2 & 3 – application refused (2007/1442JR – Clark J – 31/7/2008) [2008] IEHC 461
R (JG) v Director Public Prosecutions

Return for trial

Particulars - Uncertainty - Applicable principles – Whether sufficient particularity or certainty in charges - Onus on accused - Whether accused had sufficient specific knowledge of charges - Whether order created any uncertainty for accused in knowing charges he had to face - *State (Attorney General) v Judge Binchy* [1964] IR 395, *BH v DPP* [2003] 2 IR 43 and *DPP v Judge Riley* [2008] IEHC 419, (Unrep, Cooke J, 19/12/2008) considered - Criminal Procedure Act 1967 (No 12), s 4(B)1 - Criminal Justice Act 1999 (No 10), s 9 - *Certiorari* refused (2008/1256JR - McMahon J - 17/7/2009) [2009] IEHC 362
Sherry v Judge Brennan

Return for trial

Procedure - Indictable offences – Order sending forward for trial on indictment – Order included summary offence – Whether order invalid – Whether order severable - *People (AG) v Walsh* (1972) 1 Frewen 363 approved; *DPP v Brennan* [2005] IEHC 277, (Unrep, Murphy J, 10/8/2005) distinguished - Criminal Justice Act 1951 (No 2), s 6 – Criminal Procedure Act 1967 (No 12), s 4(A)(1)(b) - Return severed; part quashed (2008/1085JR – O'Neill J – 26/5/2009) [2009] IEHC 261
Murphy v Judge Early

Road traffic offence

Arrest – Drink driving charge – Incorrect citation of offence by arresting garda – Whether arrest rendered invalid – Whether precise legislative provision must be identified – Whether charge defective – Whether reasonable grounds for opinion – Whether opinion must relate to particular offence – *Hobbs v Hurley* (Unrep, Costello J, 10/06/80), *DPP v Connell* [1983] 3 IR 62, *DPP v Mooney* [1992] 1 IR 548, *Mulligan v DPP* [2008] IEHC 334 (Unrep, Charleton J, 29/10/2008), *DPP v Tyndall* [2005] IESC 28 [2005] 1 IR 593 and *DPP v Gilmore* [1982] ILRM 102 applied; *Dumbell v Roberts* [1944] All ER 326 considered - Courts (Supplemental Provisions) Act 1961 (No 39), s 52(1) – Road Traffic Act 1961 (No 24), s 49 – Road Traffic Act 1994 (No 7), s 10 – Road Traffic Act 2006 (No 23), ss 4 & 18 – Arrest lawful (2009/370SS – Hedigan J – 2/07/2009) [2009] IEHC 314
Director of Public Prosecutions v O'Rourke

Road traffic offences

Drink driving - Blood sample - Mandatory provision - Whether statutory provision complied with - Whether sufficient compliance with Act - Legal effect of error made by doctor in completing statutory form - Whether failure to complete form accurately fatal to prosecution - Minor or technical error - Prejudice to accused - Technical slip - Whether error mislead or confused or cause prejudice or injustice to accused - Whether any breach of statutory provision - *DPP v Kemmy* [1980] IR 160, *DPP v Fanagan* (Unrep, HC, Denham J, 18/12/1991), *DPP v Somers* [1999] IR 115, *DPP v O'Neill* (Unrep, SC, 30/7/1984), *DPP v McPartland* [1983] ILRM 411, *DPP (O'Reilly) v Barnes* [2005] IEHC 245, [2005] 4 IR 176, *Ruttledge v Judge Clyne* [2006] IEHC 146, (Unrep, HC, Dunne J, 7/4/2006), *DPP v Keogh* (Unrep, Murphy J, 9/2/2004) considered; *DPP v Freeman* [2009] IEHC 179, (Unrep, MacMenamin J, 21/4/2009) distinguished - Road Traffic Act 1994 (Part III) Regulations 1994 (SI 351/1994), reg 3 - Road Traffic Act 1961 (No 24), ss 6, 18 & 49(2) - Case stated answered that provisions complied with (2009/608SS - McMahon J - 17/7/2009) [2009] IEHC 361
DPP v Kennedy

Sentence

Fine – Proportionality – Stolen goods – Ability of accused to pay – Whether fine should be proportionate to value of stolen goods – Whether fine should be proportionate to ability to pay – Whether trial judge had considered ability of accused to pay - *People (DPP) v Redmond* [2001] 3 IR 390 considered – Fine reduced from €25,000 to €5,000 (72/2007 – CCA – 28/4/2008) [2008] IECCA 64
People (DPP) v Gannon

Sentence

Leniency – Burglary – Assault – Knife – Struggle – No serious injury – 2nd offence while on bail – Consecutive sentence – Medium range of seriousness – Sentence increased (193CJA/ 2007 – CCA – 4/2/2008) [2008] IECCA 12
People (DPP) v Delemere

Sentence

Leniency – Burglary – Previous convictions – Early plea – Evidence against him – Drug addiction – Treatment sought at time of hearing – Good Samaritan act – Sentence of 3 years with 18 month suspended increased to 4 years with 1 year suspended (175CJA/2007 – CCA – 4/2/2008) [2008] IECCA 9
People (DPP) v Lennon

Sentence

Leniency – Consecutive sentences – Bail – 50 previous convictions – Suspended sentence being served at time of sentencing – Totality of sentence – seriousness of offences – Sentence increased (201CJA – CCA – 14/4/2008) [2008] IECCA 75
People (DPP) v Hogan

Sentence

Leniency – Drugs – Mandatory minimum sentence – Possession – Value of €70,000 – Exceptional circumstances - Rehabilitation – Drug free - Suspended sentence of 5 years - *People (DPP) v Botha* [2004] 2 IR 375, *People (DPP) v Hogarty* (Unrep, CCA , 21/12/2001) and *People (DPP) v McGinty* [2006] IECCA 37, [2007] 1 IR 663 considered – Sentence affirmed with additional conditions (203CJA/2008 – CCA – 28/4/2008) [2008] IECCA 63
People (DPP) v Ryan

Sentence

Leniency – Drugs – Mandatory minimum sentence - Possession of drugs – Value of drugs – Sentencing factors – Personal circumstances – Review of sentence – Whether quantity, value and type of drugs relevant factors in sentencing – Whether excessive importance placed on personal circumstances – *People (DPP) v Botha* [2004] IECCA 1, [2004] 2 IR 375, *People (DPP) v Duffy* (Unrep, CCA, 21/122001) and *People (DPP) v McGinty* [2007] IECCA 37, [2007] 1 IR 633 considered; *People (DPP) v Renald* (Unrep, CCA, 23/11/2001) followed; *People (DPP) v. Spratt* [2007] IECCA 123, (Unrep, CCA, 10/12/2007) distinguished - Misuse of Drugs Act 1977 (No 12), s 15A – Criminal Justice Act 1999 (No 10), s 4 – Sentence quashed (95CJA/2008 – CCA – 31/10/2008) [2008] IECCA 133
People (DPP) v Long

Sentence

Leniency – Firearms – Possession – Mitigating circumstances – Early admission – Rehabilitation – Low risk of reoffending – Prior convictions – Drug addiction – Criminal gang – Acting under threat – Sentence upheld (195CJA – CCA – 11/2/2008) [2008] IECCA 19
People (DPP) v Mullarney

Sentence

Leniency – Firearms – Possession of arsenal and ammunition – Early plea and admission – Maximum sentence 10 years – Sentence of 7 years affirmed as not unduly lenient (157CJA – CCA – 14/1/2008) [2008] IECCA 4
People (DPP) v Radmall

Sentence

Leniency – Firearms – Possession - Weapon discharged – Injury to victim - Gun not recovered – Serious offence – Guilty plea – Daylight – Residential area – Accused well known and identified by 4 witnesses – Sentence of 3 years increased to 7 years – (148CJA – CCA – 14/1/12008) [20098] IECCA 3
People (DPP) v Dillon

Sentence

Leniency – Offences committed on bail – Aggravating circumstance – Possession of drugs – Consecutive sentences suspended – Sentence served – Sentence increased to 4 years but suspended as original sentence expired (180CJA/2008 – CCA – 14/1/2008) [2008] IECCA 2
People (DPP) v O'Brien

Sentence

Leniency – Rehabilitation – Alcohol – Suspended sentences – Series of robberies – Imitation firearm – Some compensation paid - Accused sober – Sentence increased from 3 years to 5 years but suspended (182CJA/2008 – CCA – 4./2/2008) [2008] IEHC 11
People (DPP) v Donovan

Sentence

Leniency – Rehabilitation – Turning point – Drug free – Serving sentence for earlier convictions - Sentences suspended – Sentence increased to 3 years with 18 months suspended (216CJA/2007 – CCA- 14/4/2008) [2008] IECCA 74
People (DPP) v O'Connor

Sentence

Leniency – Threats to kill – Totality of sentences – Proportionality – Consecutive and concurrent sentences – Current sentence – Application allowed and sentence increased from 5 years with 2 suspended to 7 years with 5 ½ suspended consecutive to current sentence and 3 year sentence (159CJA – CCA – 4/2/2008) [2008] IECCA 8
People (DPP) v Neeson

Sentence

Leniency – Unauthorised taking of motor vehicle – 63 previous convictions – Young age of accused – Previous concessions not availed of – Sentence of 2 years increased to 4 years (227CJA /2007 – CCA – 21/4/2008) [2008] IECCA 62
People (DPP) v Hyland

Sentence

Severity – Assault – Firearm - Previous convictions – Late guilty plea - Sick child – Voluntary work – Previous suspended sentence – Failure to rehabilitate – Sentence affirmed (204/2007 – CCA - 31/10/2008) [2008] IECCA 146
People (DPP) v McElligott

Sentence

Severity - Assault – Previous convictions – Seriousness of injuries sustained – Bouncer – Whether condition restraining work as doorman should be imposed – Balance of sentence suspended (119/2007 – CCA - 11/7/2008) [2008] IECCA 139
People (DPP) v Dunne

Sentence

Severity – Assaults – Previous convictions – Structure of sentence – Violent assaults – Fear of victims – Sentence affirmed (109/2007 – CCA 14/3/2008) [2008] IECCA 45
People (DPP) v O'Connell

Sentence

Severity – Assault – Vigilante – Deterrence – Leave to appeal refused (180/2007 – CCA – 5/2/2008) [2008] IECCA 49
People (DPP) v Fallon

Sentence

Severity – Burglary – 26 previous offences – Whether error – Sentence reduced from 3 years to 2 years (50/2007 – CCA – 12/3/2008) [2008] IECCA 40
People (DPP) v Ross

Sentence

Severity – Burglary – Opportunistic crime – Key left in front door – Occupant disturbed – Nothing taken – Previous offences – Maximum 14 years sentence - Sentence of 4 years affirmed (110/2007 – CCA9/2/2008) [2008] IECCA 55
People (DPP) v Foley

Sentence

Severity – Burglary – Refusal to suspend portion of sentence – Remarks of trial judge – Whether facts of offence of which not convicted taken into account – No conviction for violent offences – Drug free - Sentence of 5 years affirmed with 18 months suspended (155/2007 – CCA – 15/2/2008) [2008] IECCA 23
People (DPP) v Byrne

Sentence

Severity – Co-accused – Drugs – Possession – Whether parity of sentencing with co-accused – Whether penalised for not pleading guilty - *People (DPP) v Duffy* [2003] 1 IR 192 and *People (DPP) v O'Toole* (Unrep, CCA, 25/3/2003) followed – Appeal allowed and sentence reduced to 10 years with 2 years suspended (77/2007 – CCA – 25/2/2008) [2008] IECCA 28
People (DPP) v Shekale

Sentence

Severity – Co-accused – Lower sentence - Administrative error – Co-accused dealt with in District Court – Leave to appeal refused (151/2007 – CCA – 7/2/2008) [2008] IECCA 26
People (DPP) v O'Loughlin

Sentence

Severity – Co-accused – Proportionality – Plea of guilty – Driver of get away car – Medical report – Judge underestimating maximum sentence – Leave to appeal refused (163/2007 – CCA – 14/4/2008) [2008] IECCA 73
People (DPP) v Heelan

Sentence

Severity – Dangerous driving causing death – Leaving the scene – Drinking – Remorse – Victim impact statements – Leave to appeal sentence of 4 years with 1 year suspended refused (189/2007 – CCA – 15/2/2008) [2008] IECCA 25
People (DPP) v O'Reilly

Sentence

Severity – Dangerous driving causing serious injury – Mitigating factors - Early admission – Non-Irish national – Youth – Intermediate range of offences – Leave to appeal refused (177/2007 – CCA 15/2/2008) [2008] IECCA 24
People (DPP) v Belov

Sentence

Severity – Driving – Intoxicated – Consecutive sentence with sentence for unrelated offence – Sentence affirmed (16/2008 – CCA – 14/3/2008) [2008] IECCA 46
People (DPP) v Coulter

Sentence

Severity – Drugs – Possession – Mandatory minimum sentence – Immediate acceptance of responsibility – Mitigating factors – ADHD and Asberger's syndrome – Rehabilitation – Sentence reduced from 10 years with 3 suspended to 6 years with 3 suspended (98/2007 – CCA – 12/3/2008) [2008] IECCA 42
People (DPP) v Sweeney

Sentence

Severity – Drugs – Possession – Mandatory minimum sentence – Material assistance – Plea and indication of location of drugs – Sentence of 7 years with 2 suspended affirmed (167/2007 – CCA – 19/2/2008) [2008] IECCA 58
People (DPP) v Davis

Sentence

Severity – Drugs – Possession – Mitigating factors – Character references – Rehabilitation – Drug free – Absence of previous convictions – Difficult youth – Sentencer4educed to 8 years with 4 suspended (217/2007 – CCA - 30/7/2008) [2008] IECCA 141
People (DPP) v Tyrell

Sentence

Severity – Drugs – Possession – Pellets internal – Plea of guilty – Whether at earliest opportunity – Whether explanation for delay – Personal circumstances – Foreign national – Little English – Whether prison more onerous - *People (DPP) v Foster* (Unrep, CCA, 15/5/2002) considered – Sentence reduced to 10 years with 2 suspended (81/2007 – CCA – 25/2/2008) [2008] IECCA 29
People (DPP) v Drozzin

Sentence

Severity – Drugs – Possession – Value €5,927 – No previous convictions – Addict – Drugs free at hearing – Attempts at rehabilitation – Sentence reduced to 2 years with 18 months suspended (187/2007 – CCA – 28/2/2008) [2008] IECCA 35
People (DPP) v Treacy

Sentence

Severity – Drugs – Possession – Value of €12,500 – Trading for own profit – Early admission incomplete - Fleeing while on bail – Rehabilitation - Final year of 5 years sentence suspended (171/2007 – CCA – 4/2/2008) [2008] IECCA 10
People (DPP) v Pierce

Sentence

Severity – Endangerment – Handing stolen property – Offence committed on bail – Whether sentences disproportionate – Respective maximum sentence – Sentence of 3 years affirmed (123/2007 – CCA – 31/1/12008) [2008] IECCA 17
People (DPP) v O'Driscoll

Sentence

Severity – Error in judgment – Construction of sentence – Appeal allowed; sentence of 4 years with 2 suspended substituted (134/2007 – CCA – 25/2/2008) [2008] IECCA 30
People (DPP) v Nolan

Sentence

Severity – Firearm – Control – Passenger in car – Threw gun out car window – Whether driver of car more culpable - 5 year sentence affirmed (203/2007 – CCA - 31/10/2008) [2008] IECCA 145
People (DPP) v Kenna

Sentence

Severity – Firearms offence – Maximum sentence – Offence committed while on bail

– Aggravating factor – Mitigating factors – Plea – Health – Appeal allowed; further submissions to be made (184/2007 – CCA – 7/2/2008) [2008] IECCA 27
People (DPP) v McGrath

Sentence

Severity – Firearms offence – Sawn off shot gun – Ammunition – Late plea – No explanation for possession – Whether error in sentence – Leave to appeal refused (28/2007 – CCA – 28/2/2008) [2008] IECCA 33
People (DPP) v Canning

Sentence

Severity – Manslaughter – Lack of intention – Drug overdose – No prosecution unless he cooperated - Early plea – Unusual circumstances – Appeal allowed and sentence reduced from 7 years to 5 years (111/2007 – CCA – 28/2/2008) [2008] IECCA 34
People (DPP) v Naughton

Sentence

Severity – Manslaughter – Probation and psychiatric reports not available to sentencing judge – Rehabilitation – No non-custodial portion of sentence – Sentence affirmed (229/2008 – CCA 21/4/2008) [2008] IECCA 66
People (DPP) v Mulhall

Sentence

Severity – Manslaughter – Range of offences – Single stab wound – Accused leaving scene – Victim came after her - *People (DPP) v McCormack* [2004] 4 I.R. 333, *People (DPP) v Kelly* [2004] IECCA 14 [2005] 2 IR 321 and *People (DPP) v M* [1994] 3 I.R. 306 considered – Whether at upper range of offences – Appeal allowed and sentence of 8 years with 2 suspended substituted (137/2007 – CCA – 27/2/2008) [2008] IECCA 32
People (DPP) v Noble

Sentence

Severity – Public order offences – Demonstration – Petrol bombs thrown at gardaí – Early plea – Premeditated – 5 years affirmed but last 2 years suspended (117/2008 – CCA – 19/2/2008) [2008] IECCA 56
People (DPP) v Maguire

Sentence

Severity – Reactivated sentence – Proportionality – Totality – Sentence varied on reactivation – Minor reoffending – Original sentence suspended to allow for rehabilitation – Sentence affirmed (61/2007 – CCA – 19/2/2008) [2008] IECCA 54
People (DPP) v Kiely

Sentence

Severity – Remarks of trial judge – Whether reflected in sentence actually imposed – Offer of compensation – Whether evidence of remorse – Whether taken into account – Leave to appeal refused (139/2007 – CCA – 11/2/2008) [2008] IECC 20
People (DPP) v O'Riordan

Sentence

Severity – Robbery – Imitation gun – Elderly victim – Sentence of 3 years affirmed (112/2007 – CCA – 5/2/2008) [2008] IECCA 48
People (DPP) v Ayat

Sentence

Severity – Series of robberies – Structure of sentence – Failure to allow for rehabilitation – Failure to suspend portion – *R (Black) v Home Secretary* [2007] EWHC 1668 Admin (Unrep, EHC, 12/7/2007) followed – Proportionality – Overall sentence – Sentence affirmed (99/2007 – CCA -31/1/2008) [2008] IECCA 16
People (DPP) v Campbell

Sentence

Severity – Rape - Seriousness of offence - Scale of seriousness of offences – Circumstances of offence - Personal circumstances – Aggravating features - Mitigating factors - Appropriateness of appellate court laying down standardisation or tariff of penalty - Whether decision in *People (DPP) v Drought* established categories of rapes with appropriate range of sentences - Whether sentence fell within range of appropriate sentences - *People (DPP) v Drought* [2007] IEHC 310, [2008] 1 IR 308, *People (DPP) v Stafford* [2008] IECCA 15, (Unrep, CCA, 14/2/2008), *People (DPP) v Shannon* [1988] IR 250 and *People (DPP) v Tiernan* [1988] IR 250, [1989] ILRM 149 considered - Criminal Law (Rape) Act 1981 (No 10), s 2 - Criminal Law (Rape) (Amendment) Act 1990 (No 32) , s 4 - Leave to appeal against sentence refused (149/2008 – CCA - 29/7/2009) [2009] IECCA 96
People (DPP) v Finn

Sentence

Severity – Serious medical condition – More severe impact of sentence due to illness – Other serious offences - Whether error in suspending 2 years of sentence – Misuse of Drugs Act 1977 (No 12), s 15A - Sentence varied to 10 years with 5 years suspended (116/2007 – CCA – 14/1/2008) [2008] IECCA 5
People (DPP) v Kinahan

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European arrest warrant

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FREEDOM OF INFORMATION

Appeal

Access to records – Personal information – Age – Deceased person – Request by next of kin – Refusal to grant access to records – Record created prior to commencement of Act – Whether applicant entitled to access under Act – Retrospective effect – Whether provisions applied to records created prior to commencement – Whether access necessary to understand records created after commencement – Whether record related to personal information of person seeking access – Whether information sought was personal information – Procedure on appeal – Whether new point of law could be raised on appeal – Whether information confidential – Whether prohibition on disclosure applied – Whether information publicly available — Test to be applied – Whether public interest in disclosure – Constitutional rights of deceased persons – Constitutional rights of corporations – *Sheedy v Information Commissioner* [2005] IESC 35, [2005] 2 IR 272, *Minister for Agriculture v Information Commissioner* [2000] 1 IR 309, *Health Service Executive v Information Commissioner* [2009] IEHC 298, [2009] 1 ILRM 440, *Deely v Information Commissioner* [2001] 3 IR 439, *South Western Area Health Board v Information Commissioner* [2005] IEHC 177, [2005] 2 IR 547, *Murray v Trustees and Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] IEHC 27, [2007] 2 ILMR 196, *Murphy v Minister for Defence* [1991] 2 IR 161, *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323 (Unrep, Finnegan, 1/11/2006), *Minister for Finance v McArdle* [2007] IEHC 98, (Unrep, Laffoy J, 22/3/2007), *Hamilton v Hamilton* [1982] IR 466, *Re Heffernon Kearns Ltd* (No 1) [1993] 3 I.R. 177 , *Chestvale v. Glackin,* [1993] 3 I.R. 35, *Information Commissioner v. Canada (Minister of Public Works and Government Services)* (1996) 70 CPR (3rd) 37, *IO'T v B* [1998] 2 IR 321, *Coco v AN Clarke (Engineers) Ltd* [1968] FSR 415, *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, *House of Spring Gardens Ltd v Point Blank Ltd* [1984] IR 611, *Prince Albert v Strange* (1849) 1 H & TW 1, *Gannon v Information Commissioner* [2006] IEHC 17, [2006] 1 IR 270, *National Maternity Hospital v Information Commissioner* [2007] IEHC 113 [2007] 3 IR 643, *McK v Information Commissioner* [2006] IESC 2, [2006] 1 IR 260, *Odievre v France* (2004) 38 EHRR 43, *Campbell v MGN Ltd* [2004] 2 AC 457, *Gaskin v UK* [1990] 12 EHRR 36, *G(M) v UK* (2003) 36 EHRR 3, *Jaggi v Switzerland* (2008) 47 EHRR 30, *Mikulic v Croatia* (2002) 1 FCR 720, *Peck v UK* (2003) 36 EHRR 41, *W v Egdell* [1990] 1 All ER 835, *X v Y* [1988] 2 All ER 648, *Murray v Commission to Inquire into Child Abuse* [2004] IEHC 225, [2004] 2 IR 222, *McCann v UK* (1996) 21 EHRR 97, *Hilliard v Penfield Enterprises Ltd* [1990] 1 IR 138, *Private Motorists Provident Society v Attorney General* [1983] IR 339, *Kerry Cooperative Creameries v An Bórd Bainne* [1990] ILRM 664, *Iarnrod Éireann v Ireland* [1996] 3 IR 321, *Competition Authority v Irish Dental Association* [2005] IEHC 361, [2005] 3 IR 208, *People (DPP) v Kenny* [1990] 2 IR 110 and *Bupa Ireland Ltd v Health Insurance Authority* [2008] IESC 42, (Unrep, SC, 16/7/2008) considered — Courts of Justice Act 1946 (No 21), s 16 – Succession Act 1965 (No 27), ss 70 & 71 – Freedom of Information Act 1997 (No 13), ss 5, 6(1), 21(1)(a), 26, 28, 32(1), 34(2) & 42(1) - Education Act 1998 (No 51), s 5 – European Convention on Human Rights Act 2003 (No 20), s 2 – Constitution of Ireland, Art. 40.3 – European Convention on Human Rights and Fundamental Freedoms, art 8 – Appeal dismissed (2008/16MCA – McCarthy J – 2/7/2009) [2009] IEHC 315
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Asylum

Appeal – Claim based on persecution – Whether tribunal erred in law in relying on documentation not revealed or disclosed to appellant - Country of origin information – Whether selective use of country of origin information – Whether tribunal required to disclose documents not already given to the appellant at the earlier state before the final decision is adopted – Whether non compliance of a technical nature - Error of fact – Whether error material - Whether error constituted breach of fair procedure or constitutional justice – Assessment of credibility – *Mongenda v Minister for Justice, Equality and Law Reform* (Unrep, Clarke J, 29/11/2007) considered – Refugee Act 1996 (No. 16), s. 16 – Relief refused (2006/1151JR – Cooke J – 1/7/2009) [2009] IEHC 301
N (M) v Refugee Appeals Tribunal

Asylum

Appeal – Country of origin information – Role of court on judicial review – Fair procedures – Whether sufficient evidence to base conclusions – Nature of evidence relied upon – *Imafu v Minister for Justice* [2005] IEHC 426 (Unrep, Peart J, 9/07/2005) applied - Relief refused (2007/91JR – Cooke J – 3/07/2009) [2009] IEHC 323
M (SI) v Refugee Appeals Tribunal

Asylum

Appeal – Leave for judicial review – Assessment of credibility - Failure to refer to documentation submitted – Whether tribunal erred in law in relying on documentation not revealed or disclosed to appellant – Whether selective use of country of origin information – Refugee Act 1996 (No. 17), s. 16 – Leave refused (2007/1500JR – Birmingham J – 3/7/2009) [2009] IEHC 295
A (EA) v Minister for Justice, Equality and Law Reform

Asylum

Appeal – Leave for judicial review – Claim based on persecution – Whether substantial grounds for review – Assessment of credibility – Errors of fact – Whether errors material – Whether error constituted breach of fair procedure or constitutional justice – Whether adequate reason for adverse finding – *Imafu v MJELR* [2005] IEHC 182 (Unrep, Clarke J, 27/5/2005), *Carciu v MJELR* (Unrep, Finlay Geoghegan J, 4/7/2003), *AMT v RAT* [2004] 2 IR 607, *Memishi v RAT* (Unrep, Peart J, 25/6/2003), *Tabi v RAT* (Unrep, Peart J, 27/7/2007), *Imafu v MJELR* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) considered - Relief refused (2007/549JR – Cooke J – 18/6/2009) [2009] IEHC 299
B (B) v Minister for Justice, Equality and Law Reform

Asylum

Appeal – Leave for judicial review – Claim based on persecution – Whether substantial grounds for review – Assessment of credibility – Failure to refer to documentation submitted - Whether selective use of country of origin information – Weight of evidence - Whether error of fact material - *McNamara v An Bórd Pleanála (No. 1)* [1995] 2 ILRM 125 - *K (N) v Refugee Appeals Tribunal* [2004] 4 IR 321, *Sango v RAT* [2005] IEHC 395 (Unrep, Peart J, 24/11/2005), *Carciu v Minister for Justice, Equality and Law Reform* (Unrep, Finlay Geoghegan J, 4/7/2003), *Muia v RAT* [2005] IEHC 363 (Unrep, Clarke J, 11/11/2005), *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *A (A) v Minister for Justice, Equality and Law Reform* (Unrep, Cooke J, 23/1/2009), *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 182 *(Unrep, Clarke J, 27/5/2005*), *Traore v RAT* (Unrep, Finlay Geoghegan J, 15/5/2004), *Da Silveira v RAT* (Unrep, Peart J, 9/7/2004), and *Zhuchova v Minister for Justice, Equality and Law Reform* (Unrep, Clarke J, 26/11/2004) considered - Leave refused (2006/67JR – Irvine J – 2/7/2009) [2009] IEHC 302
M (AA) v Refugee Appeals Tribunal

Asylum

Credibility – Treatment of applicant's credibility – Inconsistencies - Whether open to tribunal member to draw negative credibility findings from discrepancies - Reliance on undisclosed material - Expertise of tribunal member acquired at conference –Whether applicant entitled to see materials relating to conference – Whether tribunal member entitled to rely on knowledge acquired in the course of experience and training - Substantial grounds - Extension of time - Whether good and sufficient reason to extend time - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2)(a) Application for leave to apply for judicial review refused (2006/1402 JR – Hedigan J - 4/11/2008) [2008] IEHC 342
S (O) v Refugee Appeals Tribunal

Asylum

Evidence – Credibility – Country of origin information – Female genital mutilation – State protection – Whether finding irrational – Whether all evidence considered – Whether some evidence more authoritative – *DVTS v Minister for* Justice [2007] IEHC 305 [2008] 3 IR 476 considered – Application dismissed (2006/986JR – MacMenamin J – 8/5/2008) [2008] IEHC 142
M (V) v Refugee Appeals Tribunal

Asylum

Errors of fact – Credibility - Tribunal placed reliance on two significant errors of fact in rejecting applicant's credibility - Whether errors such that tribunal in breach of obligation to assess application in accordance with principles of constitutional justice - Whether errors had capacity to affect correctness of process by which decision reached – Whether material or significant error – Severability - Decision in round - *Ryanair Ltd v Flynn* [2000] 3 IR 240, *T (G) v Minister for Justice, Equality and Law Reform* [2007] IEHC 287, (Unrep, HC, Peart J, 27/7/2007), *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416, (Unrep, HC, Peart J, 9/12/2005), *P(V) v Refugee Appeals Tribunal* [2007] IEHC 415, (Unrep, HC, Feeney J, 7/12/2007), *T (AM) v Refugee Appeals Tribunal* [2004] IEHC 219, [2004] 2 IR 607, *Carciu v Minister for Justice, Equality and Law Reform* (Unrep, HC, Finlay Geoghegan J, 4/7/2003), *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642, [1987] ILRM 202, *O'Keeffe v An Bórd Pleanála* [1993] 1 IR 39, *Doran v Minister for Finance* [2001] 2 IR 452, *Kikumbi v Refugee Applications Commissioner* [2007] IEHC 11, (Unrep, HC, Herbert J, 7/2/2007), *Bisongi v Minister for Justice, Equality and Law Reform* [2005] IEHC 157, (Unrep, HC, O'Leary J, 25/4/2005) and *Keagnene v Minister for Justice, Equality and Law Reform* [2007] IEHC 17, (Unrep, HC, Herbert J, 31/1/2007) considered - Application for judicial review refused (2007/800JR - McCarthy J - 28/7/2009) [2009] IEHC 383
A (S) v Refugee Appeals Tribunal & Minister for Justice

Asylum

Fair procedures – Failure to afford applicant opportunity to rebut evidence - Failure to disclose documents relied on - Adequacy of appeal to refugee applications commissioner – Whether fundamental and irremediable infringement of entitlement to fair procedures - Applicant seeking order quashing the decision of ORAC rather than availing of statutory right to appeal before refugee appeals commissioner - Whether fundamental flaw or illegality such that rehearing upon appeal before the tribunal inadequate remedy - Discretion - Whether certiorari appropriate remedy - Whether serious deficiency in investigative process - Existence of alternative remedy - Conduct of applicant - Merits of application - Consequences to applicant if certiorari not granted - Degree of fairness of procedures - Whether flaw remediable at appeal - Absence of the right to oral hearing - Factors to be taken into account - *Idiakheua v Minister for Justice, Equality and Law Reform* [2005] IEHC 150, (Unrep, HC, Clarke J, 10/5/2005), *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218, (Unrep, HC, Clarke J, 10/5/2005, *D (A) v Refugee Applications Commissioner* [2009] IEHC 77, (Unrep, HC, Cooke J, 27/1/2009), *Stefan v Minister for Justice, Equality and Law Reform* [2001] 4 IR 203, *K (A) v Refugee Applications Commissioner* (*Ex tempore*, SC, 28/1/2009), *N (NB) v Minister for Justice, Equality and Law Reform* [2008] IEHC 308, (Unrep, HC, Hedigan J, 9/10/2008), *M (J) v Refugee Applications Commissioner* [2009] IEHC 64, (Unrep, HC, Cooke J, 27/1/2009), *A (TT) v Refugee Applications Commissioner* [2009] IEHC 215, (Unrep, HC, Cooke J, 29/4/2009) and *A (RL) v Minister for Justice, Equality and Law Reform* [2009] IEHC 216, (Unrep, HC, Cooke J, 30/4/2009) considered - Order of *certiorari* granted, case remitted to ORAC (2008/262 JR – Clark J – 29/7/2009) [2009] IEHC 352
M (JG) v Refugee Applications Commissioner

Asylum

Fair procedures - Inconsistent decisions – Well founded fear of persecution - Failure to provide reason for inconsistency in decisions - Son of applicant granted refugee status in Ireland – Application of applicant grounded on identical fear of persecution supported by identical or analogous medical evidence of son - Absence of any apparent distinctions – Whether tribunal member required to provide reasons for reaching different conclusion with respect to applicant - Assessment of country of origin information - State protection - Extension of time - Good and sufficient reasons - *DL v Refugee Appeals Tribunal* [2008] IEHC 351, (Unrep, HC, Hedigan J, 11/11/2008) followed; *Jong v Minister for Immigration and Multicultural Affairs* (1997) 143 ALR 695 distinguished; *GS v Refugee Applications Commissioner* [2008] IEHC 365, (Unrep, HC, Irvine J, 21/11/2008), *Canada (AG) v Ward* [1993] SCR 689, *ABM v Minister for Justice, Equality and Law Reform* (Unrep, HC, O'Donovan J, 23/7/2001), *McMahon v Leahy* [1984] IR 525, *Dikilu v Minister for Justice, Equality and Law Reform* (Unrep, HC, Finlay Geoghegan J, 2/7/2003), *COI v Minister for Justice, Equality and Law Reform* [2007] IEHC 180, (Unrep, HC, McGovern J, 2/3/2007) and *Fasakin v Refugee Appeals Tribunal* [2005] IEHC 423, (Unrep, HC, O'Leary J, 21/12/2005) considered - Refugee Act 1996 (No 17), s 13 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) - Leave to apply for judicial review granted (2006/991 JR – Hedigan J - 27/10/2008) [2008] IEHC 400
G (E) & G (D) v Minister for Justice, Equality and Law Reform

Asylum

Fair procedures - Substantial grounds - Country of origin documentation – Credibility – Assessment of credibility - Whether applicant afforded hearing which complied with principles of natural justice and fair procedures – Whether tribunal member prejudged applicant's claim – Whether relevant material excluded by tribunal member - *McNamara v An Bórd Pleanála (No 1)* [1995] 2 ILRM 125, *Atanasov v Refugee Appeals Tribunal* [2005] IEHC 237, (Unrep, HC, MacMenamin J, 7/7/2005), *Corrigan v Irish Land Commission* [1977] IR 317, *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416, (Unrep, HC, Peart J, 9/12/2005), *T (G) v Minister for Justice, Equality and Law Reform* [2007] IEHC 287, (Unrep, HC, Peart J, 27/7/2007), *Kramarenko v Refugee Appeals Tribunal* [2004] IEHC 101, [2004] 2 ILRM 550 and *Da Silveria v Refugee Appeals Tribunal* [2004] IEHC 436, (Unrep, HC, Peart J, 9/7/2004) considered - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) - EU Council Directive 2004/83 - Refugee Act 1996 (No 17), s 16(8) - Leave to apply for judicial review refused (2008/504 JR - Irvine J - 31/7/2009) [2009] IEHC 356
M (ME) v Refugee Appeals Tribunal

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Fear of persecution - Conflicting country of origin information - Assessment of credibility - Treatment of country of origin information - Internal relocation - Substantial grounds - Whether decision explained with sufficient clarity - *L (Y) v Minister for Justice, Equality and Law Reform* [2009] IEHC 62,(Unrep, HC, Cooke J, 11/2/2009), *McNamara v An Bórd Pleanála (No 1)* [1995] 2 ILRM 125, *Traore v Refugee Appeals Tribunal* [2004] IEHC 606, (Unrep, HC, Finlay Geoghegan J, 14/5/2004), *Camara v Minister for Justice, Equality and Law Reform* (Unrep, HC, Kelly J, 26/7/2000), *East Donegal Co-operative Livestock Mart Ltd v Attorney General* [1970] IR 317, *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416, (Unrep, HC, Peart J, 9/12/2005), *Banzuzi v Refugee Appeals Tribunal* [2007] IEHC 2, (Unrep, HC, Feeney J, 18/1/2007), *DVTS v Minister for Justice, Equality and Law Reform* [2007] IEHC 305, [2008] 3 IR 476 and *MIA v Refugee Appeals Tribunal* [2008] IEHC 336, (Unrep, HC, Hedigan J, 29/10/2008) considered - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 10 (2) - Leave to apply for judicial review refused (2007/1206JR - Irvine J - 20/7/2009) [2009] IEHC 355
R (UF) v Minister for Justice, Equality and Law Reform

Asylum

Fear of persecution – Substantial grounds - Credibility - Availability of internal relocation - Country of origin information - Application for extension of time - Whether good and sufficient reason to extend time – Whether affidavit disclosed adequate basis for grant of extension of time - Illegal Immigrants Trafficking Act 2000 (No 29), s 5(2)(a) - Application for leave to apply for judicial review refused (2007/1272JR - Cooke J - 21/7/2009) [2009] IEHC 350
J (A) v Refugee Appeals Tribunal

Asylum

Refugee status – Fear of persecution – Fair procedures – Whether applicant's interview accorded with UNHCR guidelines having regard to her young age, distress and vulnerable condition – Country of origin information – Whether selective – Matter for tribunal of fact – *VZ v Minister for Justice* [2002] IR 135, *Kayode v RAC* [2005] IEHC 172 (Unrep, SC, 28/1/2009); *B (NN) v Minister for Justice, Equality and Law Reform* [2008] IEHC 308 (Unrep, Hedigan J, 9/10/2008); *D (A) v RAC* [2009] IEHC 77 *(Unrep, Cooke J, 27/1/2009);* M (J) v *RAC* [2009] IEHC 64 (Unrep, Cooke J, 27/1/09 considered – Relief refused (2006/836JR – Cooke J – 18/6/2009) [2009] IEHC 298
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Asylum

Refugee status – Fear of persecution – Whether grounds for review – Credibility – Whether commissioner's adverse credibility findings rational or lawfully made - *Stefan v MJELR* [2001] 4 IR 203, *Kayode v Refugee Applications Commissioner* (Unrep, SC, 28/1/2009), *B(NN) v MJELR* [2008] IEHC 308 (Unrep, Hedigan J, 9/10/2008), *D(A) v RAC* [2009] IEHC 77 (Unrep, Cooke J, 27/1/2009*), M (J) v RAC* [2009] IEHC 64 (Unrep, Cooke J, 27/1/09*)* followed – Relief refused (2006/987JR – Cooke J – 25/06/2009) [2009] IEHC 296
A (O) v Refugee Appeals Tribunal

Asylum

Refugee status – Leave for judicial review – Claim based on persecution – Whether substantial grounds for review – Whether commissioner had general obligation to disclose or put country of origin information to applicant – Assessment of credibility – Matter for tribunal of fact – Obligation to disclose a shared duty to ascertain and evaluate all relevant facts – Whether commissioner's obligation to inquire in to all relevant facts extended to specific inquiries in to availability of treatment for HIV/Aids in country of origin – Application of applicant's child's case for asylum – Whether assessment sufficient – *Stefan v Minister for Justice* [2001] 4 IR 203*, Kayode v RAC* (Unrep, SC, 28/1/2009), *B (NN) v Minister for Justice* [2008] IEHC 308 (Unrep, Hedigan J, 9/10/2008), *D (A) v RAC* [2009] IEHC 77 (Unrep, Cooke J, 27/1/2009*),* M (J) v *RAC* [2009] IEHC 64 (Unrep, Cooke J, 27/1/09, *A (TT) v Minister for Justice* [2009] IEHC 215 (Unrep, Cooke , 29/4/2009), *A (RL) v RAC* [2009] IEHC 216 (Unrep, Cooke J, 30/4/2009), *N (N) v RAC* [2008] 1 IR 501, *S (P) (a minor) v RAC* [2009] IEHC 298 (Unrep, Cooke J, 18/6/2009) and *A(O) v. RAT* (Unrep, Cooke J, 25/6/2009) considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2006/1459 JR – Cooke J – 26/6/2009) [2009] IEHC 300
O (F) v Minister for Justice, Equality and Law Reform

Asylum

Time limit – Extension of time – Leave to apply – "Substantial grounds" – Stateless person claiming refugee status – Unable to return to country of former residence – Whether applicant required to show well founded fear of persecution – Whether first respondent had erred in failing to consider whether applicant refugee due to membership of particular group – *VZ v Minister for Justice* [2002] 2 IR 135 applied; *SHM v Minister for Justice* [2009] IEHC 128, (Unrep, Clark J, 12/3/2009) & *Revenko v Home Secretary* [2001] QB 601 followed - Refugee Act 1996 (No 17), s 2 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Time extended, leave granted (2007/1728JR – McMahon J – 17/7/2009) [2009] IHC 326
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Deportation

Family rights – Preservation of family unit – Whether breach of Convention rights – Lack of candour - Legitimate expectation – Whether applicant entitled to remain in state at least until husband's asylum claim determined – Leave to apply for judicial review refused (2009/196JR – Cooke J – 17/6/2010) [2009] IEHC 297
O (M) v Minister for Justice, Equality and Law Reform

Subsidiary protection

Refusal – Judicial review – Leave to apply – Setting aside of leave – Test to be applied – Threshold to be met in application for leave – *Gordon v DPP* [2002] IR 369 applied - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – European Convention on Human Rights and Fundamental Freedoms 1950, art 3 - Application to set aside leave refused (2009/566 JR – Cooke J - 7/07/2009) [2009] IEHC 324
O (N) & O (Ta) v Minister for Justice

INJUNCTION

Criminal trial

Restraint - Constitutional challenge – Principles to be applied – Jurisdiction - *Locus standi* – Whether plaintiff had *locus standi* to challenge constitutionality of statute - *Jus tertii* - Detention for up to 72 hours for possession of specified categories of information – *DM (a minor) v Ireland* [2009] IEHC 206 (Unrep, Clarke J, 21/4/2009); *Cahill v Sutton* [1980] IR 269 applied; *O'Mahoney v Melia* [1989] IR 335 distinguished; *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317, *CC v Ireland* [2006] 4 IR 1, *SPUC (Ireland) Ltd v Coogan* [1989] IR 734, *Woods, Application of* [1970] IR 154 and *Osmanovic v DPP* [2006] 3 IR 504 considered - Offences Against the State Act 1939 (No 13), s 30 - Reliefs refused (2008/10544P – Laffoy J – 25/6/2009) [2009] IEHC 291
Maloney v Ireland

Mandatory

Joint owners of property – Agreement to sell property – Balance of proceeds of sale to be divided equally between parties – Terms agreed relating to maintenance – Certain payment made – Proceeds of sale withheld pending resolution of maintenance issues - Relief sought against solicitor holding proceeds of sale – Precise division of proceeds of sale unclear – Family Law (Maintenance of Spouses and Children) Act 1976 (No 11), ss 21 & 27 –Relief refused (2009/2200P – Murphy J – 1/07/2009) [2009] IEHC 313
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Patents

Validity - Revocation – Application to revoke patent - Want of inventiveness – State of art - Obviousness depriving patent of protection at priority date – Principles to be applied - Whether patent for drug combination involved inventive step – Whether combination of two drugs into single preparation obvious – *Pozzoli SPA v BDMO SA* [2007] EWCA Civ 588, [2007] FSR 37 approved; *Cipla Ltd v Glaxo Group Ltd* [2004] RPC 43 distinguished; *Connor Medsystems v Angiotech Pharmaceuticals* [2008] RPC 716, *Generics (UK) Ltd v Lundbeck A/S* [2007] EWHC 1040 (Pat), [2007] RPC 729, *Johns-Manville Corporation's Patent* [1967] RPC 479, *Brugger v Medic-Aid Ltd* [1996] RPC 635, *Union CarbidevBP Chemicals Ltd* [1998]RPC 1, *Dyson AppliancesLtdvHooverLtd*[2001]All ER (D)37, *Ranbaxy Laboratories Ltd v Warner Lambert Co* [2007] IEHC 256 (Unrep, Clarke J, 10/7/2007), *British Ore Concentrate Syndicate Ltd v Minerals Separation Ltd* [1909] 26 RPC 124, *General Tire and Rubber Co v Firestone Fire and Rubber Co Ltd* [1972] RPC 457, *Vovartis AG v Ivax Pharmaceuticals UK* Ltd [2006] EWHC 2506 (Pat), *Davie v Magistrates of Edinburgh* [1953] SC 34, *SS Bogota v SS Alconda* [1923] SC 526, *Biogen Inc v Medeva plc* [1997] RPC 1, *Bonzel v Intervention Ltd (No 3)* [1991] RPC 553, *Vector Corp v Glatt Air Techniques* [2007] EWCA Civ 805, *Ricardson v Vicks Patent* [1995] RPC 568, *European Central Bank v Documents Security Systems* [2007] EWHC 600 (Pat) considered – Council Regulation (EEC) No 1768/92 - Patents Act 1992 (No 1) – Patents (Amendment) Act 2006 (No 31) - Patent disallowed (2008/3PAP – Charleton J – 26/6/2009) [2009] IEHC 277
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Certiorari – Nature of remedy – Whether *certiorari* would be futile – Discretion of court – Whether *certiorari* justified to ensure actions of public authorities subject to judicial review - *Carr v Minister for Education and Science* (Unrep, SC, 23/11/2000) distinguished – *Certiorari* granted (2008/905JR – O'Neill J – 28/5/2009) [2009] IEHC 258
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Involuntary patient - Renewal order – Consultant psychiatrist based in institution other than that in which applicant detained - Meaning of 'consultant psychiatrist responsible for care and treatment of patient' – Whether necessary for psychiatrist in daily charge of detainee to sign renewal order – *JB v Director Central Mental Hospital* [2007] IEHC 201 (Unrep, MacMenamin J, 15/6/2007) considered; *WQ v Mental Health Commission* [2007] IEHC 154 (Unrep, O'Neill J, 15/5/2007) distinguished – Mental Treatment Act 1945 (No 19), s 184 - Mental Health Act 2001 (No 25), ss 15, 21 and 72 – Release refused (2007/1833SS – Peart J 1/2/2008) [2008] IEHC 44
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Legal representation

Involuntary patient – Review – Medical records – Incapacity of patient – Legal representative appointed – Failure of patient to consent to access to medical records – Whether legal representative entitled to view medical records in advance of hearing – Whether should wait to apply at hearing – Declaration that legal representative entitled to view records granted (2008/264JR – Peart J – 25/11/2008) [2008] IEHC 462
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PLANNING & ENVIRONMENTAL LAW

Permission

Default permission – Circumstances under which default permission may be granted – Development plan – Whether development in material contravention of development plan – Whether development open for consideration – Whether default permission applied – Whether limitations on entitlement to default permission - Exercise of judicial discretion – *McGovern v Lord Mayor of Dublin* [1999] 2 ILRM 314, *Monaghan UDC v Alf-A-Bet Promotions Ltd* [1980] ILRM 64, *P & F Sharpe Ltd v Dublin City Manager* [1989] IR 701, *State (Pine Valley Developments) Ltd v Dublin County Council* [1984] IR 407 considered; *Maye v Sligo Corporation* [2007] IEHC 146 (Unrep Clarke J, 7/4/2007) approved – Local Government (Planning and Development) Act 1963 (No 28), s 26 – Planning and Development Act 2000 (No 30), ss 15 & 34 - Planning and Development Regulations 2001 (SI 600/2001) - Relief granted (2008/91 – SC – 22/7/2009) [2009] IESC 56
Abbeydrive Developments Ltd v Kildare County Council

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Waste management (landfill levy) order 2010
SI 13/2010

PRACTICE & PROCEDURE

Appeal

Time limits - Enlargement of time to serve notice of appeal - Applicable test – Relevant factors to consider - Discretion – Prejudice - Whether *bona fide* intention to appeal formed within ten days from date of order – Whether any genuine mistake - Whether arguable ground of appeal disclosed - Whether any circumstances to cause court to exercise discretion in favour of granting enlargement of time to appeal - *Eire Continental Trading Company Ltd v Clonmel Foods Ltd* [1955] IR 170 and *Brewer v Commissioners of Public Works* [2003] 3 IR 539 applied - Relief refused (2009/30IA - Peart J - 17/7/2009) [2009] IEHC 363
Winters v Farrelly

Costs

Before conclusion of case – Admission of liability four days before trial date - Whether plaintiffs entitled to order for costs before issue of *quantum* decided - Whether costs may be dealt with at any stage in proceedings - Whether court had discretion to make order for costs prior to *quantum* of damages being decided where lodgement made - Discretion - Hazardous exercise - Difficulties on taxation of costs - Conduct of parties - *Veolia Water UK plc v Fingal County Council* [2006] IEHC 240, [2007] 2 IR 81 considered - Rules of the Superior Courts 1986 (SI 15/1986) O 22 r 6, O, 99 - Application refused (2001/7739P - Hanna J - 24/7/2009) [2009] IEHC 372
Cork Plastics (Manufacturing) v Ineos Compounds (UK) Ltd

Costs

Taxation – Certificate of taxation – Discharge of court fees payable in order to take up certificate of taxation – Cost of proceedings awarded against plaintiff - Impecunious defendant unable to discharge court fees to take up certificate of taxation - Whether jurisdiction to dispense with requirement that defendant pay fees – Whether jurisdiction to direct plaintiff to discharge court fees payable - Whether jurisdiction to direct taxing master to issue certificate of taxation on undertaking to discharge fees upon recovery from plaintiff - *Airey v Ireland* (1979) 2 EHRR 305, *MacGairbhith v Attorney General* [1991] 2 IR 412 and *Murphy v Minister for Justice* [2001] 1 IR 95 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 37 - Supreme Court and High Court Fees Order 1989 (SI 341/1989) - Reliefs refused (2005/254P – Peart J – 18/6/2009) [2009] IEHC 293
Barrett v Beglan

Discovery

Relevancy –Alleged misconduct of applicant - Correct approach to be adopted - Overall position – Whether documents sought relevant to any matter properly before court within current proceedings - Whether court entitled to consider potential claim which could be put forward - *Lynch v Attorney General* [2003] 3 IR 416 applied - Proceeds of Crime Act 1996 (No 30), ss 2 and 3(3) - Application refused (2007/15 CAB - Feeney J - 20/4/2009) [2009] IEHC 357
Criminal Assets Bureau v L (M A)

Documents

Disclosure - Evidence - Nature and purpose of evidentiary documents used in criminal proceedings – Books of evidence – Transcript of evidence at criminal trial – Discovery and production of documents used in prior criminal proceedings sought by plaintiffs for inspection in aid of civil litigation in different jurisdiction – Whether implied undertaking against any collateral use of books of evidence and transcript – Whether absolute prohibition on disclosure of transcript to third party for collateral use – Whether discretion vested in court to release defendant from implied undertaking in respect of books of evidence for collateral use – Circumstances in which such discretion may be exercised – Existence of special circumstances and satisfaction that no injustice to person giving discovery would ensue – Rules of the Superior Courts 1986 (SI 15/1986), O 3, r 22, O 31, rr 19 and 29, O 86, rr 14 and 17 – *Roussel v Farchepro Ltd* [1999] 3 IR 567 followed; *Cork Plastics v Ineos UK Ltd* [2008] 1 ILRM 174 applied; *Kelly v Ireland* [1986] ILRM 318 considered; *Chambers v Times Newspapers Ltd* [1999] 2 IR 424 distinguished –Disclosure granted (2007/403SP – Gilligan J – 20/3/2008) [2008] IEHC 122
Breslin v McKenna

Jurisdiction

Conflict of laws – Brussels Regulation – Contract – Commercial agreement – General terms and conditions – Interpretation – Exclusive jurisdiction clause – Whether clause in writing or evidenced in writing – Whether clause formed part of agreement – *Leo Laboratories Ltd v Crompton BV* [2005] 2 IR 225 and *Bio-Medical Research Ltd v Delatex SA* [2000] 4 IR 307 applied; *Leathertex v Bodetex* (Case C-420/97) [1999] ECR I-6747, *MSG v Gravières Rhénanes* (Case C-106/95) [1997] ECRI-911 considered – Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 (No 3) - Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968, art 17 - Regulation (EC) No 44/2001, art 23 – Plaintiff's appeal dismissed (2003/7690P – Fennelly J – 1/07/2009) [2009] IESC 49
O'Connor v Masterwood (UK) Limited

Order

Slip rule - Accidental omission in return for trial –Administrative failure to transpose full decision accurately – Application for order of *mandamus* to direct District Court Judge to hear and determine application to cure defect under slip rule - Whether District Court Judge entitled to apply slip rule to make good defect in orders - Whether district court *functus officio*- Inherent power of court to remedy accidental errors and omissions - Power of court to alter orders after case concluded - Whether slip rule properly applicable to remedy defect in return for trial - *Creaven v Criminal Assets Bureau* [2004] IEHC 26, [2004] 4 IR 434 not followed; *G McG v DW (No 2)* [2000] 4 IR 1 and *Belville Holdings v Revenue Commissioners* [1994] ILRM 29 applied - District Court Rules 1997 (SI 93/1997) O 12, r 17 - Time limits - *Certiorari - Mandamus* – Extension of time - Whether good reasons for extending time - Whether explanations offered for delay constitute good reason – Factors to consider – Discretion - *De Roiste v Minister for Defence* [2001] I IR190 applied - Rules of the Superior Courts 1986 (SI 15/1986) O 84, r 21 - Extension of time and an order of *mandamus* granted (2008/856, 857, 858 and 859 JR – Cooke J – 19/12/2008) [2008] IEHC 419
DPP v Judge Reilly

Parties

Defendant - MIBI only – Whether driver and

owner of vehicle untraced - Defence alleging accident caused by named identified motorist – Plaintiff concluded that identity of driver had not been established with sufficient clarity as to justify issue of proceedings - Whether plaintiff entitled to be guided by gardaí - Whether identified motorist ought to have been proceeded against - Whether plaintiff entitled to succeed against MIBI - *Quantum - Feeney v O'Connor* (Unrep, HC, Johnston J, 30/7/1999) considered; *Lynch v MIBI* [2005] IEHC 184, (Unrep, HC, Macken J, 10/5/2005) distinguished - General damages assessed at €67,500 (2008/5179P - Birmingham J - 15/7/2009) [2009] IEHC 349
McCabey v Motor Insurers Bureau of Ireland

Parties

Plaintiff – Additional plaintiffs - Order adding two wholly owned subsidiaries of plaintiff company as plaintiffs to proceedings - Prejudice – Delay - Whether defendant prejudiced by addition of proposed plaintiffs - Rules of the Superior Courts 1986 (SI 15/1986) O 15 rr 1 and 13 - Application granted (2006/1490P - Peart J - 17/7/2009) [2009] IEHC 365
Leisure Management Corporation Ltd v AIG Europe (Ireland) Ltd

Remittal

Jurisdiction of court to remit or transfer – Costs - Plenary action seeking injunctive relief and damages initiated in High Court - Defendant sought remittal of matter to Circuit Court - Ascertainable damages fell within jurisdiction of Circuit Court - Whether alleged damage warranted proceedings being instituted in High Court - Whether reasonable to initiate action in High Court – Costs – Discretion - Whether issue of costs of proceedings should be left to Circuit Court Judge following remittal - Whether High Court had jurisdiction to make order as to costs before plenary action concluded – Normal practice – Rule that costs follow the event - *McEvoy v Fitzpatrick* [1931] IR 212 considered - Courts of Justice Act 1924 (No 10), s 25 - Courts of Justice Act 1936 (No 48), s 11(2) - Rules of the Superior Courts 1986 (SI 15/1986) O 49, r 7, O 99, r 1(4) - Proceedings remitted to Circuit Court, costs of both sides reserved (2006/ 2233P – Laffoy J – 26/11/2008) [2008] IEHC 401
Parkborough Ltd v Kelly

Summary judgment

Value added tax - Assessment - Appeals Commissioner – Precepts issued - Appeals withdrawn – No formal order made dismissing appeals – Whether failure to comply with precepts rendered assessments binding - Allegation appeals withdrawn by solicitor without instructions – Whether arguable defence – *Aer Rianta CPT v Ryanair Ltd* [2001] 4 IR 607 and *First National Commercial Bank Plc v Anglin* [1996] 1 IR 95 applied; *R v Inspector of Taxes ex p Bass Holdings Ltd* [1993] STC 122 and *Schuddenfrei v Hilton* (Inspector of Taxes) [1998] STC 404 distinguished; *Waugh v HB Clifford & Sons Ltd* [1982] 1 All ER 1095 considered - Taxes Consolidation Act 1997 (No 39), ss 933 & 935 – Liberty to enter final judgment granted (2009/324 & 325 – Kelly J – 3/7/2009) [2009] IEHC 322
Harrahill v Kane (P) & *Harrahill v Kane (J)*

Summary summons

Stay - Referral to arbitration – Building contract - Defective works - Whether referral of dispute to arbitration should preclude plaintiff from recovering judgment - Test for grant of summary judgment – Whether defence amounted to cross claim against plaintiff - Whether any right to set off on foot of counterclaim - Whether parties excluded right of set off in respect of cross claims – Entitlement of plaintiff to enter judgment - Whether execution on judgment should be stayed pending arbitration - *Aer Rianta CPT v Ryanair Limited* [2001] 4 IR 607, *Prendergast v Biddle* (Unrep, SC, 21/7/1957) and *Moohan v S & R Motors (Donegal) Ltd* [2007] IEHC 435, [2008] 3 IR 650 applied; *John Sisk & Sons Ltd v Lawter Products BV* [1976 - 77] ILRM 204, *PJ Hegarty and Sons v Royal Liver Friendly Society* [1985] IR 524, *Rohan Construction Ltd v Antigen Ltd* [1989] ILRM 783 and *Powderly v McDonagh* [2006] IEHC 20, (Unrep, HC, Kelly J, 31/1/2006) considered - Arbitration Act 1980 (No 7), s 5 - Stay placed on execution and registration of judgment in part until counterclaim disposed of by arbitration (2009/925S - Kelly J 16/7/2009) [2009] IEHC 358
Killerk Ltd v Houlihan

Summons

Renewal - Set aside renewal – Delay of six years from date of issue of summons to application to renew - Reasons for failing to have plenary summons renewed at earlier date - Whether oversight and pressure of work on part of plaintiff's solicitor good reason for renewal – Whether defendants prejudiced by intervening lapse of time - Whether delay inordinate or inexcusable –Whether order setting aside renewal order constituted denial of plaintiff's right to fair procedures - Prejudice - Overall interests of justice - Personal blamelessness of plaintiff – Whether question of personal blameworthiness relevant factor when considering balance of justice - *Roche v Clayton* [1998] 1 IR 596, *Baulk v Irish National Insurance Co Ltd* [1969] IR 66, *Bingham v Crowley* [2008] IEHC 453, (Unrep, HC, Feeney J, 17/12/2008), *Chambers v Kenefick* [2005] IEHC 402, [2007] 3 IR 526 and *Martin v Moy Contractors Ltd* [1999] IESC 26, (Unrep, SC, 11/2/1999) considered - Rules of the Superior Courts 1986 (SI 15/1986) O 8, r 1- Order renewing summons set aside (2001/11119P – Peart J - 17/7/2009) [2009] IEHC 366
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Judgment mortgage

Validity - Affidavits registered with land registry - Affidavits grounding judgment mortgages in prescribed form - No initial challenge to validity of judgment mortgages - Judgment mortgages declared well charged by Circuit Court - Subsequent application to land registry to remove judgment mortgages as burdens from folio - Refusal to cancel entry of judgment mortgage from folio – Judicial review seeking to set aside decision – Grounds upon which leave granted - Allegation that respondents not entitled in law to register judgment mortgages - Whether respondent had discretion as to whether to register mortgages - Whether respondent obliged by law to register burdens - Whether any basis to grant application to cancel judgment mortgages - Sustainable grounds - Judgment Mortgages (Ireland) Act 1850 (13 & 14 Vict, c 29) - Land Registration Rules 1972 (SI 230/1972), s 118(1) - Relief refused (2006/4962P – O'Neill J - 3/4/2009) [2009] IEHC 371
Barnes v Land Registry

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SOCIAL WELFARE

Statutory Instrument

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SOLICITORS

Undertaking

Court's jurisdiction - Supervisory and discretionary - Reliance on undertaking to protect banks interests as mortgagees - Failure to comply with terms of undertaking - Application by bank seeking to recover from defendant solicitor all sums due on loan - Whether defendants should be allowed to comply with undertaking - Punitive and compensatory jurisdiction - Discretion - Manner court should exercise discretion - Deliberate, conscious and reckless breach of undertaking - Whether undertaking capable of performance - Discretion to direct compensation - Factors to which court will have regard when determining what order may be fair and just - - *Bank of Ireland Mortgage Bank v Coleman* [2009] IESC 38, (Unrep, SC, 5/5/2009) not followed; *Udall v Capri Lighting Limited* [1988] QB 907, *John Fox v Bannister King & Rigbys* [1988] QB 925 and *IPLG Ltd v Stuart* (Unrep, HC, Lardner J, 19/3/1992) considered - Defendants ordered to repay to plaintiff bank all sums paid on foot of loan sanction, together with interest (2009/1277P - Peart J - 28/7/2009) [2009] IEHC 374
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STATUTORY INTERPRETATION

Construction

Private Act - Rules of construction applicable – Interpretation - Statutory corporation established by private act - Canons of construction - Strict approach to construction of private act - Construction of powers of statutory corporation - Whether Act of 1970 empowered defendants to sell monuments or headstones on commercial basis - Whether activities of defendant *ultra vires* Act of 1970 - Powers of corporation created by statute – Objects clause - Whether trial judge erred in law in interpretation of Act - *Keane v An Bórd Pleanála* [1997] 1 IR 184, *Howard v Commissioners of Public Works* [1994] 1 IR 101, *R(Corporation of London) v Secretary of State for Environment* [2004] EWCA Civ 1765, [2005] 1 WLR 1286, *McCarthy & Stone (Developments) Ltd v LB Richmond* [1992] 2 AC 48 and *Hazell v Hammersmith & Fulham LBC* [1992] 2 AC 1 considered - Dublin Cemeteries Committee Act 1970 (No 1P), ss 16, 17 and 19 - Appeal dismissed; order of High Court affirmed (Macken J, dissenting) (256 & 370/2006 – SC - 30/7/2009) [2009] IESC 63
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Stamp duty (designation of exchanges and markets) regulations 2010
SI 53/2010

TORT

Negligence

Contributory negligence - Road traffic accident –Plaintiff knowing driver intoxicated - Fault apportioned 85% to defendant and 15% to plaintiff - Appellate jurisdiction of Supreme Court – Findings of fact – Personal injuries - *Quantum* of damages - Whether credible evidence before trial judge for findings - Whether award within parameters of evidence adduced – Whether ample credible evidence to support trial judge's findings - Whether gross want of proportion in apportionment of fault between parties - Whether any error of law - Overall view of blameworthiness of passenger - Just and equitable apportionment - Whether plaintiff aware defendant incapable of driving safely - *Hay v O'Grady* [1992] IR 210, *The Gairloch; Aberdeen Glenline Steamship Co v Macken* [1899] 2 IR 1, People *(DPP) v Madden*

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Statutory Instrument

Railway safety act, 2005 (section 26) levy order 2010
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Report

Publication - Fair procedures - Principles of natural justice - Whether respondent adopted procedures and pursued method of publication of report which was contrary to applicant's right to constitutional justice – Conventional standards applicable to fair procedures and natural justice - Discretion - Merits of application – Remedy – Benefit - *McCormack v An Garda Síochána Complaints Board* [1997] 2 IR 489, *Duffy v Commissioner of An Garda Síochána* [1999] 2 IR 81, *Tierney v An Post* (Unrep, HC, McCracken J, 7/7/1998), *Flanagan v University College Dublin* [1989] ILRM 469, *Kirrane v Finlay Tribunal* (Irish Times, 3/3/1998), *Khan v Health Service Executive* [2008] IEHC 234, (Unrep, HC, McMahon J, 11/7/2008), *De Roiste v Minister for Defence* [2001] 1 IR 190, *State (Cussen) v Brennan* [1981] IR 181, *State (Williams) v Army Pensions Board* [1983] ILRM 331, *De Roiste v Judge Advocate General* [2005] IEHC 273, [2005] 3 IR 494 and *Byrne v Grey* [1988] IR 31 considered – Time limits - Whether failure to act promptly – Whether any good reason for extending period – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21(1) – Application refused (2007/117 JR – O'Keefe J – 9/6/2009) [2009] IEHC 369
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SI 38/2010

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BILLS OF THE OIREACHTAS AS AT 6TH MAY 2010

Information compiled by Clare O'Dwyer, Law Library, Four Courts.

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

Adoption Bill 2009
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Air Navigation and Transport (Prevention of Extraordinary Rendition) Bill 2008
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Bill 44/2009
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Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

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Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010
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2nd Stage - Dáil

Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009
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Criminal Justice (Violent Crime Prevention) Bill 2008
Bill 58/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Criminal Law (Admissibility of Evidence) Bill 2008
Bill 39/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins (Initiated in Seanad)*

Criminal Law (Insanity) Bill 2010
Bill 5/2010
Report Stage – Seanad *(Initiated in Seanad)*

Criminal Procedure Bill 2009
Bill 31/2009
2nd Stage - Dáil *(Initiated in Seanad)*

Data Protection (Disclosure) (Amendment) Bill 2008
Bill 47/2008

Order for 2nd Stage - Dáil **[pmb]** *Deputy Simon Coveney*

Defence of Life and Property Bill 2006
Bill 30/2006
2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Dog Breeding Establishments Bill 2009
Bill 79/2009
Report Stage – Seanad *(Initiated in Seanad)*

Dublin Docklands Development (Amendment) Bill 2009
Bill 75/2009
2nd Stage - Dáil **[pmb]** *Deputy Phil Hogan*

Electoral Commission Bill 2008
Bill 26/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Electoral (Gender Parity) Bill 2009
Bill 10/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Employment Agency Regulation Bill 2009
Bill 54/2009
2nd Stage - Dáil

Employment Law Compliance Bill 2008
Bill 18/2008
Awaiting Committee – Dáil

Energy (Biofuel Obligation and Miscellaneous Provisions) Bill 2010
Bill 6/2010
2nd Stage – Dáil *(Initiated in Seanad)*

Ethics in Public Office Bill 2008
Bill 10/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
2nd Stage – Dáil *(Initiated in Seanad)*

Female Genital Mutilation Bill 2010
Bill 14/2010
2nd Stage – Seanad **[pmb]** *Senator Ivana Bacik*

Financial Emergency Measures in the Public Interest Bill 2010
Bill 17/2010
1st Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Financial Emergency Measures in the Public Interest (Reviews of Commercial Rents) Bill 2009
Bill 39/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Fines Bill 2009
Bill 18/2009
Committee Stage – Seanad

Food (Fair Trade and Information) Bill 2009
Bill 73/2009
1st Stage – Dáil **[pmb]** *Deputies Michael Creed and Andrew Doyle*

Freedom of Information (Amendment) (No.2) Bill 2008
Bill 27/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Fuel Poverty and Energy Conservation Bill 2008
Bill 30/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Liz McManus*

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
1st Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
Bill 23/2006
Order for 2nd Stage – Seanad **[pmb]** *Senator Brendan Ryan (Initiated in Seanad)*

Guardianship of Children Bill 2010
Bill
1st Stage – Dáil **[pmb]** *Deputy Kathleen Lynch*

Housing (Stage Payments) Bill 2006
Bill 16/2006
2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan (Initiated in Seanad)*

Human Body Organs and Human Tissue Bill 2008
Bill 43/2008
2nd Stage – Seanad **[pmb]** *Senator Feargal Quinn (Initiated in Seanad)*

Human Rights Commission (Amendment) Bill 2008
Bill 61/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Order for Report – Dáil

Industrial Relations (Amendment) Bill 2009
Bill 56/2009
2nd Stage - Dáil *(Initiated in Seanad)*

Industrial Relations (Protection of Employment) (Amendment) Bill 2009
Bill 7/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Inland Fisheries Bill 2009
Bill 70/2009
Report Stage – Seanad

Institutional Child Abuse Bill 2009
Bill 46/2009
2nd Stage – Dáil **[pmb]** *Deputy Ruairi Quinn*

Irish Nationality and Citizenship (Amendment) (An Garda Síochána) Bill 2006
Bill 42/2006
1st Stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke*

Land and Conveyancing Law Reform (Review of Rent in Certain Cases) (Amendment) Bill 2010
Bill 11/2010
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Local Elections Bill 2008
Bill 11/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Local Government (Planning and Development) (Amendment) Bill 2009
Bill 21/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Martin Ferris*

Local Government (Rates) (Amendment) Bill 2009
Bill 40/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Medical Practitioners (Professional Indemnity) (Amendment) Bill 2009
Bill 53/2009
2nd Stage – Dáil **[pmb]** *Deputy James O'Reilly*

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik*

Mental Health (Involuntary Procedures) (Amendment) Bill 2008
Bill 36/2008
Committee Stage – Seanad **[pmb]** *Senators Déirdre de Búrca, David Norris and Dan Boyle (Initiated in Seanad)*

Merchant Shipping Bill 2009
Bill 25/2009
Report Stage – Dáil

Ministers and Secretaries (Ministers of State Bill) 2009
Bill 19/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Alan Shatter*

Multi-Unit Developments Bill 2009
Bill 32/2009
Report Stage – Seanad *(Initiated in Seanad)*

National Archives (Amendment) Bill 2009
Bill 13/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

National Cultural Institutions (Amendment) Bill 2008
Bill 66/2008
2nd Stage – Seanad **[pmb]** *Senator Alex White (Initiated in Seanad)*

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Non-medicinal Psychoactive Substances Bill 2010
Bill 18/2010
1st Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Nurses and Midwives Bill 2010
Bill 16/2010
1st Stage – Dáil

Offences Against the State Acts Repeal Bill 2008
Bill 37/2008
2nd Stage – Dáil **[pmb]** *Deputies Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

Offences Against the State (Amendment) Bill 2006
Bill 10/2006
1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn (Initiated in Seanad)*

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Paul Coghlan and David Norris*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
Order for Report – Dáil

Planning and Development (Amendment) Bill 2010
Bill 10/2010
Order for 2nd Stage – Dáil **[pmb]** *Deputies Joe Costello and Jan O'Sullivan*

Planning and Development (Amendment) Bill 2009
Bill 34/2009
2nd Stage – Dáil *(Initiated in Seanad)*

Planning and Development (Amendment) Bill 2008
Bill 49/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Joe Costello*

Planning and Development (Enforcement Proceedings) Bill 2008
Bill 63/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

Planning and Development (Taking in Charge of Estates) (Time Limit) Bill 2009
Bill 67/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Sean Sherlock*

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
Committee Stage – Dáil

Privacy Bill 2006
Bill 44/2006
Order for Second Stage – Seanad *(Initiated in Seanad)*

Prohibition of Depleted Uranium Weapons Bill 2009
Bill 48/2009
Committee Stage – Seanad **[pmb]** *Senators Dan Boyle, Deirdre de Burca and Fiona O'Malley*

Prohibition of Female Genital Mutilation Bill 2009
Bill 30/2009
Committee Stage – Dáil **[pmb]** *Deputy Jan Sullivan*

Property Services (Regulation) Bill 2009
Bill 28/2009
Report Stage – Seanad *(Initiated in Seanad)*

Protection of Employees (Agency Workers) Bill 2008
Bill 15/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Willie Penrose*

Registration of Lobbyists Bill 2008
Bill 28/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Residential Tenancies (Amendment) (No. 2) Bill 2009
Bill 15/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Road Traffic Bill 2009
Bill 65/2009
Order for Committee – Dáil

Sea Fisheries and Maritime Jurisdiction (Fixed Penalty Notice) (Amendment) Bill 2009
Bill 27/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Jim O'Keffee*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
2nd Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Small Claims (Protection of Small Businesses) Bill 2009
Bill 26/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Spent Convictions Bill 2007
Bill 48/2007
Awaiting Committee – Dáil **[pmb]** *Deputy Barry Andrews*

Student Support Bill 2008
Bill 6/2008
Awaiting Committee – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
Order for Report – Dáil

Twenty-eight Amendment of the Constitution Bill 2007
Bill 14/2007
Order for 2nd Stage – Dáil

Twenty-ninth Amendment of the Constitution Bill 2009
Bill 71/2009
1st Stage – Dáil **[pmb]** *Deputy Alan Shatter*

Twenty-ninth Amendment of the Constitution Bill 2008
Bill 31/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

Vocational Education (Primary Education) Bill 2008
Bill 51/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ruairí Quinn*

Whistleblowers Protection Bill 2010
Bill 8/2010
Order for 2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Wildlife (Amendment) Bill 2010
Bill 15/2010
Order for 2nd Stage - Dáil

Witness Protection Programme (No. 2) Bill 2007
Bill 52/2007
Order for 2nd Stage – Dáil **[pmb]** *Deputy Pat Rabitte*

ACTS OF THE OIREACHTAS 2010

Information compiled by Clare O'Dwyer, Law Library, Four Courts.

1/2010	Arbitration Act 2010 *Signed 08/03/2010*
2/2010	Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 *Signed 16/03/2010*
3/2010	George Mitchell Scholarship Fund (Amendment) Act 2010 *Signed 30/03/2010*
4/2010	Petroleum (Exploration and Extraction) Safety Act 2010 *Signed 03/04/2010*
5/2010	Finance Act 2010 *Signed 03/04/2010*

ABBREVIATIONS

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Law Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law
The references at the foot of entries for Library acquisitions are to the shelf mark for the book.

Copyright and illegal downloading after *EMI v. Eircom*

Eva Nagle BL

"To every cow its calf, to every book its copy"[1]

Introduction

In his judgment delivered on April 16 2010, Mr. Justice Charleton ruled that the graduated, "three-strikes" policy which could result in an internet subscriber being cut-off from Eircom's internet service because of persistent infringements of copyright law online was lawful. As a result, Eircom, as the Defendant internet service provider (ISP) and four major record companies (EMI Records (Ireland) Ltd., Universal (Ireland) Ltd., Sony BMG Music Entertainment (Ireland) Ltd and Warner Music (Ireland) Ltd.) who were involved in formulating this three-strikes policy[2] can lawfully proceed to implement their settlement agreement.

The case is the first in Ireland which has targeted ISPs rather than individual illegal down-loaders[3] as it is the conduit through which illegal downloading has been facilitated and the property rights of record companies and artists have been violated. In reaching this decision, Charleton J was satisfied that the Three Strikes measure is compatible with the Data Protection Acts 1988-2003 and that the Courts were entitled to supply a method of protecting the rights of copyright owners, in the absence of provision in Irish legislation.

Even though his decision was primarily concerned with the compatibility of the "three strikes" agreement with data protection legislation, Charleton J's judgment raised a myriad of issues, including discussion of the internet as a "jurisdiction" in itself, the role of the Courts in supplementing the law in the absence of legislative provision and freedom to contract. The decision also provides an interesting insight into the attitude adopted by the Judge towards illegal downloading and the primacy afforded to the rights of copyright holders which in the longer term, may raise greater constitutional issues regarding freedom of expression and privacy as has already been flagged in France with the controversial "Creation and Internet Law".

The "Three-Strikes and you're out" Policy and Protocol:

> *"This is a serious sanction. Some would argue that it is an imposition on human freedom. There is no freedom, however, to break the law"*[4].

Under the "three strikes" agreement, record companies who detect file sharers who are infringing copyright will supply the IP addresses of those file sharers to Eircom. On foot of this, Eircom is obliged to implement the "three strikes" policy. The policy is implemented on a graduated basis -

> Step 1: Eircom, as the ISP must inform the Eircom subscriber that their IP address is being used to infringe copyright;
>
> Step 2: Eircom will ssue a warning that if they do not cease to use their IP address to engage in illegal file-sharing they will be disconnected;
>
> Step 3: Eircom will disconnect the IP address user if they fail to heed the warning. This disconnection does not apply to any telephone or television service that a subscriber might get with their internet facility.

Thus, after 28 days and two letters, Eircom, as ISP, may serve a 14-day disconnection notice during which time the user may appeal or promise to stop illegally downloading files for good. In order that Eircom will not be at a competitive disadvantage, the Plaintiffs in the case also undertook to pursue like agreements with other ISPs in Ireland.

"A lance on behalf of self-interest…"

The Judge's opinion that illegal downloading and the facilitation of that by an intermediary was "theft" was already clearly evident before April 2010, in his decision to grant the four record companies an injunction[5] under s.40(4) Copyright and Related Rights Act 2000 to require Eircom to block access to the site "Pirate Bay", "..a site dedicated, on a weird ideological basis, to basically stealing the copyright owned by the plaintiffs in mainly musical works"[6]. His decision is one with a clear pro-copyright persuasion that advocates

1 Charleton J quoting St. Colmcille's aphorism "Le gach bó a buinín agus le gach leachar a chóip" in *EMI (Ireland) Ltd and Ors v. Eircom Ltd* [2010] IEHC 108 at paragraph 28.

2 Terms of Settlement were originally set down in writing and filed in Court on 28 January 2009.

3 The Irish Recorded Music Association (IRMA) previously took legal action against individual file-sharers, see Cassidy, "IRMA takes legal action against 50 file-sharers", Irish Times, November 15th 2005.

4 *EMI (Ireland) Ltd and Ors v. Eircom Ltd* [2010] IEHC 108 at paragraph 9.

5 *EMI Records (Ireland) limited, Sony BMG Music Entertainment (Ireland) Limited, Universal Music (Ireland) Limited and Warner Music (Ireland) Limited v. Eircom Plc* [2009] IEHC 411, decision of Charlton J., 24th July 2009.

6 Ibid at p.2

copyright as the means of protecting intellectual endeavour and authorship[7].

Peer to Peer sites (P2P) such as Pirate Bay operate by internet users accessing software or information from the site which enables them to identify swarms of other file-sharers online at that time and then together, these swarms can appropriate musical and other authorial works online, free-of-charge from other swarms of internet users who have already circumvented the copyright on this material. Referring to the Plaintiff record companies, Charleton J opined:

> "…they as plaintiffs in this action are facing a situation of undermining their intellectual property rights (and those who have assigned their rights to them) by virtually unrestrained unauthorised copying over the internet, which I regard as being theft. I note the quote from the Envisional report, in evidence before me, which is attributed to Mr., Peter Sunde who is one of the controlling minds of Pirate Bay:
>
> > 'This is how it works whatever you sink, we build back up. Whomever you sue, 10 new pirates are recruited. Wherever you go, we are already ahead of you. You are the past and the forgotten; we are the internet and the future'
>
> Well, that kind of statement I have just quoted is clear evidence of both an intention to flout the law and of an inflated personality which believes that Mr. Peter Sunde is on some kind of white horse and carrying a lance on behalf of good. I am convinced, on the affidavits before me, that he is carrying a lance on behalf of self-interest."[8]

"The right to be identified with and to reasonably exploit one's own original creative endeavour, I regard as a human right"[9]

This pro-copyright, leitmotif continued when Charleton J came to ruling on the data protection issues regarding the "three strikes" policy. His judgment includes a strong defence for the rights of copyright holders and authorial rights in the Internet sphere and in doing so he disposes of the concerns of the Data Protection Commissioner that such "three strikes" policies could result in unwarranted breaches of privacy rights.

In taking a pro-author, pro-copyright stance, Charleton J clearly would not subscribe to the "Creative Commons" type argument that the resistance of copyright protection forms a kind of Net-Age equivalent of civil disobedience and Robin-Hood style law that gives "works" and information "back to the people" and away from "greedy authors" or those intermediaries, such as record companies in the present case, who exploit their works. The Judge in lyrical-language, conveys huge respect for the vocation of "l'auteur":

> "Copyright is a universal entitlement to be identified with and to sell, and therefore to enjoy, the fruits of creative work. It applies to everyone who manages to produce anything copyrightable from a song, to a telephone directory, to a symphony, to a film. Were copyright not to exist, then the efforts of an artist could be both stolen and passed off as the talent of another. Were the author not entitled to exploit her or his creation by preventing others from copying it without permission, usually for a fee, then the fruits of moments of inspiration worked out through weeks of endeavour and representing, sometimes, the distillation of some fundamental experience of life would being no reward, perhaps not even applause. Even if an artist won acclaim, it alone would not keep body and soul together….. no reasonable person doubts the injustice of that situation. The law does not doubt it either"[10].

"It is not an amorphous extraterrestrial body…"

In his famous "Declaration of the Independence of Cyberspace"[11] John Perry Barlow declared "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather." Barlow and other advocates for internet self governance[12] expound the idea that because the Internet is outside a country's borders, then the law as we know it should not apply to the Internet as citizens have not consented to their being regulated by the system. In his judgment in *EMI*, Charleton J is diametrically opposed to the privatisation of Internet regulation. He emphasises that the Internet is

> "only a means of communication. It has not rewritten the legal rules of each nation through which it passes. It is not an amorphous extraterrestrial body with an entitlement to norms that run counter to the fundamental principles of human rights… There is nothing in the criminal or civil law which legalizes that which is otherwise illegal simply because the transaction takes place over the internet"[13]

In deciding in this manner, Charleton J perhaps sees access to the internet more as "privilege" rather than "fundamental human right". He rejects the view that the enforcement of copyright through policies such as "three strikes" constitutes an invasion of privacy and the right to freedom of expression, even the right to freely contract, discussed below.

7 A view shared generally, by intellectual property academics such as Jane Ginsburg- see Taylor, *Copyright in a bookless world*, (2007) 30 Columb. Journal of Law and the Arts 195.

8 *EMI Records (Ireland) limited, Sony BMG Music Entertainment (Ireland) Limited, Universal Music (Ireland) Limited and Warner Music (Ireland) Limited v. Eircom* [2009] IEHC 411 *Plc* at p.3.

9 *EMI (Ireland) Ltd and Ors v. Eircom Ltd* [2010] IEHC 108 at paragraph 28.

10 ibid, paragraph 3.

11 Published online on February 8th 1996, accessed at: http://w2.eff.org/Censorship/Internet_censorship_bills/barlow_0296.declaratin

12 The most prominent being Prof. Lawerence Lessig, Harvard Law School, see Lessig, *Code and Other Laws of Cyberspace*, *Version 2.0*, (2006)(Basic Books).

13 ibid at paragraphs 5 and 6.

Reconciling "Three Strikes" with Data Protection Law

On 15 January 2010, a number of questions that had been posed by the Data Protection Commissioner to solicitors for the Plaintiff were distilled and put before the Court. Three primary issues were raised regarding data protection law and the "three strikes" policy.

In short, Issue 1 asked – does data comprising of IP addresses which would be held either by the Plaintiffs themselves or by agents such as DetectNet (who are employed by Eircom to detect illegal P2P file-sharing) constitute "personal data" for the purposes of the Data Protetction Acts 1988 – 2003 and therefore are they subject to the "special requirements" imposed by sections 2, 2A, 2B, 2C and 2D of the Data Protection Act and if not, is that "processing" of the data by the Plaintiffs lawful?

Charleton J answered this question in the negative. He concluded that the Plaintiffs have no interest in using "three strikes" to find out the names and addresses of those with IP address which have been identified as being used for copyright infringement. He was not convinced that the Plaintiffs or their agents had any interest in using the information gathered for unlawful means. Finding out IP addresses in this manner, was, in the opinion of the Judge, "only aimed at upholding the law" and was the easiest and most cost effective way of achieving this aim[14].

The second issue raised questioned if Step 3 of the Three Strike Policy i.e disconnection from the Eircom network was "necessitated" by the "legitimate interests" pursued by Eircom or does Step 3 "prejudice" the fundamental rights and freedoms and legitimate interests of the data subject? This question involved examining, in the words of Charleton J "what is protected, how important that right is, what level of threat is directed at that right and what level of participation may be legitimately inferred against the data subject". Whether not it was "necessitated" was dependent upon section 2 of the Act being complied with by the "data controller" and at least one of the conditions set-down by section 2A being satisfied for example, the processing of the data is necessary for the performance of a contract to which the data subject is a party[15].

In his discussion of this issue, the protective qualities of copyright for authors again comes to the fore. Charleton J refers to Keane J's judgment in *Phonographic Performance Ireland Limited v. Coady* [1994] IR 504 and states,

> "Section 37 of the Copyright and Related Rights act 2000 provides that the owner of the copyright work has the exclusive right to make that work available to the public. This legal entitlement is being flagrantly violated by peer to peer illegal downloading… more than one of the condition in Secion 2A of the Data Protection Act 1988 as amended is met as to both the legitimate interest of Eircom as a responsible company and that of the community in general. The most important of those interests is that of abiding by the law. It is completely within the legitimate standing of Eircom to act and to be seen to act, as a body which upholds the law and the Constitution"[16].

Thus, the answer to the questions raised are that yes, Step 3 is necessary and no, it does not prejudice the interests of internet subscribers. Charleton J justified these answers by the fact that Eircom customers sign up to their contract subscription and in order to enforce the terms of this contract and therefore, to ensure that internet subscription is not misused, steps such as warning customers and ultimately cutting them off, if necessary, is justified. The exceptions provided-for in the policy also serve as an adequate safety valve that aids in justifying the policy.

This reasoning raises the oft-cited arguments regarding the unilateral imposition of contractual burdens upon consumers in the realm of the internet and internet access. Nowadays, consumers are accustomed to online shrink-wrap and click-wrap licences – the type of agreements to which we often click "I agree" without really understanding or caring-about what we are undertaking by consenting to the terms, yet we are all required to abide by them. Criticisms of "three strikes" policies such as the EMI/Eircom agreement echo those lodged at the digital contracts above. At pargraphs 29 to 30 of his judgment, Charleton J states

> "It is abundantly clear that the data subject has given his or her consent in return for internet access. Under contract if any of these conditions be breached, then their access can be terminated… warning Eircom customers and ultimately cutting them off is necessary for both the performance of a contract and for compliance with a legal obligation cast upon the courts, among other organs of the State, to defend the Constitution and the laws of our society… there is nothing disproportionate and it is therefore not unwarranted about cutting off internet access because of three infringements of copyright"

However, what must be questioned is how freely is the consent of the data subject really given to this agreement especially when it arguably involves the diminishing of some of the subject's own fundamental rights? Also, how can the sanction of having one's subscription terminated not be considered disproportionate when so many argue that access to the internet now involves the fundamental right to privacy and to freely express one's self. Furthermore, since more aspects of citizenship are now exercised online - access to government, public information, the prospect of cutting off one's Internet access can arguably appear to be a very severe and disproportionate sanction. As MacSithigh asks, "rights of expression, communication and participation and so on (all protected in the EU's Charter of Fundamental Rights and many other documents) are potentially being compromised. Is it proportionate to find that an internet provider can take an action that has such wide-reaching consequences on such a basket of fundamental rights simply to vindicate the

14 ibid at paragraph 25.

15 ibid at paragraph 27 and 28.

16 ibid at paragraph 29.

rights of the music industry? Is this a fair and proportionate punishment?"[17]

Indeed, the Opinion of the European Data Protection Supervisor[18], Mr. Peter Hustinx, is that such "three strikes" agreements are not a "necessary measure" within the meaning of Article 8, European Convention of Human Rights which provides that any measure that infringes the right to privacy of individuals is only allowed if it constitutes a necessary measure within a democratic society to the legitimate aims it pursues[19]. Mr. Hustinx has assessed that because alternative, less intrusive measures exist, the "three strikes" policy is disproportionate and therefore not "necessary". He has emphasized the far-reaching nature of three strikes policies and cites, in particular,

(i) "the fact that the monitoring would affect millions of individuals and all users, irrespective of whether they are under suspicion,
(ii) the monitoring is likely to trigger many cases of false positives. Copyright is not a straight "yes"/ "no" question. Courts will often have to examine whether material is indeed copyright protected, which rights have been infringed, if the use can be considered to be "fair use".
(iii) the potential effects of the monitoring, which can result in disconnection – this would interfere with individuals right to freedom of expression, freedom of information, and access to culture, e-Government applications, email and work related activities – the disconnection would affect not only the infringer but the rights of others, like family members who might also be using the same Internet connection.
(iv) the entity making the assessment is a private entity (i.e the copyright holders or the ISP – the Data Protection Supervisor has concerns about the monitoring of individuals by the private sector[20].

Mr. Hustinx has stated that "whereas intellectual property is important to society and must be protected, it should not be placed above individuals' fundamental rights to privacy and data protection. A right balance between protection of intellectual property rights and the right to privacy and data protection should be ensured"[21]. Therefore the Data Protection Supervisor is not satisfied that the benefits of "three strikes" agreements outweigh the impact that such a policy can have on individuals' fundamental human rights.

The *Napster*[22], *Kazaa*[23] and *Grokster*[24] line of cases, all of which involved illegal P2P downloading and the conduits which facilitated it, are telling examples of why copyright owners now insist that intermediaries, like Eircom implement policies such as "three strikes". Similar to the EMI and Eircom decision, these are justified by the fact that steps such as ultimate cut-off are necessary to give meaning to the contract to which internet consumers sign-up. This bypasses the fact that despite the Protocol's exceptions to Step 3[25] and the right of a user to appeal the decision to terminate, this, in the first place, begins as a non-negotiated contract about user access rights to the Internet. It entails the "subjugation of powerless users and the erosion of their fundamental rights"[26]. It could be argued that this amounts to "oppressive bargain" that completely ignores the principles of freedom to contract.

The third issue to be answered by Charleton J was whether it is open to EMI and Eircom to implement the graduated process, including termination of access in circumstances where (a) in doing so, the Plaintiffs would be engaged in the processing of "personal data" and/or sensitive personal data and (b) the termination of a user's subscription would be predicated on the user having committed uploading copyright material by means of P2P but without such being the subject of an investigation by a body and without a determination being made by a Court or a competent body as to whether an offence had been committed by the user or not?

This third question raised the issue of whether the activities that Three Strikes is aimed at outlawing are criminal or civil wrongs. The entitlement to copyright has straddled both civil and criminal law[27]. On consideration, Charleton J was satisfied that neither the Plaintiffs nor Eircom as the ISP are in anyway interested in the prosecution of a crime - "nothing in the attitude of the parties is directed at the crucial and elusive proof of the relevant mental element in criminal law. Rather everything that I have seen is based on civil law principles"[28]. Thus, the fact that no investigation or determination is carried out does not matter as no party involved is accusing anyone of "an offence", the "three strikes" policy involves no issue beyond civil copyright infringement.

"Three Strikes" in the light of *SABAM* and *HADOPI*

With his examination of the three issues raised complete, Charleton J declared the "three strikes" settlement to be lawful and held it could now be implemented. So, the speculation regarding the lawfulness or fairness of the settlement began. The Agreement itself is unpublished but one can speculate that Eircom may have been influenced into the settlement by the Belgian Court of First Instance decision in *SABAM v. Scarlett (Tiscali)*[29]. In *SABAM*, the Belgian Society of Authors,

17 MacSithigh, Daithi, *The worst of both worlds*, www.lexferenda.com, 29 January 2009.
18 Monday, 22 February 2010, www.edps.europa.eu.
19 Opinion of the European Data Protection Supervisor at para.30.
20 Opinion of the Data Protection Supervisor at para.32-33.
21 ibid at para.83.
22 *A&M Records v. Napster* 239 F 3d 1004 (9th Cir.2001)
23 *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd.* [2005] FCA 1242.
24 *MGM Studios v. Grokster* (2005)US Sup. Ct 125. SCt. 2764
25 Rights to medical care, to livelihood and to business use in appropriate circumstances.
26 Lucch, *Countering the Unfair Play of DRM Technologies* (January 22 2008) [2007] Texas Intell.Prop.Law Journal (16)(1) at p.32 who argues that these contracts amount to private legislation by which fundamental freedoms are annihilated.
27 Criminal offences are set out in section 140 of the Copyright and Related Rights Act 2000.
28 ibid paragraph 40 – 41.
29 District Court of Brussels , No. 04/8975/A, Decision of 29 June 2007. Translated judgment, (2008)25 Cardozo Arts & Ent. L. J. 1279.

Composers and Publishers took an action against Scarlett, the Belgian ISP for an injunction that would require Scarlett to install software ("Audible Magic") that would scan and block P2P file-sharing. The Court of First Instance granted the injunction, notwithstanding the fact that the E-Commerce Directive does not explicitly allow the imposition of a proactive monitoring obligation on an ISP such as Scarlett, or indeed Eircom. By its provisions, the ISP is only liable when it is actually aware of P2P copyright infringement. Interestingly, "Audible Magic" failed to work and the order was overturned by the Belgian Cout of Appeal. *SABAM* is now the subject of a reference to the European Court of Justice. The reference asks whether Article 15 of the E-Commerce Directive prohibits a measure such as an injunction that would oblige an ISP to monitor P2P traffic because this would amount to "a general obligation to monitor"?

Some guidance on this question has already been given in *Productores de Música de España (Promusicae) v Telefónica de España SAU*[30], the "Promusicae" case. The Court was asked whether the E-Commerce and Copyright Directives require ISPs to disclose the identities of Internet users to copyright holders. The Court held that it does not require Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. It also held that factors that must be considered are the fundamental rights of citizens, such as privacy and freedom of expression and the principle of proportionality. Advocate General Kokott in *Promusicae* stated

> "It is…not certain that private filesharing, in particular when it takes place without any intention to make a profit, threatens the protection of copyright sufficiently seriously to justify recourse to this exception. To what extent private file-sharing causes genuine damage is in fact, disputed"[31]

While the emphasis on the balancing of fundamental rights and proportionality in *Promusicae* might cast some doubt on the EMI/Eircom settlement, the strongest threat to its validity comes from the French Constitutional Court's decision on the 10 June last that the "Creation and Internet Law", better known as the "HADOPI" legislation was unconstitutional.

The HADOPI legislation was passed by the French Parliament on 13 May 2009 and included a "three strikes" policy that could ultimately result in the termination of the internet connection of a persistant infringer akin to the Irish model. HADOPI is an authority which acts as a intermediary between ISPs and copyright holders. The law also made it possible to block Pirate Bay and Pirate Bay-style sites. However, the Conseil Constitutionel held that the legislation was unconstitutional and that it offended the controversial Telecoms Package Amendment 138/46.[32]

Amendment 138 states:

> "Measures taken regarding end-users' access to or use of services and application through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy, freedom of expression and access to information and the right to a judgment by an independent and impartial tribunal established by law and acting in respect of due process in accordance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms".

In particular, it neutered the "three strikes" provision in the law, ruling that the power to restrict someone's Internet access equates to a restriction of their liberty, including their digital liberty and only a judge and not an administrative authority (such as HADOPI) can make that kind of decision. In October 2009, "HADOPI 2"[33], a remastered version of "HADOPI 1" passed the scrutiny of the Conseil Constitutionel[34]. Even though many commentators lamented the passing of the law as a "defeat of the rule of law", the Conseil Constitutionel emphasized the role of the judge which was recognised in the new law and the fact that it is the judge who will make a decision on the evidence that will be gathered by HADOPI and who can refuse to take any punitive action, such as terminating an internet subscription.

In the light of these two decisions of the French Conseil Consititutionel[35], it could be argued that the very foundations on which the "three strikes" deal (although it is acknowledged that "three strikes" is a private agreement and not a law, as in France) was justified are undermined by the reasons why the French Court ruled "HADOPI 1" unconstitutional, namely, disproportionate interference with fundamental freedoms such as expression and the right to privacy and the fact that incursions upon digital liberty should only fall within the jurisdiction of the Courts.

"The more artistic expression is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off."[36]

While Charleton J's judgment on "three strikes" gave the green light to the settlement and was mainly focused on data protection, it conjured a host of issues not discussed at length before in an Irish Court. The decision confirms the high regard that is afforded to creators' rights in Irish law and emphasizes the "protective function" of copyright for authors rather than the "incentivisation" of technological innovation. No doubt the Judge was influenced by the evidence of the devastating effects of illegal peer-to-peer

30 Case C-275/06, ECR 2008 www.curia.eu.

31 ibid at pt.106.

32 Carried by the European Parliament, on the Second Reading vote on 6 May 2009. It should be noted that a "HADOPI 2" law which amended the first law which was struck down has now been passed.

33 *Loi n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet* at www.legifrance.gouv.fr.

34 Décision n° 2009-590 DC du 22 octobre 2009.

35 The Romanian Constitutional Court has similarly decided that that blanket retention is incompatible with fundamental rights- http://www.legi-internet.ro/englisg/jurisprudenta-it-romania/decizii-it/romanian-constitutional-court-decision-regarding -data-retention.html. There is currently a case pending before the German Constitutional Court – http://www.bundesverfassungsgericht.de/pressmitteilungen/bvg09-124.html.

36 *MGM v. Grokster*, (2005)545 U.S. 125 S.Ct. 2764, at 2770.

traffic – the losses of IRMA can be up to €60 million per annum. But has it been a fair "trade-off"? Scanning by ISPs can be a crude exercise that can fail to properly distinguish between legitimate and illegitimate uses of IP addresses. It can also be argued, that "three strikes" agreements are being imposed prematurely – as is the opinion of the European Data Protection Supervisor – and that less intrusive measures have not been tested yet, such as those provided-for in the Citizens Rights Directive which must be implemented by May 2011. This contains procedures to limit small-scale copyright infringement among consumers[37] such the obligation on Member States "to produce standardised public interest information on various topics, specifically mentioning infringements of copyright and related rights and their legal consequences.[38] The European Data Protection Supervisor also points that no "serious thought" has been given to alternative business models which would not involve" the systematic monitoring of individuals". For instance, if copyright holders successfully prove that their losses are attributable to P2P file-sharing, ISPs and rights-holders could implement differentiated Internet access subscriptions where part of the price for a subscription with unlimited access is distributed to the copyright holders[39].

Furthermore, one must question how impenetrable subscription contracts and user agreements for Internet access will fare in the future under the glare of the Unfair Terms Directive or even the principles of equity. If all Irish ISPs follow suit and adopt "three strikes" and infringers have their subscriptions repeatedly terminated by every ISP, one-by-one, will those parties be taking cases in constitutional law, arguing that the music industry does not have a right to define the parameters of their digital freedom or their rights to access the internet, to privacy and their rights to express themselves and to receive information?

The Internet waits for no man. No sooner than "three strikes" was given the go-ahead, new methods of circumvention spawn. Whether the deal will be truly able to realise the aims of combating copyright infringement and protecting revenues remains to be seen. In the meantime, the debates on its effect on freedom to contract and fundamental freedoms should continue. ■

37 See Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, OJ 2009, L 337/11.

38 Opinion of the European Data Protection Supervisor at para.37-38. Note Article 21 (4) of Directive 2009/136/EC.

39 ibid at paras 40-44.

Reversing the Burden of Proof in Tax Litigation

Conor Kennedy BL*

Introduction

The general principle of *'he who asserts must prove'* is the civil burden of proof imposing an obligation to sustain an assertion or proposition by positive argument. This principle is entirely logical in tort or contractual disagreements but questionable in attempting to displace a tax assessment issued by the Revenue Commissioners. The default position in tax litigation requires the taxpayer to provide sufficient evidence to reduce or displace a tax assessment. This obligation can be onerous and in some cases impossible.

Recently, in a case involving *Menolly Homes Limited v The Appeal Commissioners and the Revenue Commissioners*[1], the High Court conclusively determined that in general tax litigation, the burden of proof is on the taxpayer. Prior to *Menolly Homes*, the burden of proof in tax litigation was an infrequent visitor to the Irish courts. While there have been some cursory references, the issue has only had a thorough outing in cases where the responsibility for bearing the burden of proof was contained within the statute.

Despite the ruling in *Menolly Homes*, the issue of whether a taxpayer in litigation with the Revenue Commissioners should always be responsible for bearing the burden of proof may be in some doubt. Jurisprudence from the European Courts, the European Convention on Human Rights and certain Supreme Court decisions has determined that if the burden of proof on the asserting party is too onerous or palpably unfair, the burden can be reversed.

The Appeal Process

Section 934 of the Taxes Consolidation Act 1997 (TCA) permits a revenue official to attend every hearing of an appeal, be entitled to produce any lawful evidence in support of the assessment, and to give reasons in support of the assessment. After examination of the appellant, the Appeal Commissioners will thereafter determine whether the assessment should be increased, stand or be reduced.

The view of the Revenue Commissioners is that the burden of proof is on the taxpayer to demonstrate that the tax assessment is incorrect[2]. This perception assumes that there is no requirement on Revenue to produce lawful evidence or give reasons in support of the assessment. In such cases, a taxpayer would be quite justified in having the decision of the Revenue Commissioners judicially reviewed.

Irish Jurisprudence

The Revenue Commissioners v O'Flynn Construction Co. Ltd, John and Michael O'Flynn[3] was the first tax avoidance case heard in the Irish Superior Courts. The Revenue Commissioners challenged a transaction whereby export sales relieved profits derived by a member of the Dairygold Group were acquired by an unconnected construction company, O'Flynn Construction Co. Ltd. Dividends from those profits were paid by O'Flynn Construction Co. Ltd to its shareholders. The legislation at that time relieved from income tax dividends derived from export sales relieved profits.

The Court held that the payment of a dividend by a company that was not engaged in the export of goods produced in Ireland amounted to a misuse of the relief having regard to the purpose for which such relief was enacted. Therefore the transaction was a tax avoidance transaction.

In coming to its decision, the Court determined that the burden of proof lay with the taxpayer to demonstrate that the transaction was not a tax avoidance transaction for an assortment of reasons. Smyth J. held that the taxpayer must show to the satisfaction of the Revenue Commissioners, Appeal Commissioners or the Court, as appropriate, that the transaction was either undertaken for commercial business purposes or be in a position to demonstrate that the effect of the transaction was not a misuse or abuse of a provision having regard to the purpose for which it was intended. Furthermore, in citing *Revenue Commissioners v Doorley*[4], the learned judge made it clear that a taxpayer in seeking to avail of an exemption from tax must show that the exemption applies.

In *Menolly Homes,* Revenue raised an assessment on the company for an amount of just under €20 million in respect of valued added tax. The assessments were appealed to the Appeal Commissioners on the grounds that they were excessive. During the course of the appeal hearing, the Appeal Commissioners refused the company leave to cross-examine the inspector of taxes on the basis upon which he raised the assessment. The company sought and obtained permission to judicially review that refusal on grounds that it was not accorded fair procedures.

Under the judicial review proceedings, the High Court undertook a comprehensive review of the function and jurisdiction of the Appeal Commissioners. Charleton J. took the view that the tax statute does not permit the Appeal Commissioners to enquire as to whether an inspector of taxes in raising an assessment was acting in bad faith, unreasonably or capriciously.

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* This article also appears in the June edition of the Irish Tax Review.

1 [2010] IEHC 49

2 Tax & Duty Manuals - Section 16, Part 40 Appeals Manual at paragraph 13.6

3 [2006] ITR 81

4 [1933] IR 750

The Court concluded that the burden of proof lay with the taxpayer and noted that where proper records were kept that that obligation "*could not be regarded as especially burdensome before a tribunal which has always shown itself to be both expert and open-minded*"

The Court determined that judicial review was a more appropriate remedy in challenging the basis upon which Revenue raise an assessment. Such proceedings would therefore have to be initiated within six months from the date of the raising of the assessment.

Fundamental Fairness

Hanrahan v Merck Sharp & Dohme[5] is the leading authority on the reversal of the burden of proof in civil cases. The case related to a claim that toxic gases and acid vapours emanating from the factory of a multinational pharmaceutical company had caused injury to the health of Mr. Hanrahan and was responsible for the deaths of cattle on his farm. In delivering judgement, Henchy J said:

> "The rationale behind the shifting of the onus of proof to the defendant in such cases would appear to rely on the fact that it would be palpably unfair to require the plaintiff to prove something which is beyond his reach and which is peculiarly within range of the defendant's capacity of proof."

The decision in *Hanrahan* was endorsed by Haridman J. in *Rothwell v Motor Insurers Bureau of Ireland*[6] as the authority for setting out the occasions upon which the burden of proof can be reversed.

European Convention on Human Rights

The European Convention on Human Rights Act 2003 came into effect on the 31st of December 2003. The incorporation of the Act into Irish law has ramifications for Irish courts and every organ of the State.

Article 6 of the European Convention on Human Rights (the Convention) provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. However the European Court of Human Rights (ECtHR) has held that taxation belongs to the realm of public law and therefore non amenable for Article 6 protection.[7]

Article 8 of the Convention provides protection to individuals and companies with regard to private and family lives, home, and correspondence. Any state intrusion must therefore be in accordance with the law and necessary for the security and economic well being of the state concerned. While there is a limited amount of jurisprudence in this area, many revenue authorities would appear to be cognizant of the need to approach investigations to avoid accusations that there has been an unlawful encroachment upon the private and family lives, home and correspondence of taxpayers.

However taxpayers have had success by invoking Article 1 of the First Protocol to the Convention. That Article provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law. In two prominent Value Added Tax (VAT) cases, the ECtHR had to consider whether revenue authorities had deprived the taxpayer of property contrary to the provisions of Article 1.

In *SA Dangeville v France*[8], a firm of insurance brokers was liable to VAT on the business it had conducted in 1978. However the provisions of the Sixth Directive of the Council of the European Communities[9], which became applicable from 1 January 1978, exempted insurance and reinsurance transactions and associated activities from VAT. The applicant, relying on the Sixth Directive, sought a refund of the VAT paid for the year 1978. Unable to obtain satisfaction in the French Courts, the applicant petitioned the ECtHR claiming a breach of Article 1 of Protocol No. 1, arguing that as a creditor of the State it had been deprived of the possibility of enforcing its debt by the decisions of the Conseil d'Etat in dismissing its claims.

The ECtHR confirmed that the applicant was a creditor of the State with regard to the VAT paid for the period 1 January to 30 June 1978. The ECtHR found that the interference with the applicant's possessions did not satisfy the requirements of the general interest and that the interference with the applicant's enjoyment of its property was disproportionate because the inability to enforce its debt against the State and the lack of domestic proceedings providing a sufficient remedy to protect the applicant's right to respect for enjoyment of its possessions upset the fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. It concluded that there had been a breach of Article 1 of Protocol No. 1.

In *Bulves AD v Bulgaria,*[10] the applicant company was denied a VAT input credit on business related expenditure acquired from another taxable supplier on the basis that the supplier had accounted for the VAT on the transaction in a later VAT period.

After a process of domestic appeals, the applicant initiated proceedings in the ECtHR complaining, *inter alia*, that in spite of its full compliance with its own VAT reporting obligations, the domestic authorities had deprived it of its right to deduct the input tax. The ECtHR noted that an interference including one resulting from a measure to secure payment of taxes, must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. However, in determining whether this requirement had been met, the ECtHR recognised that a contracting state enjoys a wide margin of appreciation and the legislature's assessment will be respected in such matters unless it is devoid of reasonable foundation.

The ECtHR held that there had been a violation of

5 [1988] IESC 1
6 [2003] IESC 16
7 *Ferrazzini v Italy* [2001] STC 1314
8 *SA Dangeville v France* [2003] STC 771
9 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment
10 [2009] STC 1193

Article 1 as the applicant had fully complied with its statutory obligations and therefore should not be required to bear the full consequences of the supplier's failure to discharge its VAT reporting obligations. The ECtHR considered that the denial of the input credit amounted to an excessive burden on the applicant which upset the fair balance that must be maintained between the demands of the general interest of the community and the requirements of the protection of the right of property[11].

Jurisprudence of the European Court of Justice

Unjust enrichment

The principle of unjust enrichment provides that a taxable person should not make a financial gain from making mistakes on VAT returns[12]. A determination therefore must be made as to whether any potential rebate in respect of the incorrectly VAT charge belongs to the taxpayer or to the customer who has been charged VAT in the first place.

In *Weber's Wine World v Abgabenberufungskommission*[13] the European Court of Justice stated at paragraph 111:

> "The Court has also consistently held that national rules which place on the taxable person the burden of proving that the charge was not passed on to third parties, which amounts to requiring negative proof, or which establish a presumption that the charge has been passed on to third parties, are not consistent with Community law."

Missing trader

In the missing trader or carousel type fraud cases, the Court has determined that the right of a taxable person to deduct input tax cannot be affected by a prior or subsequent transaction in a supply chain tainted by fraud, unless that taxable person knows or has any means of knowing that to be the case[14]. In *Axel Kittel v Belgian State* and *Belgian State v Recolta Recycling SPRL*,[15] the Court determined that the burden of proof lay with revenue authorities, when stating at paragraph 55:

It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends

Is there a charge at all?

The Court had to consider whether the victim of a theft of cigarettes was liable to VAT on the stolen goods in *British American Tobacco International Ltd and Another v Belgian State*[16]. The Belgian Customs and Excise Administration issued a notice of assessment demanding payment of excise duty and VAT in respect of the missing cigarettes. The matter ended up in the Court of Appeal in Antwerp where a decision was taken to stay the proceedings and refer for preliminary ruling the issue of whether there can be a "supply of goods":

1. in the absence of any consideration and
2. in the absence of the transfer of the right to dispose freely of the goods as owner

The Belgian government submitted that the victim of a theft of goods would be entitled to receive a refund of the VAT if it could evidentially establish that the goods had been stolen and that such goods had been put on the market after the theft. The Court considered the difficulty for the taxpayer in proving that the goods had not been sold by the perpetrator of the theft when stating at paragraph 28:

> "That requirement of the proof of a negative, which is moreover outside the knowledge of the victim of the theft, makes it virtually impossible to make use of the right to repayment."

The Court noted that the theft of goods does not give rise to any financial counterpart for the victim of the theft and therefore cannot be regarded as a supply of goods 'for consideration' within the meaning of Article 2 of the Directive. It was also noted that under Article 5(1) of the Directive, '*"[s]upply of goods*" means the transfer of the right to dispose of tangible property as owner' and as such, a theft cannot be regarded as effecting a transfer from the victim to the thief.

EU Treaty

In *X Holding BV v Staatssecretaris van Financiën*[17], the European Court of Justice restated at paragraph 16 that:

> "It must be borne in mind that, according to settled case-law, although direct taxation is a matter within the competence of the Member States, they must none the less exercise that competence in a manner consistent with Community law."

However where direct taxation does impinge upon EU Treaty provisions, it has been noted that in the area of tax avoidance or evasion, the burden of proof lies, in many cases, with tax authorities of the Member State concerned to prove a risk of tax avoidance or evasion in each case[18].

Irish Statutory Interpretation

The generally accepted principle in applying a taxing statute has its roots in *Cape Brandy Syndicate v Commissioners of Inland Revenue*[19] where Rowlatt J. observed that:

> "In a taxing statute one has to look merely at what is

11 *Ibid.* at paragraph 71
12 Section 20(5) of the Value Added Tax Act 1972
13 Case C-147/01
14 In Joined Cases, Optigen Ltd (C-354/03), Fulcrum Electronics Ltd (C-355/03), Bond House Systems Ltd (C-484/03) v Commissioners of Customs & Excise,
15 Case C-439/04 and C-440/04
16 Case C-435/03
17 Case C-337/08
18 Case C-451/05 - Opinion of Mr Advocate General Mazák delivered on 26 April 2007. Européenne et Luxembourgeoise d'investissements SA (ELISA) v Directeur général des impôts and Ministère public.
19 [1921] 1 K.B. 64

clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used"

This passage was cited with approval in *Texaco (Ireland) Limited v Sean Murphy*[20]. In the endorsement of that interpretation by Rowlatt J. in *Cape Brandy*, McCarthy J. stated:

> "I am happy to adopt that observation, borne out, as it is, by the decision of this Court in *McGrath v. McDermott* [1988] I.R. 258, where reference was made to *Revenue Commissioners v. Doorley* [1933] I.R. 750 and *Inspector of Taxes v. Kiernan* [1981] I.R. 117. In *Doorley's case* Kennedy C.J. at p. 765, said:—
>
> > 'The duty of the Court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e. within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred.'"

It is therefore settled law that in construing a taxing statute, the Court must adopt a literal interpretation. Both the liability to the tax and any exemption from it must be created by clear words. Lack of clarity or ambiguity must be resolved *contra preferentum* regardless of the awkwardness of the outcome, either for the taxpayer or the Revenue Commissioners[21].

Commentary

In civil litigation, there is an obligation on the claimant to persuade the court or tribunal, where appropriate, of the truth or the sufficient probability of every essential fact in issue for the purposes of establishing a prima facie case. A prima facie case is established when there is sufficient evidence for a judgement to be made unless the evidence is contested. Therefore a significant onus is placed on the party bearing the burden of proof.

In *O'Flynn Construction,* Smyth J. noted that the provisions of section 811 TCA impose an obligation on the taxpayer to satisfy the Court that a transaction was not a tax avoidance transaction. The learned judge also cited *Doorley* as the authority for placing the obligation on the taxpayer when seeking to avail of an exemption to show that the exemption applies. Correspondingly where a liability to tax is imposed, it is settled law that the charge to tax must be imposed in accordance within the strict letter of the law. Therefore in determining whether a liability to tax arises, the burden of proof should be on the Revenue Commissioners when the taxpayer has kept proper books and records.

Difficulties however can arise where the taxpayer has not kept proper books and records. There are statutory obligations requiring taxpayers to keep all records for a period of at least six years to ensure that a full and detailed tax return can be made[22]. Where proper books and records have been kept, it should be incumbent upon Revenue to prove that a liability to tax exists in the first place or provide evidence that income or sales have been suppressed. To place the responsibility on a compliant taxpayer to disprove a tax assessment in such circumstances would be contrary to the accepted basis upon which Irish taxing statutes should be interpreted, disproportionate and extremely onerous.

It is acknowledged that the success of the Revenue Commissioners in collecting €2.6 billion from the Special Investigations would have been severely hampered if Revenue had to prove that the relevant income or capital were derived from undeclared sources. In such cases there is ample justification for imposing the burden of proof on taxpayers where proper books and records have not been kept.

Furthermore, if it can be established that the burden of proof in tax litigation can be reversed, it would be prudent for taxpayers to retain for an indefinite period the requisite documentary evidence that verifies the legitimacy of accumulated funds.

In some cases, there will be disagreement as to whether proper records have been kept. However in such cases, prior to the main proceedings before an Appeal Commissioner or the Court, there should be a preliminary hearing to decide the adequacy of such records or in the absence or insufficient nature of such records, the materiality of any omissions before deciding on which party should bear the burden of proof.

There is now a considerable amount of jurisprudence that questions the validity of placing the burden of proof on a party where that party is unable to provide evidence to prove his/her case. In *Hanrahan,* the Supreme Court held that it would be palpably unfair to require the plaintiff to prove something which is beyond his reach and which is peculiarly within range of the defendant's capacity of proof. This view is also endorsed by the European Court of Justice in cases involving unjust enrichment, theft and missing traders where the burden of proof was held to be too onerous an obligation for the taxpayer.

The European Court of Human Rights has held that the lack of domestic remedies to protect any natural or legal person constitutes a breach of human rights. While recourse to the Appeal Commissioners or the Courts could offer a sufficient remedy, the placing of the burden of proof on a taxpayer will not ameliorate the position where the default position requires a compliant taxpayer to disprove a tax assessment.

The recommendation of the Court in *Menolly Homes* to seek judicial review in challenging the basis upon which the Revenue Commissioners raise an assessment would be a regressive step in the administration of taxation. The cost associated with High Court litigation together with the public

20 [1991] 4 ITR 91 102

21 Restated by O'Neill J. in *McGarry v The Revenue Commissioners* [2009] ITR 131 at page 65

22 Section 886 Taxes Consolidation Act 1997 and Section 16 Value Added Tax Act 1972

nature of those proceedings would act as major obstacles in contesting the imposition of a tax charge upon compliant taxpayers.

Conclusion

In seeking to avail of an exemption from tax, a taxpayer must prove entitlement. Correspondingly, in imposing a tax liability, the Revenue Commissioners must show that the charge is appropriate. Therefore the burden of proof should fall on the party claiming the entitlement or justifying the charge respectively.

A taxpayer in disputing a tax assessment may seek judicial review. However this procedure would be a regressive step in the administration of tax to the extent that a substantial number of taxpayers would be denied access to fiscal justice. Therefore the Appeal Commissioners should be the appropriate forum in the resolution of the preliminary stages of a tax dispute.

The obligation on a taxpayer to provide evidence to disprove a tax assessment can be disproportionate and palpably unfair. Therefore to preserve the level of fairness and to adhere to the developing jurisprudence in this area, it is submitted that the burden of proof should not automatically apply to the taxpayer. Where the obligation on a compliant taxpayer to provide evidence to reduce or abate a tax assessment is too onerous, the Appeal Commissioners and indeed the Courts should consider reversing the burden of proof. ■

The Pisa Peacekeeping Summer Course

Caroline O'Connor BL

I attended the International Training Programme for Conflict Management (ITCPM) summer course in Pisa in July of 2009. Essentially, this was a peacekeeping course for civilians, held at Italy's leading post-graduate training academic institution Scuola Superiore Sant' Anna. Also in attendance were 29 participants from Spain, Italy, DRC, Sudan, Nigeria, Norway, Pakistan and Sri Lanka. The ITPCM was established in 1995 with the aim of responding to the training needs of personnel involved in international field operations. It has since expanded its activities to include research and consultancy in the areas of human rights, humanitarian assistance, election monitoring and project design.

Summer school participants hailed from a variety of backgrounds, including trained emergency response paramedics, lawyers, protection workers, social workers, military and UN/Red Cross staff. The aim of the school is to train participants for some of the tasks usually performed by the civilian component of peacekeeping operations and peacebuilding missions, with a specific focus on Human Rights and International Election Observation. The Summer School, in addition to general background lectures, focuses on operational procedures and practice. Many aspects are tested in practical exercises through the use of advanced role-playing sessions and simulation techniques. The teaching environment was the most animated I have experience and ensured that participants were alert from class hours of 830am -7pm Monday to Friday and Saturday mornings. Classes included safety and security, stress management, preventive medicine and hygiene, intercultural understanding, human rights reporting, UN structure, mediation training and short term election monitoring.

Pisa, being a University town was a beautiful location for the course and its proximity to the Airborne Brigade Folgore, Italian elite paratroopers, meant they we spent 2 days receiving onsite military training on safety and security. This included mine awareness, appropriate behavior/responses in kidnapping and hostage taking simulation and how to operate VHF Radio's, Thuraya's and map-reading (not my forte). This security training entailed being ambushed by soldiers dressed up as militia and civilians, being kidnapped and held hostage for 2 hours in blistering Italian heat, threatened at gunpoint, exposed to unexploded ordinances (UXO) and mine explosions. A senior military officer accompanied each vehicle and assessed our performance during simulations. For the dreaded kidnap-hostage taking simulation, we were blindfolded, handcuffed with sticky tape and bundled into land rovers to another location where we were separated and interrogated to check our stories matched, engaged in a series of demeaning activities/stances, had to deal with frisky kidnappers, conduct TV ransom interview and eventually duck for the shoot out.

At the end of the course, a specific session was devoted to improving participants' capacity to design and pursue their own career path within the field of peace building and peace keeping operations. Although I didn't find the cv writing and UN roster system lectures all that useful the one on one time with UNV (United Nations Volunteers) and Dept of Peacekeeping operations (DPKO) staff was very useful as I always presumed I would fit into protection work/human rights officer roles. UNV staff found my experience more suited the Rule of Law projects. Participants then had an opportunity to interview for UNV and DPKO positions. Interviewers flew in from their respective HQ's in Bonn and New York. DPKO positions require minimum 2 years field experience whereas UNV recruit novices. As a result of interview, I was offered a number of posts and accepted a one year post as Judiciary Specialist UNV position with Rule of law and security (ROLS) with UNDP Somalia in October 2009.

The situation in Somalia obliges UNDP to run its operations from the Kenyan capital, Nairobi, but development interventions are active throughout Somalia. Conditions mean that UNDP are well established in Somaliland, emerging successfully in Puntland and sporadic in the south central area of the country. Office locations include Hargeisa, Garowe and Mogadishu.

I can say that the course did prepare me for life on a field mission and demystified the UN procedure and policies. I am in contact with many of the participants and 3 of us were directly recruited from the course. The skills I learned would also be useful for lawyers on the Bar Council/Law Society Rule of Law Committees, although the projects may be not be located at such high risk locations, the orientation and cultural awareness training is invaluable. ■

See *http://www.sssup.it* for further information.

Participants in the peacekeeping programme.

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