The Bar Review

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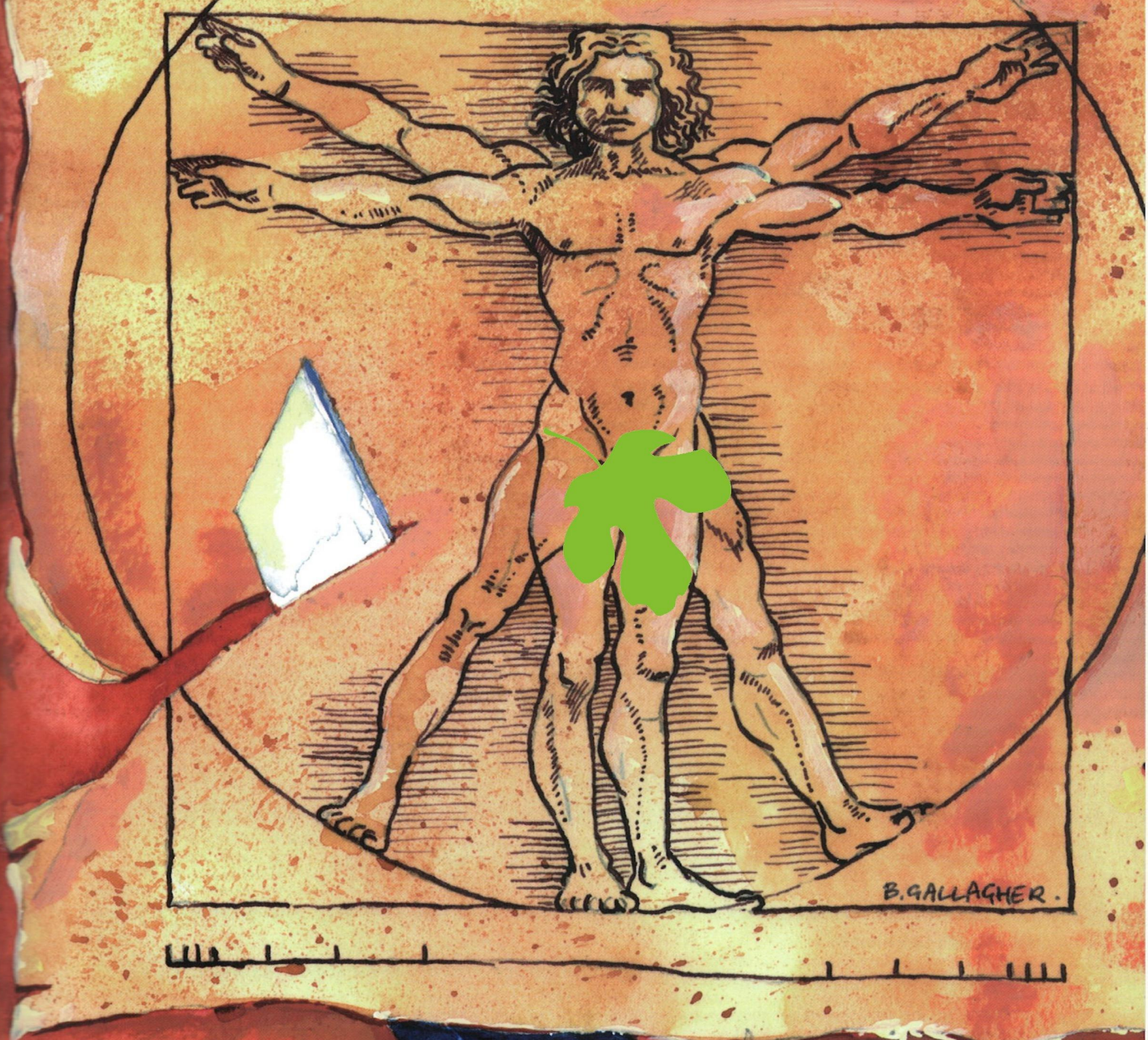

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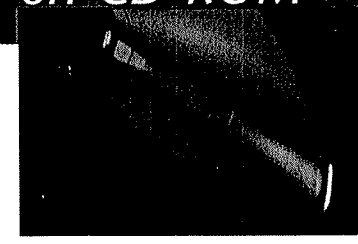

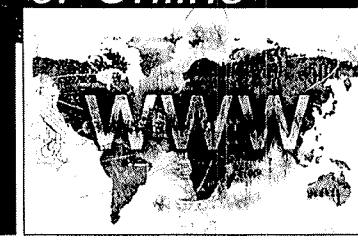

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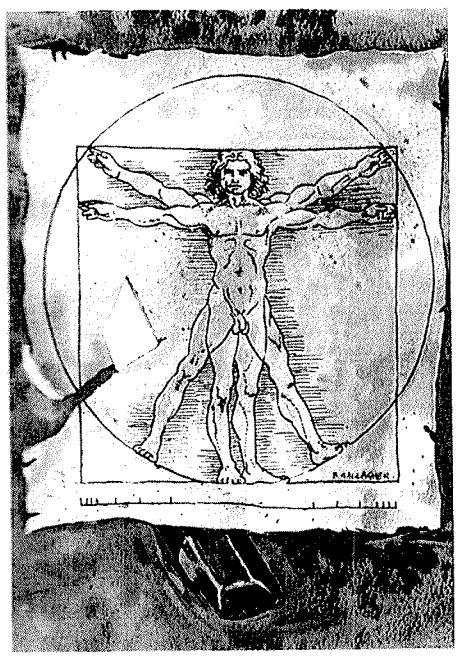

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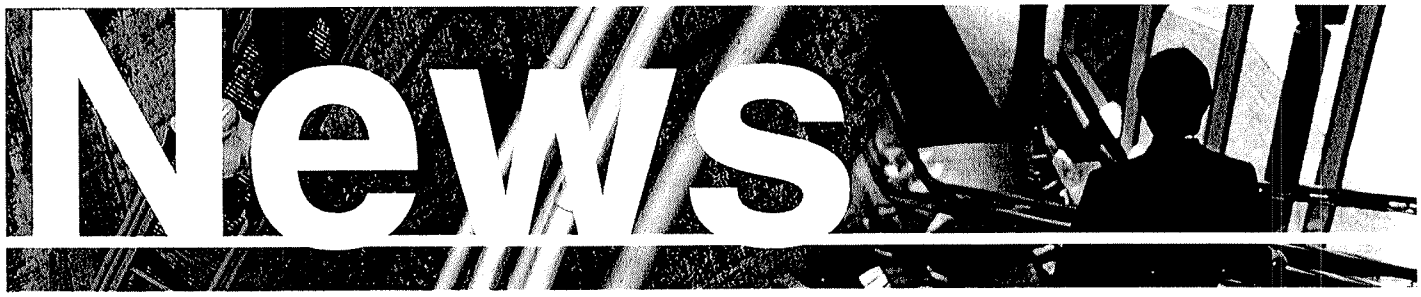

CONFERENCE ON REFUGEE AND ASYLUM LAW

A major conference on Refugee and Asylum issues, in the context of the recent implementation of the Refugee Act, will take place at the King's Inns on Friday 26th January 2001. This event will highlight the issues surrounding current asylum and refugee policy in the State.

The conference will examine the background to the recent legislation, together with the potential pitfalls and hazards which it is likely to encounter. An analysis will be made of the legal position and the implications of the new procedures for practising lawyers and persons working in the area. The potential remedies for asylum seekers in Irish Law will be examined in detail.

Participants include the Attorney General, Michael McDowell SC, Peter O'Mahony, Chairman of the Irish Refugee Council, Gerard Hogan SC, Ursula Fraser, Amnesty International, Brian Ingoldsby, Department of Justice, Equality and Law Reform, Noeline Blackwell, solicitor and Marie Quirke of the Refugee Legal Service.

The conference will also serve as a forum for the discussion of asylum issues generally. The guidelines that exist in various international conventions and the extent to which the Irish system incorporates human rights issues will be examined. An analysis of the different factors to be taken into account under international law in dealing with refugee applications will also be considered.

The event takes place all day Friday 26th January at King's Inns, Constitution Hill, Dublin 7. Further details and registration can be had from the C.L.E. Officer of the Bar Council at (01) 817. 4614 or (fax) (01) 817.4901

THE IRISH LEGAL HISTORY SOCIETY

The Irish Legal History Society has instituted a Bursary to assist persons undertaking research into Irish legal history. The first Irish Legal History Society Bursary was awarded in November to Margaret Clayton (UCC) to assist her work on the Munster Council Book 1601-1621, an important manuscript source on early seventeenth century Irish law and government, currently housed at the British Library.

Further information about the Irish Legal History Society Bursary can be obtained at http//www.law.qub.ac.uk.bursary.htm.

LECTURES

1 February 2001: *EU Public Procurement Law - Recent Developments* Kevin Kelly, Partner, McCann Fitzgerald, Solicitors. Irish Society for European Law, to be held at the European Comm ission offices, Dawson St, Dublin 2, at 6.15p.m. sharp.

3 March 2000: *European Human Rights Law - Recent Developments (Judge Brian Walsh Memorial Lecture),* Judge John Hedigan (ECHR), Irish Society of European Law, to be held at the Kings Inns at 11a.m. sharp.

14 March 2000: *Irish Influences in Americal Law Books: authors, printers and subjects* Morris L. Cohen, Emeritus Professor of Law, Yale Law School (Hugh M. Fitzpatrick Lecture on Legal Bibliography.) By invitation contact Hugh M. Fitzpatrick at tel: (01) 2692202.

New Retirement Options
for the Self Employed

January 31st Tax Deadline

In the 1999 and 2000 Finance Acts, revolutionary changes to the existing pensions regime were announced by the Minister for Finance.

The table below shows how much you may invest to get maximum tax relief on your pension contributions.

Age Band	% of relevant earnings qualifying for tax relief
Under 30	15%
30-40	20%
40-50	25%
50	30%

And when you do retire, the new retirement options mean that you can take up to 25% of your pension fund tax free to use in whatever way you want leaving the balance for you to invest in a choice of new and flexible options.

You must invest £50,000 or the remainder of your pension fund into an AMRF (Approved Minimum Retirement Fund). Any balance over this £50,000 can be invested in an ARF (Approved Retirement Fund) or withdrawn as cash on which you pay income tax at the marginal rate.

However you do not need to invest in an AMRF if you have a guaranteed pension or annuity of at least £10,000 a year for life or you are over 75

Pension Mortgages

Another efficient way to use your Pension is a Pension Mortgage. You pay interest on the amount you borrow. You take out a pension plan, with your regular pension contributions receiving tax relief and growing tax-free until you retire. When you retire you simply use part of the fund to pay off the mortgage.

For further information call Sarah O'Toole (01) 817 5016 or Rita Simons (01) 817 5416.

FOR CONTEMPT TOO HIGH

THIS ONLY GRANT ME, THAT MY MEANS MAY LIE TOO LOW FOR ENVY, FOR CONTEMPT TOO HIGH

Abraham Cowley (1618-1667)

Even those lawyers for whom the phrase 'ground-breaking decision' is a part of their everyday courtroom lexicon must regard the decision in the case of Liam Lawlor TD as a defining moment in modern legal history. Up to this point there was a feeling (perhaps unjustified) among certain members of the public that, no matter how grave the crime alleged, politicians would always find a way to prevent the law from catching up with them.

Ultimately our entire legal system is based upon the deceptively simple premise that court orders will be respected. Lawyers and litigants are entitled to fight their corner as hard as they can during the case, but once a final verdict is reached it must be obeyed. Few members of the public would hazard their grievances to the courts unless there was certainty that any orders issued would be vigorously enforced. The law of contempt of court is directed to securing the integrity of the system of justice as a public (rather than an individual or State) interest.

The Lawlor case also serves to remind us that the law of contempt is a difficult subject. A few years ago it was controversially used by the courts to prevent criticism of the Special Criminal Court. The trend in other Commonwealth jurisdictions is to move away from using contempt to protect the courts from criticism, even where that criticism is intemperate and ill-judged. In the words of Lord Atkin "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men." There are also several decisions of the European Court of Human Rights on the proper balance between contempt and freedom of expression/due process which have yet to be considered in depth in this jurisdiction.

Despite huge public pressure and media interest the contempt proceedings in the Lawlor case were conducted in a dignified and careful manner. All of the participants in the case deserve credit for this. One of the most impressive aspects of our legal system is the manner in which even the most contentious and difficult issues can be resolved in a calm and non-sensationalist way.

In one sense the Lawlor case was a side-show (albeit a significant one) to the more important question of whether any substantive proceedings will result from the investigations carried out by the Tribunals. Ultimately securing compliance with procedural orders is no substitute for substantive results. Only time will tell whether the Lawlor case is a prelude to more substantive findings.

Finally, and on a lighter note, it may be recalled that Irish courts have recently held that prisoners have the right to vote in elections. One of the arguments against this was the fact that prisoners would demand direct access to political debate and to politicians. In this case at least the mountain has come to Mohammed. •

SEX EQUALITY THE EQUAL STATUS ACT 2000[1]

Clíona Kimber BL and Marguerite Bolger BL provide an overview and analysis of the sex equality provisions of the Equal Status Act 2000, which for the first time in Irish law extends principles of non-discrimination on grounds of gender beyond the workplace.

Introduction

The Equal Status Act 2000 is a significant and radical departure in Irish equality law. For the first time the principle of non-discrimination, which is now so familiar in the field of employment law, is extended to the world outside the workplace. As a result of the new Act, the provision of goods, services and accommodation, the disposal of premises, the provision of education, the membership of clubs, as well as the conduct of advertising, are now subject to equality law.

It is important to note that the Equal Status Act is not concerned solely with gender discrimination, but also prohibits discrimination on the grounds of marital status,[2] family status, sexual orientation, religion, age, disability, race and membership of the travelling community. These grounds of discrimination will not, however, be considered by us in the present article which focuses on the impact of the new Act on just one of its nine areas of application, namely sex equality.[3] In it we will set out the scope of the legislation, examine each of the fields in which sex discrimination is outlawed by the Act, together with the exceptions thereto, and conclude with a consideration of the enforcement mechanisms under the Act.

Scope of the Legislation

The 2000 Act adds to a large body of existing equality legislation, the most important of which is the Employment Equality Act 1998, and as such it is undoubtedly a welcome development. Unusually, the Equal Status Act was not adopted in order to implement European Community law, but in large measure derived its impetus from the need to comply fully with Irelandís obligations under the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[4] and to enable Ireland to ratify the 1966 United Nations Convention on the Elimination of all Forms of Racial Discrimination.

In many respects the Act is a radical departure in Irish law and as such there are no authorities to give any guidance as how it might be applied. The Act is however similar in some respects to the UK equality legislation of the 1970s, namely the Sex Discrimination Act 1975[5] and the Race Relations Act 1976. These pieces of legislation prohibited discrimination *inter alia* in the fields of the provision of goods, services and facilities to the public with regard to education and with regard to the provision of accommodation and premises. It may be that some of the case law interpreting this legislation will be of some relevance in an Irish context.

Provision of Goods and Services

The general provision applying the principle of non-discrimination to the disposal of goods and the provision of services is found in section 5 (1), which provides that a person shall not discriminate in disposing of goods or in providing a service to the public generally or to a section of the public. Furthermore, the obligation not to discriminate cannot be avoided by not charging for the goods or services or by limiting their provision to a certain section of the public. It is also clear that section 3 of the Act prohibits both direct and indirect discrimination, although indirect discrimination may be justified if it is "reasonable in all the circumstances of the case."[6]

(a) services

The concept of a service is defined quite broadly in Section 2 of the Act and includes a facility of any nature which is available to the public generally or a section of the public, including facilities for banking and insurance, entertainment and recreation, transport and travel as well as a service or facility provided by a club to the public or a section of the public and a professional or trade service. However, pension rights or any service or facility in relation to which the Employment Equality Act 1998 applies are expressly excluded from the definition of service.[7]

This definition of services is largely similar to the list of examples of facilities and services in the UK Sex Discrimination and Race Relations Acts. In the UK it was stated that the examples given were not intended to be exhaustive.[8] It is unclear whether the definition in section 2 of the Irish legislation is exhaustive or not. It was also clear early on in the UK that the application of the Act to the private sector presented few problems. Thus in *Gill v. El Vino Co. Ltd.*[9] the refusal of a wine club to serve women at the bar, where they were only served at tables, while men could be served at the bar as well as at tables, was clearly contrary to the prohibition against non-discrimination in section 29 of the UK Sex Discrimination Act.

(b) exceptions

Personal services

Section 5(2)(c) provides that the general principle of non-discrimination on the gender ground will not apply in relation to "services of an aesthetic, cosmetic or similar nature, where the services require physical contact between the service provider and the recipient." Section 5(2)(g) provides for an exception specifically in relation to the principle of non-discrimination on the gender ground where "embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender." Finally section 5(2)(i) permits differences in the treatment of persons on the gender ground that are "reasonably required for reasons of authenticity, aesthetics, tradition or custom in connection with the dramatic performance or other entertainment."

The concept of permitting discrimination on grounds of sex in relation to the provision of personal services has always formed part of equality law. Indeed there are similar provisions in the Employment Equality Act 1998 with regard to access to employment.[10] However it is submitted that such an exception should be limited to situations where it is genuinely necessary for a service to be provided by a man or a woman. Whilst it is arguable that services of an "aesthetic or cosmetic nature" do not necessarily require the service provider to be either a man or a woman, it is probably reasonable to suggest that where the services require "physical contact" between "the service provider and the recipient" that the recipient of the service should be entitled to prefer that service to be provided by a person of the same gender. However, it is somewhat worrying that section 5(2)(i) allows sex discrimination in the provision of dramatic performance or entertainment where it is reasonably required for reasons of tradition or custom. Does this mean that it would be open to a TV company, for example, only to allow men to be sports presenters, or presenters for certain types of sports, on the grounds that this was necessary for reasons of tradition and custom? The forces of tradition and custom are highly discriminatory against women and should not be allowed to justify discrimination.

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Services related to the assessment of risk - pensions and insurance

Section 5(2)(d) provides that the general principle of non-discrimination in relation to the disposal of goods or the provision of services does not apply in respect of:

"(d) differences in the treatment of persons in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk where the treatment-

(i) is effected by reference to-

(I) actuarial or statistical data obtained from a source on which it is reasonable to rely, or

(II) other relevant underwriting or commercial factors,

(ii) is reasonable having regard to the data or other relevant factors,"

A similar exception is contained in section 45 of the UK Sex Discrimination Act in the face of the near universality of the practice of differential treatment on grounds of sex in insurance. This exception, together with the fact that the definition of services in section 2 of the Act expressly excludes pensions, effectively removes the specific fields of insurance and pensions from scope of the Equal Status Act. It might be possible to argue that a pension should be considered as a 'good' so as to come with the Equal Status Act as a whole, but this does not help with the exception discussed here. As such it is a disappointing and disheartening exclusion which many commentators criticise as too broad an exception to the principle of equality.[13] This approach to risk classification has also been criticised as imposing a high social and economic cost on society[14] and particularly on women. In *Pinder v. Friends Provident*, one of the few test cases taken under the UK legislation, for example, the County Court found it reasonable for a company to justify its practice of charging women 50 per cent more than men for Permanent Health Insurance, which it had done since 1953 largely by reference to social security statistics at the time.[15] It is interesting to note that Irish legislation creates an even wider exception than that impugned in *Pinder*.

Sport

The field of sport is also, to a very large extent, excluded from the scope of the Equal Status Act, because discrimination in the provision of goods or services is allowed to take place if it is reasonably necessary having regard to the nature of a sporting facility or event and 'relevant to the purpose of the facility or

event.'[16] This exception is very wide, and as a result it would be extremely difficult for a complainant to show that discriminatory treatment in a sporting event or facility was not reasonable or not relevant. The inclusion of such a broad exception to the non-discrimination principle for sports events and sporting facilities is very disappointing given the very high degree of segregation in Irish sporting events and clubs. Of course in many if not most sporting events there clearly have to be separate men's and a women's games or categories, but this is not true in all circumstances. In certain age brackets, for example under 14, girls can often be physically as strong if not stronger than boys of the same age, yet are not allowed to play on boys teams or compete in boys events.[17] Furthermore, in sports in which physical strength does not play such an important role, such as table tennis, men and women could certainly compete on equal terms. The Equal Status Act would have been better if it had contained a more focused exception to equal treatment in the area of sport. In the UK Sex Discrimination Act 1975, by contrast, discrimination in any sporting activity is only allowed where the physical strength, stamina or physique of the average woman would place her at a disadvantage vis-á-vis a man.

In addition, the Equal Status Act does nothing to address the disadvantage to women due to the greater resources put into male sporting events and sports in comparison with womenís leagues or sports played by women. It is abundantly clear that the framers of the Equal Status Act did not want to upset the status quo with regard to Irish sport. As a result it remains to be seen whether or not the legislation will be of any assistance to sportswomen seeking equality in Government funding for facilities for women in sport or to young girls seeking to participate in a male dominated sport.

The disposal of premises and the provision of accommodation.

Section 6 of the Equal Status Act applies the principle of non-discrimination to the disposal of premises and the provision of accommodation. This is subject to a number of exceptions. The principle of non-discrimination does not apply to the disposal of estates or interests in estates by will or gift, or to near relatives.[18] There is, in addition, a ësmall premisesí exception similar to that contained in section 32 of the UK Sex Discrimination Act. Where the person providing the accommodation or a near relative of that person intends to continue to live there and the premises are small, the principle of non-discrimination does not apply.[19] There is a further exception where the accommodation in question is not generally available to the public.[20] There is also express recognition in section 6(2)(e) of the personal nature of the provision of accommodation in certain circumstances. Thus, it is not discriminatory on grounds of sex to provide accommodation to persons of one gender where "embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender." Express provision is also made for a housing authority to treat people differently based on, *inter alia*, their family or marital status.

Section 6 may be of considerable assistance to young single mothers who may sometimes be refused accommodation by a landlord who does not wish to have children and/or single parents as tenants. Such an attitude could be discriminatory on all three grounds of gender, marital status and family status.

Education

The Equal Status Act extends the principle of discrimination to educational establishments in relation to admission to, access to, participation in and expulsion from an educational establishment. Having said that, the regime established by section 7 is nowhere near as wide as that relating to the provision of goods and service and has a large number of exceptions. The Equal Status Act was not the piece of legislation designed to radically restructure the Irish educational system, in which primary and secondary education is largely provided for by single sex schools of particular religious denominations. Thus, section 7(3)(a) permits first and second level single sex educational institutions to discriminate on grounds of gender. In practice, therefore, a girl's school can lawfully refuse to admit boys and vice versa. An institution established for the purpose of providing training to ministers of religion is also permitted to discriminate on grounds of gender in admitting students of only one gender.

Despite these broad exceptions, for the limited number of co-educational schools in Ireland, the prohibition of non-discrimination on ground of sex could have some important implications. Of particular interest is section 7(2)(b) which provides that the educational establishment shall not discriminate in relation to 'the access of a student to any course, facility or benefit provided by the establishment.' Traditionally girls were not encouraged to study woodwork, mechanical drawing, physics or advanced mathematics, while there was a bias against boys studying home economics. Discrimination of this kind could now be contrary to the Act. In addition, in many co-educational schools the sports facilities are primarily orientated towards sports played by boys, and the same commitment is not made to sports facilities and sports training for female students. Again, it is possible that this situation could be contrary to the Equal Status Act. The position with regard to sporting facilities is complicated however by section 7(4)(a) which states that the general principle of non-discrimination in respect of the provision of services by educational institutions may not apply to the provision or organisation of sporting facilities for sporting events to the extent that the differences are reasonably necessary having regard to the nature of the facilities or events. This exception is highly ambiguous and open to a number of

"The sports exception is very wide, and as a result it would be extremely difficult for a complainant to show that discriminatory treatment in a sporting event or facility was not reasonable or not relevant. The inclusion of such a broad exception to the non-discrimination principle for sports events and sporting facilities is very disappointing given the very high degree of segregation in Irish sporting events and clubs. "

"If the club is found to be a discriminating club, then its certificate of registration is not renewed or granted, although for a first such finding the certificate of registration is simply suspended for 30 days. ... Thus, whilst the sanctions for a club found to have engaged in discrimination may be very serious, it is open to the club at any time to right its wrongs and come back to Court seeking approval for its attempts to cease its discriminatory practices"

different interpretations. As with the 'sports' exception to equal provision of goods and services, discussed above, it is regrettable that a firmer line was not taken to ensure equality for girls in Irish primary and secondary schools with regard to sports facilities and sports training.

The Equal Status Act may also have significant and practical implications for educational institutions in the area of sexual harassment between staff and students. Section 11(c) of the Act prohibits the sexual harassment of a student at an educational establishment. Whilst the law on sexual harassment has been highly developed in the context of employment law, there have been considerable difficulties in extending those principles beyond that domain. The problem of sexual harassment in schools or on a college campus has frequently been discussed but never before placed properly in a legal framework. For the first time the Equal Status Act provides students with a statutory right to an educational environment free from sexual harassment. It is to be expected that this will lead to the development of Sexual Harassment Policies in such institutions similar to those which have become relatively commonplace in the workplace in recent years. However, it is regrettable the Act did not include legal protection for teachers and university lecturers from sexual harassment by students. While this form of sexual harassment is more unusual, it does take place on occasion, particularly where groups of students act in concert to harass a young or inexperienced teacher.

Discriminating clubs

The issue of discriminatory treatment with regard to membership of clubs is tackled in a novel and unusual way by the Equal Status Act. Section 10 provides that where an order is made determining that a club is a discriminating club then no certificate of registration under the Registration of Clubs Acts 1904-1999 shall be granted or shall be renewed for the benefit of the club. The relevance of having a certificate of registration is that such a certificate is necessary for the club to be permitted to sell intoxicating drink. The net effect of the refusal of a certificate, therefore, is that a discriminating club will be deprived of the opportunity to sell alcohol and will lose what may be a significant source of their revenue.

Having prohibited discriminatory treatment in becoming a member of a club, it is rather puzzling to find that the Equal Status Act contains a number of exceptions to the principle of non-discrimination in relation to the membership of clubs which would seem to allow the very kinds of discrimination which it prohibits. Clubs are allowed to be discriminatory in their membership policies if their principal purpose is to cater only for the needs of persons of a particular gender, marital status or family status. Presumably, this exception is designed to allow clubs such as widows associations or the Irish Countrywomen's Association to continue unchanged, but it would also seem to legitimate the continued existence of the traditional men's clubs. Section 9 also contains further exceptions, many of which are badly drafted and highly ambiguous. The fear is that such exceptions could be used to justify the type of discrimination which in fact the Act intended to outlaw.

One of the fundamental aims of the Equal Status Act is to eliminate discrimination in specific fields in Irish society which had hitherto not been subject to anti-discrimination law. One such area was the membership of recreational and sporting clubs, and in particular golf clubs, many of which allowed women only a limited membership and others which completely banned women. Most sporting clubs operate a licensed premises as part of their activities, and the revenue from the sale of alcohol is often vital to the ongoing viability of the club. Under the new legislation such clubs will now be faced with the choice between permitting both men and women full and equal involvement in the club or not to be allowed to sell alcohol. On that basis it is not difficult to see that such blatant discrimination on grounds of sex in this area of Irish life will soon be a thing of the past.

It would appear that anyone, including the Equality Authority, has the power to apply to the local District Court requesting the Court to make a determination as to whether or not the club is a discriminating club. Whilst the Court may dismiss the application if it is found to have been brought in bad faith or to be frivolous or vexatious or to relate to a trivial matter, it is clear from Section 8(3) that the person making the application does not have to have any actual connection with the club. As noted above, section 10 provides that if the club is found to be a discriminating club, then its certificate of registration is not renewed or granted, although for a first such finding the certificate of registration is simply suspended for 30 days. The determination of the District Court may be appealed to the Circuit Court.[24]

A club that is found to be a discriminating club may also at any time apply to the District Court requesting the Court to determine whether the club continues to be a discriminating club.[25] The person who made the original application to the District Court must be served with a copy of the club's application, if possible. It is to be presumed that in accordance with the principles of natural justice that such a person will be entitled to be heard at that application. Thus, whilst the sanctions for a club found to have engaged in discrimination

may be very serious, it is open to the club at any time to right its wrongs and come back to Court seeking approval for its attempts to cease its discriminatory practices.

Advertising

The Equal Status Act also applies the principle of non-discrimination to advertising. This is to be welcomed as advertising often helps to reinforce stereotypical and discriminatory images of women. Advertisement is very widely defined and includes every form of advertisement, whether to the public or not, in newspapers or other publications, on television or radio or by way of display of a notice.[27] The area of application of this provision is clearly very wide. The provision as a whole is confusing, however, as it does not prohibit advertising which is in itself discriminatory or which portrays conduct which might be construed as sexual harassment. Instead it prohibits an advertisement which indicates an *intention* to discriminate or to sexually harass. It is difficult to envisage the kinds of advertisements that might fall into this category. Thus it is unlikely that section 12 will be a significant tool in trying to ensure that advertisers treat men and women equally in their advertisements.

Sexual harassment

Sexual harassment has long been recognised as a particularly invidious form of sex discrimination. It has been expressly prohibited in the employment context in Ireland since the Employment Equality Act 1977, now replaced by the Employment Equality Act 1998.[28] The Equal Status Act is the first piece of Irish legislation to make sexual harassment unlawful *outside* the workplace in relation to the provision of goods or services or accommodation and in educational establishments.[29] It is to be expected that principles developed in the context of workplace sexual harassment will be applied by the Director of Equality Investigations to dealing with allegations of sexual harassment experienced by the recipients of goods or services, by students or by those to whom accommodation is provided.

It is interesting to note that the Equal Status Act does contain some new departures with regard to sexual harassment. Section 11(2) introduces the new concept of a "responsible person", that is someone who is responsible for the operation of any place that is an educational establishment or at which goods, services or accommodation facilities are offered to the public. Such a person shall not permit another person who has a right to be present in that place or to avail themselves of those facilities, goods or services to suffer either sexual harassment or harassment at that place. This provision places a potentially wide liability on those involved in running an educational establishment or who run or own any other place where goods or services are offered to the public, or which provides accommodation or accommodation services. However the scope of the liability is considerably restricted by section 11(3) which provides a defence for such a person where they can prove that they took such steps as are "reasonably practicable" to prevent the sexual harassment or harassment in question.

It remains to be seen what steps might be regarded by the Director of Equality Investigations as satisfying this test of "reasonably practicable." The attitude adopted by the Equality Officers and Labour Court to sexual harassment in the work place was that an employer who could show that she or he had an effective sexual harassment policy that was being actively and meaningfully applied in the work place might be able to avoid liability where an employees suffered sexual harassment. It may be that a similar approach might be adopted under the Equal Status Act.

Enforcement

Complaints Procedure

Unlike the Employment Equality Act 1998 which provides a complainant with a number of options in respect of lodging a complaint, the Equal Status Act obliges a complainant to refer her complaint, in the first instance, to the Director of Equality Investigations.[30] Thus an ordinary member of the public, if she feels she has been discriminated against, can simply make a direct complaint to the Director. However, before that person can do so they must notify the respondent in writing of the nature of the allegation. The complainant must also notify the respondent of their intention, if they are not satisfied with the response to the allegation, to seek redress by referring the case to the Director. This must be done within two months after the conduct in question is alleged to have occurred or within two months from the time when the last incident of the conduct in question is alleged to have occurred.[31] Where 'exceptional circumstances' exist which prevented the complainant from notifying the respondent and where it is "just and equitable", having regard to the nature of the alleged conduct and to any other relevant circumstances, the time limit of two months may be extended by the Director to not more than four months.[32]

In this written notification to the respondent, the complainant is permitted to question the respondent so as to obtain 'material information' [33] as defined in Section 21(8). The complainant is not, however, entitled to look for confidential information.[34] The respondent may, if he or she so wishes, reply to the questions raised by the complainant. However section 26 provides that where the respondent fails to reply to the notification or to the questions asked or supplies false or misleading information or supplies information that would not assist a person in deciding whether or not to refer the case to the Director, the Director may draw such inferences, if any, as seem appropriate.

The Director will not proceed to investigate a case referred to her unless she is satisfied either that the respondent has replied to the notification or that at least one month has elapsed after the notification was sent to the respondent.[36] The claim for redress to the Director must be made within six months from the date of the occurrence of the prohibited conduct or from the date of its most recent occurrence.[37] This time limit of six months may be extended to a period not exceeding twelve months in exceptional circumstances.[38]

It is not only an individual member of the public who has the power to make a complaint, it is also open to the Equality Authority to refer a case to the Director where it believes that discrimination is taking place or has taken place and that it is not reasonable to expect the person discriminated against to make a claim under the Act.[39] This might be because the person discriminated against fears recriminations or victimisation. If the Authority makes the complaint, it too must go through the

"A 'responsible person' shall not permit another person who has a right to be present in that place or to avail themselves of those facilities, goods or services to suffer either sexual harassment or harassment at that place. ... However the scope of the liability is considerably restricted by section 11(3) which provides a defence for such a person where they can prove that they took such steps as are "reasonably practicable" to prevent the sexual harassment or harassment in question.

procedure of notifying the respondent, described above. The Equality Authority is also empowered to apply either to the High Court or to the Circuit Court for injunctive or such other relief as is deemed necessary to prevent the further occurrence of prohibited conduct or the further contravention by a person who has been found by the Director to have engaged in prohibited conduct or contravened the provisions in the legislation relating to discriminatory advertisement.

Investigation of Complaints

Having received the complaint, and being satisfied that notification requirements have been complied with, the Director then proceeds to investigate the complaint. If the Director finds that the complaint can be upheld she can either make an order of compensation for the effects of discrimination or an order that a person take a specified course of action. The maximum amount of compensation is the maximum amount that could be awarded by the District Court in civil cases in contract, currently £5,000. A decision of the Director under Section 25 can be appealed to the Circuit Court within 42 days of the Director's decision. The only other appeal is to the High Court on a point of law only. Either party to the case is entitled to request that the decision of the Director should include a statement of the reasons why she reached the decision. This will be very helpful in enabling the reasoning behind decisions to be analysed and appropriate advice given on that basis.

Vicarious Liability

Express provision is made in section 42 of the Equal Status Act for the vicarious liability of an employer in respect of the conduct of an employee which leads to proceedings being brought under the Act. This provision is a very useful one in ensuring that employers do not hide behind their employees in order to evade the application of the Act. As a result, employers whose businesses are concerned with the provision of goods and services or the provision of accommodation would be well advised to train their staff to be sensitive to issues of discrimination and gender equality if they wish to escape being made vicariously liable for their employees' misconduct. Educational facilities will also need to have training programmes and equality policies in place.

Analysis

The enforcement mechanism under the Equal Status Act is to be welcomed. The fact that a person who feels that they have been discriminated against can simply make a direct complaint to the Director rather than having to resort to expensive litigation is an important step forward for access to justice for the ordinary citizen. It can also be seen that the emphasis in terms of enforcement is on trying to have the issues resolved informally before proceeding to litigation. The requirement of notification of the respondent creates the opportunity for the matter to be settled informally between the two parties directly involved at an early stage. In addition, section 24 of the Equal Status Act contains a provision on mediation similar to that under the Employment Equality Act 1998. Where a case has been referred to the Director and it appears that it is one that could be resolved by mediation, the Director must refer the case for mediation to an equality mediation officer unless either party to the proceedings objects. Such an investigation is held in private. If there is any objection to mediation then the case falls to be dealt with in the usual way by the Director. These options for alternative settlement of the dispute are very welcome in that they cut costs and simplify procedures and so make it easier for the ordinary person to obtain redress for discrimination.

The emphasis in the Act on the informal settlement of disputes will probably mean that there will be little reported litigation. It is to be expected that 90% of complaints will be dealt with directly by the Director, with most of the remaining litigation taking place in the District Court. It is likely that only a few cases will make their way to the High Court. While this has positive aspects in terms of cost and speed of justice, it does mean that a body of case law which might assist with the interpretation and application of the legislation will not develop quickly. However, if the Director of the Equality Agency avails of the opportunity given to her in the Act to give reasons for her decisions, this will give guidance with regard to the application of the legislation.

Conclusions

The Equal Status Act marks a significant advance in the achievement of equality for women. In many respects it is flawed, particularly with regard to the width of the exceptions and the ambiguity and overinclusion of many provisions, a fact which is surprising given the length of time which it has taken to reach the statute books. Despite its failings, it nevertheless represents a radical and innovative departure for Irish law in that for the first time it extends the principle of non-discrimination to the world beyond the workplace. As such it is an extremely valuable addition to Irish equality law. It is also a good piece of legislation in that it is easy to enforce; the easy and informal complaints procedure has the potential to bring the rights in the Act within the grasp of many ordinary women. However, the Act will not have a significant impact on such women's lives unless they become aware of their rights under the legislation. It may take some time for information about the new legislation to disseminate to women in all sectors of Irish society. It is to be hoped that the Equality Authority will play some part in bringing this important piece of legislation to the attention of those who need it.•

1. The Equal Status Act 2000 and gender equality are considered in more detail in Bolger and Kimber, *Sex Discrimination Law* (2000) at Chapter 13, "Equal Access to Goods and Services".

2. It is interesting to note that the definition of family status in Section 2 (1) includes being pregnant. This leaves open the possibility that a woman who has been treated less favourably in respect of goods or services on grounds of her pregnancy would have a cause of action in relation to both gender and family status discrimination.

3. As with the Employment Equality Act 1998 these grounds are the gender ground, the marital status ground, the family status ground, the sexual orientation ground, the religion ground, the age ground, the disability ground, the ground of race and the Traveller community ground. See section 3(2) of the Equal Status Act.

4. For discussion of the Convention and women's rights under international law see Chinkin, 'Women's Rights as Human Rights under International Law' in Gearty and Tomkins (eds.) *Understanding Human Rights* (1996); Wallace, *International Human Rights* (1997) at Chapter 2; and Steiner and Alston, *International Human Rights in Context: Law, Politics and Morals* (1996) at Chapter 13.

5. The prohibition against sex discrimination in the UK Sex Discrimination Act does not apply generally. Instead the Act details three precise fields in which discrimination is outlawed, namely, the provision of goods, facilities, services or premises to members of the public, employment and education. Within each field, the Act includes further detailed specifications on the grounds of action. For a short description of the Act see Fredman, *Women and the Law* (1997), at p284-285.

6. Section 3(1)(c)(iv).

7. On pension rights and equality generally see Bolger and Kimber, above, n.1 at Chapter 6, 'Pension Rights'.

8. See *R v. Entry Clearance Officer, Bombay ex parte Amin* [1983] 2 A.C. 818. For a more detailed discussion of the meaning of 'goods, facilities and services' in the UK legislation, see Bourn and Whitmore, *Race and Sex Discrimination* (2nd. Ed. 1993) pp. 248-249.

9. [1983] Q.B. 425

10. For a more detailed discussion of these provisions see Bolger and Kimber, above n.1, at Chapter 11, 'Access to Employment and Promotion'.

11. Section 5(2)(c).

12. Section 5(2)(c).

13. See for example Shannon, *The Impact on Insurance Practice of the Equal Status Bill 1997* (1997) Irish Insurance Law Review 23. Bourn and Whitmore, above, n.8, point out that the UK Race Relations Act contains no similar exclusion even though discrimination on grounds of race in relation to the granting of insurance policies was not uncommon.

14. See generally Ebrahams, *Distributing Risk Insurance, Legal Theory and Public Policy* (Yale University Press, 1986).

15. *Pinder v. Friends Provident*, The Times, 16 December 1985, as cited in Bourn and Whitmore, above, n. 8, p.253.

16. See section 5(2)f.

17. On this point, see *Re Blainey and Ontario Hockey Association et al* (1986) D.L.R. (4th) 728 where a 12 year old Canadian girl successfully challenged Ontario Human Rights law on the ground that it did not protect her right to continue to play in the boys Minor Division Hockey League.

18. Section 6(2).

19. Section 6(2)(d). Small premises are further defined in Section 6(4).

20 Section 6(2)(c).

21. Section 7(3)(b).

22. Section 8(3)

23. Section 8(4)

24. Section 8(8)(a).

25. Section 8(15).

26. Section 8(15).

27. Section 12(3).

28. Sexual harassment in the employment context is discussed in greater detail in Bolger and Kimber, above n.1, at Chapter 11, "Sexual Harassment".

29. It is defined in section 11 (4) and (5) of the Act.

30. Section 21(1).

31. Section 21(2)(a).

32. Section 21(3).

33 Section 21(2)(b).

34. As defined in section 21(9) of the Act.

35. Section 21(2)(b

36. Section 21(4).

37. Section 21(6).

38. Section 21(7).

39. Section 23(1).

40. Section 12(1); Section 23(3).

41. Section 27.

42. Section 28. A decision of the Director that has not been appealed can be enforced by the Circuit Court under section 31(2) of the Act.

HE TREATY OF NICE

Eugene Regan BL outlines the institutional and constitutional changes approved by the Nice Summit of European Union leaders and considers whether a referendum will be strictly required for the ratification of the Treaty of Nice in Ireland.

Overview of the Treaty

The draft Treaty of Nice, yet to be finalised by jurists and linguists, is expected to be signed by March 2001 and, following ratification by Member States, to enter into force on 1 January 2003. This Treaty addresses the institutional issues left unresolved by the Amsterdam Treaty, such as the weighting of Member States' votes in the Council of Ministers, the total number of European Commissioners and the extension of qualified majority voting. The new Treaty emerged from a deliberate process bearing specifically on questions of institutional reform associated with enlargement, and was agreed following often difficult negotiations at the Intra-Governmental Conference of Member States which concluded on 11 December 2000 under the French European Union Presidency.

"In order to improve the workings of the Court of Justice the Court may establish judicial panels to hear certain classes of action in proceedings brought in specific areas. In addition the jurisdiction of the Court of First Instance will be extended to include *inter alia* the issuing of preliminary rulings on matters referred from national courts."

Mr. Brian Cowan T.D., Minister for Foreign Affairs, speaking at the Institute of European Affairs on 20 December 2000, explained that the purpose of the Inter-Governmental Conference (IGC) was to prepare the Union for an enlargement which could involve a near doubling of the size of the Union in the years ahead, and stated that in taking on this task, the leaders of today's Union are engaged in a project every bit as ambitious as that undertaken half a century ago by the Union's founding fathers." This project, he suggested, is "about restoring the unity of a divided continent; it is about reinforcing democracy and stability in Europe to the benefit of all its citizens." Accordingly the IGC and the Treaty of Nice can only be fully appreciated when viewed in the context of the enlargement of the Union to Eastern Europe.

As the political challenges facing Member States have changed over the years, the objectives of the European Union, its political priorities and the constitutional basis of its decision-making procedures have also changed. Thus the founding Treaty of the then European Economic Community of 1957 has been amended on four occasions following the Intra-Governmental Conference process.

While the various Treaty amendments have involved an array of new policy initiatives and further elaboration of existing policies, there has usually been an overriding political objective in each case. The Single European Act 1986 was designed primarily to improve the competitiveness of the European Union by providing for the completion of the Internal Market; the Maastricht Treaty 1992 was designed to lay the legal basis for the creation of Economic and Monetary Union and the Euro; and the Amsterdam Treaty 1997 was conceived also as a means of preparing the Union for enlargement to the East following the fall of the Iron curtain. However, Amsterdam failed to resolve the institutional issues which would allow for effective decision-making in a Union of 27 Member States and accordingly the overriding political objective of the Treaty of Nice was to resolve the institutional reform issues left over from Amsterdam. To a great extent it has succeeded in doing so.

The main elements of the Treaty of Nice include:

(i) An extension of qualified majority voting to a large number of policy areas that heretofore had been subject to unanimity so that almost 90% of EU legislation will in future be adopted by this method. The unanimity rule and the national veto will remain in areas such as taxation, trade in services, and asylum and visa policy - much to the relief of the Irish government.

(ii) Decision-making in the Council of Ministers will in future be subject to a new complex voting system. Following a re-weighting of votes of Member States the new qualified

majority has been set at 258 votes out of 345 with a blocking minority at 88. In addition a Member State may request that the qualified majority comprises at least 62% of the total population of the Union. As most of the Eastern European countries likely to join the Union are small member states this new voting system, which also specified the votes to be accorded to these prospective new members, will, not unreasonably, prevent the voting strength of the existing larger Member States being dissipated.

(iii) In the case of the European Commission a new rotation system, based on strict equality on Member States, will become operational when the Union is enlarged to include 27 Member States at which stage the number of Commissioners will be less than the number of Member States. In addition, when this new rotation system is introduced each Commission should reflect the demographic and geographical range of all the Member States of the Union. Thus pending the enlargement of the Union to 27 members Ireland will retain its permanent seat at the Commission table.

(iv) It is provided that the President and other Members of the European Union will be chosen by the Council on the basis of qualified majority voting which will have the effect of preventing a single Member States vetoing the appointment of any particular Commissioner President, as happened in the past.

(v) The total number of MEPs in the European Parliament has been increased from 700 to 732 members. From 1 January 2004 the number of MEPs from each of the existing and new Member States are now fixed by the Treaty. Ireland will retain 12 MEPs out of 15.

(vi) In order to improve the workings of the Court of Justice the Court may establish judicial panels to hear certain classes of action in proceedings brought in specific areas. In addition the jurisdiction of the Court of First Instance will be extended to include *inter alia* the issuing of preliminary rulings on matters referred from national courts.

(vii) The Treaty amends the flexibility provisions of the Amsterdam Treaty that allows groups of Member States to cooperate more closely with each other in specific policy areas. The new flexibility provisions will apply to the area of Common Foreign and Security Policy (Pillar 2).

These institutional issues are more the subject matter of political science than legal theory and, apart from the changes to the workings of the European Court of Justice, do not hold a great interest for legal practitioners. When implemented the Treaty of Nice will not alter significantly the European legal framework although, following the adoption of qualified majority voting the speed with which decisions are taken in certain policy areas such as anti-discrimination measures, free movement of citizens[2] and refugee and asylum policy[3] will improve.

There are, nevertheless, a number of noteworthy innovations introduced by this Treaty. Prompted no doubt by the questionable legal basis of the decision of the Heads of States and Government of fourteen Member States, who acting outside the provisions of Article 7 of the Treaty of the European Union, on 31 January 2001 imposed sanctions on Austria, the Treaty provides a number of safeguards against the arbitrary imposition of sanctions against a Member State considered to be in serious breach of the fundamental principles of the Union. An amendment to Article 7 of the TEU provides that in future a proposal holding a Member State in breach must be a "reasoned proposal" and "before making a determination the Council shall hear the Member State concerned and acting in accordance with the same procedure may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question".[4] In addition, the Court of Justice will have a role in supervising the application of Article 7 against any Member State.

The Treaty also provides a further impetus to combating crime in the Union in providing a Treaty basis for the operation of the European Judicial Cooperation Unit (Eurojust) which is composed of national prosecutors and magistrates (or police officers of equivalent competence) from each Member State. The role of Eurojust is to facilitate coordination between national prosecuting authorities in the area of cross border crime and to support criminal investigations in organised crime cases.[6] The Treaty also calls for closer cooperation between Eurojust and the European judicial network in relation *inter alia* to extradition.[7]

Crotty revisited

One of the most interesting legal questions that arise in relation to the Treaty of Nice is whether the institutional and other changes introduced necessitate a constitutional referendum in Ireland. In addressing this question one must have recourse to the criteria laid down by the Irish Supreme Court in Crotty v. An Taoiseach in 1987.8

It is often overlooked that the Supreme Court in *Crotty* ruled that the ratification by the government of the Single European Act, with the sole exception of Title 111 concerning European Political Cooperation, without holding a referendum, was constitutionally permissible. The Single European Act contained provisions *inter alia* on the completion of the internal market, monetary policy, social policy, economic and social cohesion, research and technological development and the environment. In the decision-making sphere there was provision for the introduction of what is known as the "cooperation procedure" and for qualified majority voting in certain policy fields. The Act also provided for the creation of a Court of First Instance attached to the European Court of Justice.

"When implemented the Treaty of Nice will not alter significantly the European legal framework although, following the adoption of qualified majority voting the speed with which decisions are taken in certain policy areas such as anti-discrimination measures, free movement of citizens and refugee and asylum policy will improve."

The Supreme Court ruled that all of these provisions "were properly within the constitutional licence of Article 29.4.3. which authorised the State's accession to a living, dynamic Community and [that] the proposed changes to qualified voting in the European Council had already been anticipated in the establishing Treaties after the transitional period; [that] the allegedly new objectives of the SEA brought into Irish law amounted to no more that a more specific enumeration of the objectives of the establishing Treaties; and [that] the proposed new Court of First Instance did not in any way extend the primacy of the Court of Justice of the European Communities over the Irish Courts beyond that already authorised by Article 29.4.3 of the Constitution."[9]

It is worth re-examining the ruling in some detail. Finlay CJ, in outlining the unanimous view of the Supreme Court, stated *inter alia* that:

> "It is the opinion of the Court that the first sentence of Article 29.4.3 of the Constitution must be construed as an authorization given to the State *not only to join the Communities but also to join in amendments of the Treaties so long as such amendments do not alter the essential scope or objectives of the Communities.*"[10] [emphasis added]

The Supreme Court held that the Community is a "developing organism with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress, both in terms of the number of its Member States and in terms of the mechanics to be used in the achievement of its agreed objectives." In the present context, it is thus noteworthy that the institutional changes set out in the Treaty of Nice are required specifically to accommodate the Community/Union's "objective of expansion and progress" i.e., enlargement to include Eastern European states. These institutional changes are thus perfectly consistent with the concept of the Community/Union as a "developing organism" with "changing methods for making decisions."

Accordingly, it would appear that the institutional changes introduced by the Treaty of Nice fall into the same category of institutional changes as those sanctioned by the Supreme Court in the *Crotty* judgment, and thus should not necessitate a referendum in Ireland. The changes to be introduced, one might say, do not alter the essential scope, objectives or character of the Treaty of the European Communities (TEC), as amended by the SEA, Maastricht and Amsterdam, or of the Treaty of the European Union (TEU) as adopted at Maastricht and amended at Amsterdam.

"The institutional changes set out in the Treaty of Nice are required specifically to accommodate the Community/Union's "objective of expansion and progress ... Accordingly, it would appear that the institutional changes introduced by the Treaty of Nice fall into the same category of institutional changes as those sanctioned by the Supreme Court in the *Crotty* judgment, and thus should not necessitate a referendum in Ireland."

Flexibility

The Feira European Council of 20 June 2000 added an important item to the ICG agenda, that is the notion of enhanced co-operation, or flexibility. The Amsterdam Treaty had provided for enhanced co-operation in both Pillar 1 and Pillar 3. However, the conditionality attached to the use of these provisions was highly restrictive, and to date these provisions have not been utilised. Nonetheless, it may be recalled that the flexibility provisions introduced by the Amsterdam Treaty into both the TEC and TEU gave rise to a lively political and legal debate in Ireland at the time in which signing up to flexibility was considered the equivalent of ìa constitutional blank cheque". For example, Mr. Michael McDowell SC, currently Attorney General, at that time expressed serious reservations and insisted that the public must be given a clear and unambiguous indication of the scope of the amendment - "otherwise the discretion it gives the Government is a blank cheque." [11]

The result of that debate led to changes in the proposed amendment to the Constitution to facilitate the ratification of Amsterdam whereby the areas where the Government had discretion to utilise the flexibility provisions were particularised. The areas covered specifically were Pillar 1 (European Communities), visas, asylum, immigration and other policies related to free movement (transferred from Pillar 3 to Pillar 1) and Pillar 3 (Police and judicial cooperation in criminal matters). The 18th amendment to the Constitution (Article 29) thus provides:

> *5* The State my ratify the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain Acts signed at Amsterdam on the 2nd day of October 1997
>
> *6* The State may exercise the options or discretions provided by or under Article 1.11, 2.5 and 2.15 of the Treaty referred to in subsection 5 of this section and the second and fourth protocols set out in the said Treaty but such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

The Amsterdam Treaty provided for a move away from pre-determined co-operation such as EMU and Schengen to general enabling provisions allowing for closer co-operation to apply in policy areas not yet decided upon by Member States. However, the overall sphere in which the flexibility provisions could apply were confined to Pillar 1 European Community matters and Cooperation in Police and Judicial cooperation in Criminal matters(Pillar 3). The 18th amendment of the Constitution ratified those provisions. By contrast, it may be argued by reference to the *Crotty* judgment that the technical adjustments to the mechanisms to be used for the activation of closer cooperation provided for in the Treaty of Nice would be covered by the constitutional licence provided by the 18th amendment.

The Amsterdam Treaty, however, did not provide for enhanced cooperation *per se* in

Pillar 2 (Common foreign and security policy), although there is a form of flexibility in that Pillar known as "constructive abstention." The flexibility provisions introduced by the Treaty of Nice into the area of the CFSP (Pillar 2) may be considered fundamentally new or merely a variation of the "constructive abstention" theme. If fundamentally new, then legally, and following the precedent of the Amsterdam Treaty, a referendum would be required but if deemed merely a technical modification of the existing provisions on "constructive abstention", already sanctioned by the Amsterdam Treaty, it appears that a referendum may not be required.

"The flexibility provisions introduced by the Treaty of Nice into the area of the CFSP (Pillar 2) may be considered fundamentally new or merely a variation of the "constructive abstention" theme. If fundamentally new, ... a referendum would be required but if deemed merely a technical modification of the existing provisions on "constructive abstention", already sanctioned by the Amsterdam Treaty, it appears that a referendum may not be required."

Nice and the Limits of the European Union

The Treaty of the European Communities provides that "[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.[12] In adopting measures at the level of the Community or Union this principle of "limited attribution of powers" to the Community must be balanced against a competing principle that the Community powers must be effective to ensure that the objectives of the Community are achieved. Member States decide which powers are transferred to the Community but, once transferred, it is the European Court of Justice alone which has competence to decide the scope of the powers transferred. In this regard the European Court of Justice has at times been criticised as being too activist in assuming a policy making role.[13] The response, in the Maastricht and Amsterdam Treaties, has been that Member States have sought to define more clearly the scope of Community competence by introducing the principles of subsidiarity, proportionality and transparency.

Given the completion of the internal market, the introduction of a single currency, and the extension of Community competence to most areas of law affecting the citizens of the Union, the question now being asked is what are the limits to the competence of the Community or Union. Having achieved its economic objectives, the focus has now shifted to discerning the ultimate political objectives of the Union. It is with these considerations in mind that a Declaration forming part of the Treaty of Nice provides that a new Inter-Governmental Conference will be called in 2004 to deal with "how to establish and monitor a more precise de-limitation of competences between the European Union and the Member States, reflecting the principle of subsidiarity." In addition, the new IGC will decide on the status of the New Charter of Fundamental Rights of the European Union adopted at the European Council of Nice but not referred to in the Treaty of Nice. It will also decide on a simplification of the Treaties and the role of national Parliaments in the "European architecture." In preparing for this new IGC, a detailed dialogue on these issues with citizens and non-governmental organisations is to commence immediately under the Swedish Presidency.

While the Single European Act and the Maastricht, Amsterdam and Nice Treaties constitute fundamental building blocks in the construction of the European Union, it may be anticipated that the next Inter-Governmental Conference will be more significant in shaping the ultimate character of the Union. In this respect it is likely to constitute the end-game in the constitutional building of the European Union. It is of some interest, therefore, that Ireland will hold the EU Presidency in the first half of 2004 and will thus have an important role to play in the final shaping of the European Union.•

1. Article 13 TEC
2. Article 18 TEC
3. Article 67 TEC
4. Article 7 TEU. See also Regan, *EU Sanctions against Austria - Are they Lawful,* The Bar Review, Vol. 5, Issue 6, April 2000, 290
5. Article 46 TEC
6. The Establishment of Eurojust was provided for in the Presidency Conclusions of the European Council at Tampera, Finland of 15/16 October 1999. See also Regan (Ed), *The New Third Pillar Cooperation against Crime in the European Union* (Institute of European Affairs 2000)
7. The European Judicial Network was set up by joint action 98/428/JHA adopted by the Council on 29 June 1998 (OJL) 191, 7.7.1998, page 4
8. IR p713
9. Headnote of Judgment
10. Ibid 1 p767.
11. Irish Times European Diary ñ Patrick Smyth.
12. Article 5, Treaty of the European Community
13. Hjalte Rasmussen "On Law and Policy"

PROPERTY IN THE LIVING BODY

Críonna Creagh BL *outlines the law relating to the protection of bodily organs and human tissues and, in the light of modern biotechnological developments, argues in favour of the extension of property law to the field of medical donations and the exploitation of bodily materials.*

Introduction

According to Blackstone, "there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property."[1] The same could perhaps equally be said of the human body, and although we may be accustomed to thinking in terms of ownership of our bodies as a whole (including the question of property in the dead body), the question of property in the living body including severed human tissue has perhaps greater potential to raise important legal issues. In particular, it is now clear that, with genetic and microbiological advances, "for better or worse, we have irretrievably entered an age that requires examination of our understanding of the legal rights and the relationships in the human body and the human cell."[2]

In this article, property in the living body refers to property in living human tissue. Human tissue is compromised of the basic unit of cells. The human body is made up of around 100,000,000,000,000 cells. These cells are specialised to perform different functions such as muscles, bones, nerves, blood and bodily fluids. Hence tissue is the generic name for bodily materials.[3] Tissues can also be structured to form complex organs such as brain and kidneys which perform specialised functions.[4]

Historically, severed human tissue was not considered to be of any value or use. Today while the potential therapeutic benefits to be derived from human tissue are recognised, the potential to obtain large financial gains from the use of human tissue is less acknowledged. Some of the key aspects of the debate on property in the living body focus on the right to control material that has come from oneself and the right to a share in the financial benefits that derives from use of such human tissue. Further, the right of an individual to control materials that are expelled or removed either intentionally or accidentally from his or her body is essentially a matter of self-determination and autonomy.

Biotechnology[5] can now create new uses for bodily tissues which heretofore were thought useless. Cell lines, bacterial strains, drugs, biologic probes, synthetic hormones and enzymes are all possible products of such technology. Generally these products are derived from the tissue of patients obtained through clinical trials or research or even from abandoned human material. The very recent discovery by the Human Genome Project of a human genetic alphabet offers almost endless potential for future development in biotechnology. Whereas biotechnological companies have large investments in research and development as well as in manufacturing and marketing these products, it is this commercial exploitation that has caused some owners, and undoubtedly will stir others in the future, to lay claim to a share of the financial rewards that justly reflects their property right in the material, without which there would have been no development or manufacture.

As with property in the dead body, the development of the law of property in the living body has taken place on ground where there is no regulation. However, "to hold categorically that human tissue cannot be the subject of proprietary rights suggests that, in the absence of specific empowering legislation, such tissue could not be gifted, bought or sold, stolen or converted, bailed or patented."[6] For the moment these questions fall to be determined by reference to the relevant common law rules, and for this purpose it is helpful to look to England and other jurisdictions where legislation has already taken effect for direction and guidance.

Removal of tissue and consent

When discussing property rights in the living body it is necessary to examine the circumstances under which the tissue has been removed. At common law and under statute[7] it is beyond question that a person must consent to the removal of tissue, and that any removal in the absence of an informed, competent and valid consent would be both a crime, a civil wrong and a breach of the constitutional right to bodily integrity.[8] Generally a competent adult can make a valid

"The general rule that there is no property in the body should mean that there is no property in any tissues removed once they come into the hands of the remover or when they pass on to another. Yet "despite the lack of clarity, it is probable that the user of tissue acquires at least the right to possess, and probably a right of ownership, over the tissue."

consent to either a therapeutic or non-therapeutic removal of tissue. Consent is a general defence to tortious actions affecting the person or property. A parent can consent on behalf of a child to medical treatment that is in the best interests of the child and is of therapeutic value. In relation to an incompetent adult only the doctor can act in the best interests of his patient in respect of treatment decisions.

It is only on the removal/dissection of tissue from the body that it becomes property. At first instance, albeit momentarily, title to the tissue must therefore vest in the patient. However consent to removal ensures that upon removal (without the patient exerting a continued interest) the property becomes vested in the person removing it.

The parameters of consent are also relevant post-removal in relation to the particular uses to which the tissue will be put:

"[P]robably very few might refuse consent to anything but destruction; most are likely to indicate that it matters not whether the tissue is destroyed or used for other medical or medical related purposes; some might say that they agree to its use for such purposes but not for example, for anything that affects their social or religious sensibilities or which in some other way is offensive to them, or possibly, not for any commercial purposes."[9]

On the other hand, apart from so-called clinical waste which is considered in the next section, the notion of abandonment of one's property rights in respect of human tissue may only have limited application because the above considerations would be likely to have exercised the mind of the donor were he or she to have considered them and because, in general, the law is reluctant to imply states of mind.

Sources and removal of human tissue

Generally tissue is donated by live donation, whereas organs are generally taken from dead donors. In order to avoid undue injury to the life and health of donors of vital organs, the World Health Organisation supports a policy that organs for donation should preferably be removed from the bodies of deceased persons.

Certain bodily matters may be called wastes/clinical waste, examples being such things as hair, urine, nail clippings, placentas and other things that are customarily discarded and therefore considered to be abandoned. However when a person demonstrates an intention to possess that thing or an interest in the ultimate outcome of those bodily matters, these materials are not truly abandoned.

With the exception of the removal of healthy organs from the living donor [10] for transplantation, and of clinical waste, by and large human tissue is only removed because it is either diseased or defective through infection or scarring. Good and careful medical practice requires that when a tumour or diseased segment of tissue is removed, some healthy tissue other than the affected tissue is also removed. The removal of this zone of surrounding healthy tissue is to ensure clearance of the disease or tumour section. Similarly the practice of drawing more blood than actually required for a particular blood test is to cover such eventualities as the risk of spills or the possibility of the need to redo the test. Taking more than is required in respect of specimens for pathological/diagnostic examination serves the same purpose.

Medical practice has for years considered itself free to use these leftovers from over-collection for research, archiving and medical training. However, following recent controversies in respect of organs for sale, uncertainty about the legality of this practice has resulted in hospitals ceasing this kind of research. In England, these scandals have prompted the introduction of the Human Organ Transplants Act 1989.[11] Under the Act it is a crime to deal commercially in any organ, defined to mean any part of a human body of a structured arrangement of tissues which, if wholly removed, cannot be replicated by the body.[12] The Act also establishes a special body charged with authorising live organ[13] donation to genetically unrelated recipients. The controls are very strict in relation to consent, and require that the donor actually understand the nature and risks of the procedure. This standard protects against the risk that a person may donate a healthy organ without a full understanding of the nature and consequences of what is involved.

Although welcome, the 1989 Act has certain shortcomings in that it is limited in effect to prohibiting commercial dealing in organs for transplantation. The Act therefore does not address dealings in human tissue not falling within the statutory definition of an organ.

What is and has a Property Value

A strict property right in the living or dead body is not and has not been recognised. Although Halsbury states that trover may lie for human tissue or human remains,[14] as a matter of first principle it is also established that "[b]efore a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable to third parties, capable by it's nature of assumption by third parties, and have some degree of permanence or stability."[15]

Historically, because of the limitations of medical science, there has not been a need to recognise property rights in the body. Although originating from cases in respect of dead bodies, the traditional view was that there is no property in the body including the living body. Possession type cases in respect of human tissue rarely arose and when they did, public health law and criminal law rather than property law provided the appropriate remedies. However, a notable difference between considering property in the dead body and rights in respect of the living body is that, in respect of the dead body one is looking at the whole of the body and at claims of others, whereas in respect of the living body one is looking more at

"It is only on the removal/dissection of tissue from the body that it becomes property. At first instance, albeit momentarily, title to the tissue must therefore vest in the patient. However consent to removal ensures that upon removal (without the patient exerting a continued interest) the property becomes vested in the person removing it. The reasonable and practical solution would therefore be to effect a legal presumption in favour of abandonment."

parts of the body and the concern is with claims of the person from whom such tissue has been removed. This gives the issues a greater immediacy and texture.

In England, the difficulties associated with the traditional approach have been partly circumvented in specific contexts such as the Polkinghorne Report,[16] which recommended a system whereby parents give their consent and permission for the use of tissue from their dead foetus for research and/or treatment,[17] and by the Human Fertilisation and Embryo Act 1990 which also adopted a scheme of consents to deal with storage, use and disposal in respect of gametes and embryos. These specific measures thus avoided having to address the property issues that would have otherwise arisen. An intact dead foetus falls within the definition of an organ under the Human Organs Transplant Act 1989 and is so controlled by the living source.

More generally, property rights are usually described as a bundle of rights in respect of a thing, a good, a chattel or an asset.[18] Those rights *in* or *over* things include such rights as the familiar right to possess as well as the rights to exclude, use, dispose, destroy and enjoy the fruits of the material in question. It has always been the position in relation to property law that one need not possess all the traditional bundle of rights in respect of property to possess a property interest.

It remains an open question as to which approach would most likely be taken in respect of a claim by a person from whom tissue has been removed. It is indeed surprising is that it has taken so long for the property analysis to take a serious hold on the law relating to human tissue and products produced from human tissue. One of the principal features of a property approach is that it confers on an individual the ability to bring claims. Proprietary remedies may be particularly necessary when no specific legislative offences exist to curb the misuse or destruction of validly donated human tissue. For example, in the case of a blood sample taken for HIV testing, it is arguable that greater protection would be available to the donor if the donation of the blood donation were regarded as a bailment, in that the doctor's duty of confidentiality could be found to extend further into the laboratory.

However, it is also the case that a commercial value will attach to any property interest. As against this, as a general statement it is correct to say that most countries prohibit human tissue having a property value by prohibiting the sale of corpses or parts of bodies (although there are exceptions such as some States in the United States which allow the purchase of dead body parts and blood). The prohibition is directed at safeguarding human dignity and preventing the bodies of poor persons becoming a source of spare parts for the rich.[19] A similar moral position is reflected in laws which prevent a person selling himself or herself into slavery or prostitution.

However, although legislative prohibition on the sale of body parts reflects a public policy that body parts are not to be regarded as an asset, this policy is not directed at and should not be opposed to recognising just reward to a person whose bodily tissue is used to develop a commercial product. Alternatively, it has been suggested that because of the nature of the material in question, property in the living body will never be regarded as a regular asset and therefore special rules will emerge for dealing with this material. The general rule that there is no property in the body should mean that there is no property in any tissues removed once they come into the hands of the remover or when they pass on to another. Yet "despite the lack of clarity, it is probable that the user of tissue acquires at least the right to possess, and probably a right of ownership, over the tissue."[20]

For tissue to be abandoned or donated it has to become a thing or *res* for those rights to be exercisable. The implication of this is of course that a person acquires a property right over the tissue that is removed, which he then waives so as to pass the property to another. Alternatively, if the right is not expressly waived, can it be said that be property right is abandoned by the failure to express a continuing interest in the fate of the material? In *Venner v State of Maryland* [21] it was held that "by force of social custom.... When a person does nothing to indicate an intent to assert his right of ownership, possession, or control over [bodily] material, the only rational inference is that he intends to abandon the material."

The reasonable and practical solution would therefore be to effect a legal presumption in favour of abandonment. It would mean that if the doctor returns gallstones or kidney stones to a patient after a surgical procedure to remove them, without a specific request for such return, that on the return to the patient they become a gift. This is because upon removal the patient did not specifically request their return and thereby assert an interest in them, he abandoned any claim thereto. The stones then acquired the status of a *res* or a thing, which became the property of the hospital.

Matthews suggests that "there has never been...any general doctrine of abandonment in English law, but at most only abandonment in individual cases for specific purposes (e.g. theft, wreck, salvage, treasure trove)." This criticism seems easily addressed by a specific and unequivocal intention to abandon at the time of operation, removal, passage, expulsion or delivery, and by a specific consent provision in the hospital consent form that reflects this. Other commentators have suggested that just as Roman lawyers found it expedient to make provision for abandonment in often bizarre situations, it beholds lawyers of today to do likewise, when faced with the new bizarre!

Claims in respect of removed tissue

In general when tissue is removed from a person, they have no interest in making a claim to it. For this reason consent to medical treatment should be understood to alienate all and any rights in respect of that tissue for the generally acceptable uses of medical audit, scientific research[22] and medical training. As indicated above, to ensure that the tissue is truly abandoned, consent prior to removal should expressly indicate that the consent covers acceptable further use for research purposes.

The most celebrated exception to the above proposition, that in general one has no interest in what becomes of tissue once removed from one's body, is the case of John Moore, *Moore v Regents of the University of California.*[23] Mr Moore had hairy cell leukaemia. Doctors removed blood from him and soon discovered that his blood contained substances with scientific and commercial potential. Moore consented to the removal of his tissues based on the understanding that the removal was necessary to stop the disease process and save his life but apparently the real purpose was to use his spleen for research. Subsequently a valuable cell line was developed and patented for commercial exploitation. Mr Moore sued *inter alia* in negligence on grounds of lack of informed consent, breach of fiduciary duty, and conversion. A lower court while cognisant of the need for caution and prudence in addressing this issue had no difficulty finding in favour of Moore. According to that Court, property consists of the right of dominion over one's own body, and "there is ... a dramatic difference between having property rights in one's own body and being the property of another."

The Supreme Court reversed that decision. The narrow ground on which the conversion/property claim was rejected turned on the Californian Safety Code, which for health and safety reasons limited a patient's right to control excised tissue. The Court held that Californian legislation dealing with human biologic materials tended not to abandon human tissue to the law of personal property. It rejected the claim in conversion because Mr Moore had voluntarily surrendered his tissue and essentially abandoned any ownership interest in it. The broader ground for rejecting Moore's claim was "the chilling effect this would have on biotechnological development since conversion is a tort of strict liability that would create legal liability in even innocent and bona fide holders of property." The Supreme Court observed that:

> "Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering .... Products developed through biotechnology...include treatments and tests for leukaemia, cancer, diabetes, dwarfism, hepatitis B, kidney transplant rejection, emphysema, osteoporosis, ulcers, anaemia, infertility and gynaecological tumours to name but a few."[24]

Thus, the solution adopted by the US Supreme Court was essentially a pragmatic one targeted at protecting material for research and protecting researchers who may not know about the pedigree of each and every cell used in research. It is therefore a judgment in favour of the utilitarian and social benefit of research. The judgment also seems to anticipate that the economic incentive to conduct medical research would be threatened if a property right in one's own body parts and products were recognised. Yet this need not necessarily be the position: a symbiosis could exist whereby there is justifiable economic gain for the researcher and for the patient whose bodily material enabled the research.

Another ground relied upon by the Supreme Court to deny the claim was that, in the Court's view, the cell line was factually and legally distinct from the cells removed from Moore's body. This last reason is similar to property in the dead body whereby, if the body part has been so changed by the property of the worker, it may become property by that process of change. In *Moore*, the Court held that the cell line was the product of invention. This approach is not without criticism and it could be argued that if the tissue can give rights to possession protected by law, there should not be any need to work it.

Two of the six judges dissented on the conversion claim. Broussard J highlighted the fact that Moore's personal legal rights were interfered with before the removal of his tissue. Normally consent is the key to both the taking and use of human tissue. Moore by deceit was deprived of that right, and he should therefore have been able to sue for conversion and recover the economic value of the right to control the use of the body material.[25] Moreover it did not matter that the patient might not have the resources or opportunity to make the same use of the material as the researcher. If a man discovers oil in his back yard, even though he does not have a refinery to process it, he is still entitled to payment for transfer of the resource to the oil company and is entitled to compensation if he did not receive it. If on the other hand a patient had consented to the removal and to later use in research, the patient has abandoned his interest and cannot sue in conversion in circumstances where it is subsequently discovered that the material was scientifically and commercially valuable. Broussard J also reminded the Court that the majority position could not mean that Moore's cells were incapable of ever being property, otherwise these cells would be open to theft with impunity.

Significantly the Supreme Court left room to find a property right in appropriate circumstances when it clearly stated, "we do not purport to hold that excised cells can never be property for any purpose whatsoever." In fact this would have been a difficult position for the Court to adopt, in view of the fact that the Defendants were making the incongruous claim that while Moore could not legally own his cells, they could.

This case clearly demonstrated that the fundamental issues concerning property rights and rights in human tissue are matters for policy makers to address. In many jurisdictions, special inquiries and advisory bodies have been established, including in the United Kingdom, the United States, Canada, France and Holland, and have made a series of recommendations for future policy and regulation. This is the type of route Ireland will have to take in order to be prepared to fairly tackle these issues as they arise and to legislate for the future.

Reproductive material

Property issues become even more acute in relation to genetic material such as gametes, ova, sperm, or fertilised eggs. In respect of embryos there may also be the added complication of the constitutional protection due to them. Because of the special nature of the material involved, the courts have

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expressly rejected any notion that human reproductive material is property. Human reproductive material has the potential for personhood and is therefore considered neither inheritable nor the object of commerce. This type of material must be differentiated from foetal tissue, whether it be cells or whole organs derived from spontaneous miscarriage or elective abortion, which are classed as sensitive material deserving of special treatment, but not in the reproductive category. Because this type of material never attained independent life, it is reasonable to regard it as a former part of the mother. Possible uses of the placenta and umbilical cord fall outside the strict reproductive category also.[26]

For many years in England, there has been a payment for donation on the donation of sperm. At first glance this would seem to be a technical violation of legal prohibitions on sales of human tissue. However, this is where the distinction between organ and tissue is most significant: because the Human Organs Transplant Act 1989 prohibits the sale of organs that do not replicate, any payments for naturally replicable materials such as blood, bone marrow and sperm would not violate the Act. By contrast the Ontario Human Tissue Gift Act [27] specifically makes it an offence to "buy, sell or otherwise deal, directly or indirectly for valuable consideration, any tissue for transplant, or any body or part or parts thereof other than blood or a constituent, for therapeutic purposes, medical education or scientific research."

At present sperm donation is considered a service rather than a commodity transaction and the money paid is for time and inconvenience. Payment for service is consistent with section 1(3) of the Human Organs Transplants Act 1989 which permits payment for costs involved in organ donation. It is planned to eventually phase out the payment for donation of gametes altogether.

Although organs and tissues cannot be bought or sold like goods, they undoubtedly possess a strong commercial value. Although tissue banking of eyes, blood, and breast milk for example are becoming increasingly common, it is the banking of reproductive tissues that is most sensitive. Ethically the objections to treating a pre-embryo as property stem from the Kantian doctrine against treating people as a means to the end or as objects. Yet in the case of *York v Jones*[28] the Court of Virginia found a bailor-bailee relationship arose between a couple whose pre-embryo [29] was preserved in a fertility clinic. Once the purpose of the bailment terminated, as it had when the Yorks did not seek any further treatment, their proprietary right to control the embryo entitled them to possession. A bailment analysis best reflects the interest the owner/donor has in ensuring the material is properly looked after and ensures also that theft and conversion remedies are available.[30] To apply the no property rule would be to open up a wide vacuum for all human property such as umbilical cords, frozen blood vessels, bones, joints and freeze dried nerves stored in tissue banks.

In the cause celebre case of *Davis v Davis*[31] the Tennessee Supreme Court decided the important legal issue of who should decide the fate of embryos and on what basis. The court decided that pre-embryos were strictly speaking neither persons or property but rather *sui generis,* entitling them to special respect because of their potential for human life. The Court while stating the couple did not have a true property interest in the pre-embryo, nonetheless found they had an interest in the nature of ownership in respect to the decision making authority concerning disposition, within a framework operated by law. In this case the court had to examine the ex-husband's wish not to procreate against the ex- wife's wish to donate the embryo to a childless couple. The Court found that the wish not to procreate outweighed the wife's wish to donate. However if the ex-wife wished to use the pre-embryo for her own needs, it appears that different considerations would apply.[32] Although the Supreme Court of Tennessee rejected the property analysis, it recognised the decision-making control over the embryo of the couple. The decision thus implies recognition of the existence of a proprietary or perhaps pseudo-propriety or quasi-ownership interest. The court rightly found that there was no state interest sufficient to negative the premise that the couple should have the relevant decision–making authority, as "no one else bears the consequences of these decisions in the way the gamete providers do."[33]

In general, the rule that there is no property interest in a corpse results in the position that a corpse cannot form part of the deceased person's estate to be governed by his will. Yet Human Gift legislation may permit disposition by living persons to provide for their body parts to be available after their deaths for medical research, education and transplantation. Furthermore, it appears on the authority of the Californian case of *Hecht* that a man can bequeath to his girlfriend sperm specimens that he had stored in a sperm bank in the same way as he could his stock or other property.[34] In England the Human Fertilisation and Embryo Act 1990 provides that the owner must state how he wants the sperm to be dealt with in the event of his death, which removes the potential for posthumous disputes. Similar contingency is provided for in the event of the death of a sperm owner or in the event of him being untraceable or where he no longer asserts an interest in the sperm after a certain cut-off period. The Irish Bill on the Regulation of Assisted Human Reproduction 1999 allows a provider of services to store human reproductive material, and makes provision for the Minister to attach conditions to the provision of such services (including storage) as he may deem necessary in the public interest.

A very recent example of the difficulties that can arise in respect of banked reproductive material is the case of *R v Human Fertilization and Embryology Authority, ex parte Blood* which concerned sperm that had been harvested from the body of an unconscious man at his wife's request, so that she could have his child in the future. As the sperm was taken while the man was unconscious the strict consent provisions laid down in

the Act were not complied with. The Court of Appeal found that the storage of the sperm in this case did not comply with the Act (the question of whether the doctor acted properly in the circumstances by simply complying with the wife's request was not raised). Luckily for Mrs Blood another avenue of redress presented itself. She was entitled to treatment in the European Community under Treaty Articles and because the HFEA is entitled to send gametes outside the UK where the limiting consent restrictions would not apply, the HFEA refusal to send the sperm abroad was set aside. This case goes a long way towards recognising a property right in reproductive material.

Conclusion

The view that there are no property rights in respect of human tissue and in particular living human tissue is outdated and no longer tenable. Generally legal rules tend to lag behind changes in science and technology and the societal response to such changes, yet the aim of legal rules is to reflect and keep pace with the values of society. Just as modern medicine is challenging the law to redefine death,[36] new biotechnologies are forcing consideration of how to legally protect the personal and commercial interests in human tissue. The category of property is not permanently frozen – just as things that are considered property may lose such recognition (e.g., slaves), the notion of property is capable of extending to new categories of relationship, and in this article it has been argued that property law offers a possibly useful model for the regulation of the use of body tissue and organs by live donors and sources notwithstanding the traditional view that this is not the case.

John Moore 's claim before the United States Supreme Court may have been prejudiced because he sought to profit from the use of his property, but fear of the recognition of a property right in respect of transplantable materials similarly stems from the fear of exploitative commerce. However it must be said that the unsavoury commercialisation of aspects of property law are easily stripped away. Property law is an established way of vindicating people's rights. To use it for the vindication of rights in respect of human tissue is an irresistible step. The benefits of so doing is that, to treat something as private property encourages more care and consideration, and may thus increase tissue quality and prevent scarce resources being wantonly destroyed. It would also protect use and safeguard personal integrity.

Medical law has not heretofore included property and contract concepts. Yet in the complex area of property rights in human tissue, regard for the special nature of human tissue may perhaps be best reflected in the immense range of property interests from absolute ownership to single rights. One view on how to bring about this change is "to have a widely publicised judicial decision which appears to flout popular morality, and threatens to open the flood gates to transactions regarded (at least in the media) as undesirable. Then the government of the day can react swiftly."[37] Yet to prescribe such a remedy is hardly appropriate. It may be more realistic to expect that disputes like those at issue in the *Moore* case will operate to jar pre-existing legal structures, and more reasonable to allow the law to endure a period of confusion and reflection before consolidation. •

1. Blackstone 2 Bl Comm. 2
2. *Moore v the Regents of the University of California* 1988 249 Cal rept 494
3. Different definitions of tissue operate in different jurisdictions. For example, in Ontario tissue does not include blood, bone, skin, or other tissue that is replaceable by natural process of repair. Tissue in this context is similar to organ in the British Act.
4. These are non-regenerable.
5. Biotechnology refers to the application of engineering and technological principles to life sciences.
6. Magnusson, *The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions* (1982) 18 Melbourne University law Review 601-2
7. Non Fatal Offences against the Person Act 1997
8. The equal right to life of an unborn child under the Irish Constitution necessarily means that the right to bodily integrity in respect of pregnant women is not absolute.
9. Dworkin and Kennedy, *Human Tissue: Rights in the Body and its Parts* (1993) Medical Law Review
10. And from a dead donor.
11. Somewhat confusingly, the Human Tissue Act 1962 does not distinguish organs from unstructured tissues. This Act deals with cadaveric removal of materials and not tissue from a living donor.
12. The whole liver for instance is an organ but a segment of the liver is not because the part of the liver remaining in the body can regenerate.
13. Most organ donation is from brain stem dead donors.
14. Halsbury 4 th edn vol45 para 1421
15. *National Provincial Bank Limited v Ainsworth* [1965] AC 1175, per Lord Wilberforce at 1247-48.
16. Polkinghorne et al, *Review of the Guidance on the Research Use of Foetuses and Foetal Material* (London HMSO, 1989).
17. The Australian guidelines on ethics in medical research involving the foetus and human foetal tissue advise that specific consent be obtained from the genetic mother in respect of research on foetal tissue that involves live-cell storage, propagation in tissue culture, or transplantation into a recipient human being.
18. If the only way of transferring a thing is without consideration, such as by gif or inheritance, then the term asset will not usually apply.
19. It is also argued that to allow the sale of organs would increase criminal activity associated with satisfying demand for organs and that defective organs would enter the market.
20. Nuffield Council on Bioethics, page 77
21. (1976) 354 A 2d 483 (Md CA)
22. By universities and medical schools and not by industry and profit making companies.
23. (1988) 249 Cal Rptr 494; 1990 111 S Ct 1388 (US Sup Ct). The California Court of Appeal upheld Moore's property claim, but the Supreme Court reversed on appeal.
24. Kennedy & Grubb, *Principles of Medical Law* (2nd Edition), 800
25. i.e., that he was entitled to compensation for the unauthorised use of his cells before they were patented.
26. Using umbilical cord blood for transplantation instead of bone marrow transplantation has received public attention in cases where parents have admitted that their newborn child was conceived for the dominant purpose o harvesting the umbilical cord blood to transplant into a sibling.
27. 1990 c H-20
28. (1989) 717 F supp 421 (ED Va)
29. Pre-embryo means an embryo prior to transplantation in utero.
30. Intermediate handlers and medical staff are accountable to the donor for the misuse of tissue.
31. 842 SW 2d 588 (1992)
32. In *Paton v Trustees of BPAS* [1979] QB 276, it was held that as a matter of English law a foetus cannot have any right of its own at least until it is born and separate form its mother. An English court would therefore not hold an embryo to be a person.
33. *Davis v Davis,* per Daughtrey J
34. (1993) 20 Cal Rptr 2d 275
35. (1997) 2 WLR 806
36. Brain death criteria are is acceptable in medicine and law. The courts are increasingly being called upon to examine cases of permanent vegetative state.
37. Matthews, *The Man of Property* (1995) Med L Rev 273

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COURTS AND COURT OFFICERS ACT, 1995

The Judicial Appointments Advisory Board

Appointment of one Ordinary Judge of the District Court

Notice is hereby given that one vacancy exists in the Office of Ordinary Judge of the District Court and that The Minister for Justice, Equality and Law Reform has requested the Board under Section 16 of the Act to exercise its powers under that section and to make recommendations pursuant to it.

Practising Barristers or Solicitors who are eligible for appointment to the Office and who wish to be considered for appointment should apply in writing to the Secretary of the Board, Courts Service, Green Street Courthouse, Green Street, Dublin 7 for a copy of the application form. Completed forms should be returned to the Board's Secretary, on or before 5.00 p.m. on Friday 2nd February 2001.

Existing applications which were renewed by the 5th January 2001 made in respect of vacancies in the Office of Ordinary Judge of the District Court will be regarded as applications for this and all subsequent vacancies in the District Court to the 31st December 2001.

It should be noted that this advertisement for appointment to the Office of the Ordinary Judge of the District Court applies not only to the present vacancy but also to all future vacancies that may arise in the said Office during the period to the 31st December 2001, unless and until the Applicant signifies in writing to Board that the application should be withdrawn.

Applicants may at the discretion of the Board be required to attend for interview.

Canvassing is prohibited.

Dated the 11th January 2001.

BRENDAN RYAN, B.L., SECRETARY,
JUDICIAL APPOINTMENTS ADVISORY BOARD

Legal Update

The BarReview
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A directory of legislation, articles and written judgments received in the Law Library from the 13th November 2000 to the 15th January 2001.
Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.
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Administrative Law

Healy v. The Commissioner of Garda Síochána
High Court: **Herbert J.**
07/11/2000

Administrative; judicial review; *certiorari;* disciplinary procedure; whether requirements of natural and constitutional justice were observed; whether decision-making process in accordance with the principles of natural justice; whether applicant given sufficient time to make his defence; whether applicant was given an opportunity to put forward his case; whether applicant informed of the seriousness of the allegations brought against him.
Held: Applicant not afforded proper hearing or fair procedures; respondent must establish new inquiry and reconsider the matter using the principles of natural and constitutional justice; *per curiam,* strong recommendation to applicants seeking judicial review on grounds of failure to offer sufficient time that they should exhibit and formally verify in the grounding affidavit a Schedule of times and events setting out briefly and in chronological order the sequence of the facts upon which the applicant relies to establish such failure.

Article

Another brick in the wall?
O'Halloran, Barry
2000 (November) GLSI 14

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SI 318/2000

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Agriculture

Statutory Instruments

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Banking

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Civil Liberties

Article

Another brick in the wall?
O'Halloran, Barry
2000 (November) GLSI 14

Statutory Instruments

Equal status act, 2000 (commencement) order, 2000
SI 351/2000

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SI 355/2000

Commercial Law

Ulster Bank Limited v. Patrick Lyons
High Court; **O' Caoimh J.**
10/03/2000

Liquidated debt; liberty to enter final judgment against the defendant for sums due; mortgage suit had been instituted in 1990; order of possession had been granted; plaintiff had refrained from enforcing order to facilitate defendants in prosecution of third party; defendant claimed that current proceedings were substantially the same; whether plaintiff estopped from maintaining said claim; whether the plaintiffis claim estopped in so far as should have been brought within terms of earlier claim.
Held: Judgment for the plaintiff; proceedings not substantially the same; no inconsistency between the action taken in later proceedings and that taken in earlier proceedings.

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Company Law

A Vehicle Imports Ltd., In re
High Court: **Murphy J.**
23/11/2000

Company law; duties of directors; application for restriction orders against three directors of the company; whether activities of third named respondent elevated him to the status of shadow director; whether first named respondent had fulfilled duty to supervise the discharge of delegated functions; whether restriction order should be made against second named respondent, a named director, spouse of the first named respondent, with no involvement in the day-to-day running of the company; whether directors had acted honestly and responsibly in relation to the conduct of the affairs of the company; s.150, Companies Act, 1990; s. 27, Companies Act, 1990.

Held: Restriction order granted against first and third named respondents. Order refused against second named respondent.

Duigan v. Carway
High Court: **O'Donovan J.**
27/07/2000

Company law; liquidator sought declaration under s. 150 of Companies Act, 1990 that the respondents should not be appointed to act as directors or secretaries or be involved with the promotion or formation of any company for a period of five years; motion not proceeded with; five years later notice of intention to proceed was served; whether application for declaration should be dismissed on grounds of delay; whether delay excessive and inordinate; whether delay caused prejudice; whether ambiguity on the face of the section; whether effect of section intended to be retrospective from date of commencement of proceedings.
Held: Relief refused; section not ambiguous; five year period commences whenever the court says that it is to commence; while delay was inexcusable and inordinate the public interest that unsuitable persons should not be directors overcomes any delay in the case.

Duggan v. Stoneworth Investment Limited
Supreme Court: Barrington J., Keane J., **Murphy J.**
21/12/1999

Company; interpretation; compulsory acquisition of shares pursuant to s. 204, Companies Act, 1963; defendant companyís agent made an offer to purchase the ordinary shares in a company in which the plaintiff was a shareholder; subsequently the defendant informed the plaintiff by notice that up to a certain date the offer for the ordinary shares had become binding or was approved or accepted in respect of not less than four fifths in value of the share affected and thereby gave notice that pursuant to s. 204(1) it desired to acquire the beneficial ownership of the ordinary shares held by the plaintiff in the company; plaintiff subsequently established that on the date of the notice the offer made for the ordinary shares had been accepted by 47% in number of the ordinary shareholders in the company; controlling shareholders in the defendant owned 27.6% of the shares in the transferor company; plaintiff seeking a declaration pursuant to section 204 that the defendant was neither entitled nor bound to acquire the shares of the plaintiff in the company on the grounds that the offer made by the defendant for the ordinary shares was neither approved nor accepted by not less than three quarters in number of the holders of the ordinary shares; whether s. 204 should be interpreted and applied in such a way as to treat the defendant as being identical with the controlling shareholders; whether s. 204 required for its applicability that the

holders of the four fifths majority had to be independent of or disinterested in the transferee company; whether any interest or dependence between that majority and the transferee company was merely a factor to be taken into account by the court in exercising its discretion under the section; whether in enacting s. 204 the legislature determined clearly and unequivocally to apply the relevant subsections to the beneficial ownership of shares of the transferor company other than shares already in the beneficial ownership of the transferee company; whether the fact that the legislature extended that exclusion to capture only shares in a subsidiary made it impossible to infer an intention to exclude other categories of share holdings; whether there was any basis on which the court would be justified for the purposes of s. 204(1) or s. 204(2) as treating the said 27.6% shareholding as if it was in the ownership of the defendant.
Held: Appeal dismissed.

Millhouse Taverns Limited, In re
High Court: **Finnegan J.**
03/04/2000

Company; winding-up; petition for the winding up of the company presented by the Revenue Commissioners; company not in a position to pay sum due or to secure or compound it for the reasonable satisfaction of Petitioner; whether company has a substantial and reasonable defence which would enable it to defeat the entire of claim brought against it; whether company deemed to be insolvent and unable to pay its debts pursuant to s.214(c), Companies Act, 1963.
Held: Order granted to wind up company.

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2000 (December) GLSI 14

Constitutional Law

Dunnes Stores Ireland Company v. Ryan
Supreme Court; **Keane C.J.**, Denham J., Murphy J., Barron J., Murray J.
08/02/2000

Constitutional; judicial review; company; authorised officer appointed by respondent Minister to examine books and documents of first and second named applicants pursuant to s.19, Companies Act, 1990; applicants had successfully grounded judicial review proceedings on the failure of the respondent Minister to give reasons for her decision to appoint an officer; applicants dissatisfied with reasons given and therefore sought a number of reliefs including the quashing of the second named respondentís decision to appoint the officer, an order preventing first named respondent from acting as authorised officer and declarations that the provisions of s.19 were unconstitutional; trial judge concluded that the appointment of first named respondent was valid but that he had acted unreasonably in requiring certain books and records; applicants appealing on the ground that the trial judge had failed to address a number of grounds on which the applicants had relied and had failed to determine whether s.19 was unconstitutional; whether once High Court had concluded that the appointment of first named respondent was intra vires the 1990 Act, applicants were entitled to have the issue of the constitutionality of s.19 determined.
Held: Applicant's appeal allowed; entire High Court order set aside and proceedings remitted to the High Court as it cannot determine the constitutional issue in isolation from other issues in the case.

Kearney v. Ireland
Supreme Court: **Murphy J.,** McGuinness J., Fennelly J.
10/11/2000

Constitutional; practice and procedure; High Court had dismissed applicantís case on basis that it disclosed no cause of action against respondents; Supreme Court had affirmed that order; applicant by notice of motion grounded on affidavit seeks to set aside Supreme Court order on grounds of unconstitutionality; whether applicant has discharged very heavy onus of proof to establish that exceptional circumstances exist for Supreme Court to set aside its own judgment.
Held: Application dismissed.

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Copyright Patents & Designs

Montex Holdings Ltd. v. The Controller of Patents, Designs and Trademarks
High Court: **O'Sullivan J.**
14/01/2000

Intellectual property; trademarks; plaintiff appealing decision of defendent who had refused registration of a trademark; whether the plaintiffis propsed use of the trademark was bona fide; whether the defendent was correct in holding that the use of the same word on the same type of garment in the same market would raise the likelihood that a substantial number of persons would be confused; whether, where it is established that use of a trademark would involve confusion or deception, an element of blameworthiness must also be established to disentitle the party seeking registration of such; s.19, Trademarks Act, 1963.
Held: Appeal dismissed.

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Costs

Minister for Finance v. Goodman
High Court: **Laffoy J.**
08/10/1999

Costs; four applications by applicant pursuant to O.99 r. 38(3) RSC to review taxation of certain items allowed by Taxing Master on taxation of certain costs; costs taxed by Taxing Master pursuant to two orders made by the Tribunal of Inquiry (the 'Beef Tribunal'); whether the court was obliged to consider and adjudicate upon the amounts allowed by the Taxing Master for any item irrespective of whether the Taxing Master erred in principle or not; whether the court was entitled to review, in the sense of alter, the Taxing Masteris determination if it was shown that he had erred in principle or, although applying correct principles, had arrived at the incorrect amount for any item in the bill; whether if the court was satisfied on the balance of probabilities that error had been shown it was obliged to intervene and to substitute for the decision of the Taxing Master an order which achieved a just result; whether it was open to the Minister to raise arguments on the review which had not been advanced before the Taxing Master; whether section 27 of the Courts and Courts Officers Act, 1995 applied to the taxation of any of the bills of costs the subject of the review; whether the Minister had discharged the onus of disturbing the finding of the Taxing Master that the companies and Mr. Goodman had discharged the onus of proof in relation to all the hours claimed in respect of the solicitorsí general instruction fee; whether the appropriate instruction fee, if it was to be quantified on the basis of an hourly rate for allowable work, had to be based on a fair and reasonable market rate for work of the type undertaken in representing the client or for work of comparable urgency, complexity, difficulty, importance and responsibility at the time the work was performed; whether in respect of the solicitors' general instruction fee in relation to export credit issues the allowance made by the taxing master was excessive to a degree that was unjust to the Minister; whether in respect of counsel's fees the Minister's objection in principle to the allowance of fees for non-sitting or preparatory days was sustainable; whether Minister's objection in principle to the allowance of a fee for written final submissions was sustainable; whether the non-refresher items should be considered together first, the refreshers second and then all the elements together; whether the disparity between refresher and non-refresher fees in respect of counsel for the State and counsel for the companies was justified; whether in respect of other

disbursements the costs, charges and allowances which were allowable provided they came within O. 99 r. 37(18) were those incurred in retaining persons who did not become witnesses but gave opinions, advice and information of an expert or technical nature; whether certain other costs charged by various persons to the companies and Mr. Goodman were allowable.
Held: Order made in terms of Column 2 of the table annexed to the judgment as Appendix B.

Goodman v. Minister for Finance
High Court: **Laffoy J.**
08/10/1999

Costs; plaintiffs claiming declaration of entitlement to interest on costs payable under certain orders made in favour of each at the conclusion of the Tribunal of Inquiry into the Beef Industry; plaintiffs claiming order for payment of such interest as and when same was determined; whether entitlement of plaintiffs to recover interest in respect of costs as finally ascertained by taxation; plaintiffs submitting that effect of orders of Tribunal was to import into and impose upon the taxation of the plaintiffs' costs the statutory provisions and the Rules of the Superior Courts applicable to the taxation of costs in an action in the High Court and that therefore the award of costs in favour of the plaintiffs should carry interest from the date of the order irrespective of when the costs were taxed; plaintiffs submitting that a demand having been made by the plaintiffs for payment of interest, by virtue of section 53, Debtors (Ireland) Act, 1840, they are entitled to interest from the date of the demand; plaintiffs submitting that the defendants would be unjustly enriched if the plaintiffs were not awarded interest on the costs; whether the powers conferred on the Tribunal by section 4, Tribunals of Inquiry (Evidence) Act, 1979 amplified the Tribunalís power in relation to the award of costs such that it was empowered not only to order that the costs of the plaintiffs be paid out of monies provided by the Oireachtas but also to extend the provisions of sections 26 and 27, Debtors (Ireland) Act, 1840 which allowed for interest on an award of costs and also the mechanisms provided in the Rules which allowed for execution for costs and interest without further order to the plaintiffs; whether on the proper construction of the Act of 1979 the only power which the Tribunal had to award costs to a party appearing before it is the power contained in section 6 of the Act of 1979; whether the Tribunal had the power to order that the award of costs under section 6 of the Act of 1979 should carry interest for any period; whether for a creditor to have an entitlement to claim interest under section 53 the debtor's liability to pay a specific sum had to have arisen when the claim was triggered by a demand and notice; whether the liability of the defendant under the relevant order to pay the costs arose only when an interim certificate of taxation or a final certificate of taxation issued; whether plaintiffs only entitled to invoke the section and to claim interest when a final certificate issued and then only if the defendant failed to pay on foot of a final certificate; whether the plaintiffs had an equitable entitlement to section 53 interest; whether until the taxation process was completed and the liability of the defendant quantified by the issue of a certificate of taxation there had been wrongdoing or unconscionable conduct involved in the failure of the defendant to pay the costs and whether there was any basis on which the defendant could be regarded as holding the monies in question in fiduciary circumstances or circumstances in which he was unjustly enriched at the expense of the plaintiffs.
Held: Plaintiffs' claim dismissed.

Spring v The Minister for Finance
High Court: **Smyth J**
29/05/2000

Taxation of costs; review; tribunal of enquiry into the beef processing industry; whether ruling of taxing master reducing costs allowed was correct; whether taxing masteris comparsion of work of plaintiffis solicitor with that of other solicitors at the tribunal was erroneous; whether system of taxation can work without adequate paper records; whether methods adopted by plaintiff's solicitor appropriate.
Held: Ruling of taxing master unbalanced and unjust; nature of work involved couterbalanced limitation as to extent of work; necessity of paper records to be judged on a case by case basis.

Criminal Law

MK v. His Honour Judge Raymond Groarke
High Court: **Kearns J.**
13/09/2000

Criminal; judicial review; orders sought restraining prosecution of applicant because of lapse of time between date of commission of alleged offence and date of trial; alleged offences of buggery and assault with intent to commit an indecent act perpetrated against a minor in 1983; complainant first reported the alleged offences in 1998; complainant allegedly told mother of incident on following day but nothing was ever reported to the Gardai; 15 years had elapsed since alleged offences committed; whether dominant power relationship prevented earlier report; whether lapse of time gave rise to unavoidable and incurable prejudice against the applicant; whether delay will result in applicant being denied a fair trial.
Held: Orders granted; gross and substantial delay due entirely to the complainant; fact that alleged incident reported next day to mother clear refutation of suggested dominant power relationship; ability of the applicant to defend himself seriously impaired as a result of the delay.

Casey v. The Governor of Cork Prison
High Court: **Herbert J.**
13/09/2000

Criminal; lawful detention; delay in the execution of warrants for the committal of a person to prison; constitutional right to have the warrant for committal to prison served as soon as is reasonably possible; whether satisfactory explanation for delay offered; whether delay due to evasion on the part of the convicted person; whether delay in executing the warrants was excessive and impermissible and consequently an infringement of the applicantís constitutional rights; Article 40.4.2 of the Constitution.
Held: Relief granted; delay was excessive and unfair to Applicant and constituted a denial of his constitutional right to fair procedures.

Byrne v. Government of Ireland
Supreme Court: **Hamilton C. J.**, O'Flaherty J., Denham J., Barrington J., Barron J.
11/03/1999

Criminal law; venue of trial; Director of Public Prosecutions certifying offences for trial in Special Criminal Court; appellants had been charged with manslaughter, assault and violent disorder; nine of appellants' co-accused were sent forward for trial to the Central Criminal Court; appellants had been sent forward for trial to the Special Criminal Court as a result of a certificate issued by the third named respondent stating that in relation to the appellants the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order; appellants had been refused liberty to apply for judicial review; appellants seeking a declaration that the certificate is invalid and contrary to the Constitution; whether there is an arguable case that review by the courts of the decisions of the Director of Public Prosecutions are subject to review by the courts for the purpose of obtaining an objective assessment as to whether or not the ordinary courts are inadequate; whether the decision of the third named respondent to issue the certificates amounted to unfair discrimination against them contrary to the provisions of Article 40.1 of the

Constitution; Art 38 of the Constitution; s.46(2), Offences against the State Act, 1939; ss.2 & 3(1), Prosecution of Offences Act, 1974.
Held: Appeal dismissed.

Preece v. D.P.P.
High Court: **O'Caoimh J.**
07/12/2000

Criminal Law; right to a fair trial; jurisdiction to prosecute aliens for alleged narcotics offences in the territorial seas; whether certificate of the Minister for Foreign Affairs necessary to institute procedings; whether adjournment of trial, subsequent entry of a nolle prosequi and rearrest of the applicant on foot of freshly issued certificate constituted violation of his constitutional right to a fair trial; whether Circuit Court judge should have directed the jury to acquit the applicant for want of certificate in initial procedings; whether application by respondent for adjournment bona fide; applicant seeking inter alia order of prohibition restraining respondent from taking any further steps in the proceedings; s. 11(1), Maritime Jurisdiction Act, 1959.
Held: Appeal dismissed.

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SI 354/2000

Damages

McGrath v. The Minister for Justice
High Court: **Morris J.**
09/11/2000

Damages; plaintiff member of An Garda Síochána; in 1987 he was accused of criminal embezzlement; suspended from duty and paid suspension allowance which was equivalent to two thirds of his basic pay; tried in the Circuit Court and found not guilty; in spite of acquittal by jury Gardai Commissioner set about holding an enquiry into the alleged misconduct of the plaintiff under 1971 regulations; High Court order restricting scope of enquiry; new regulations came into operation in 1989 and enquiry proceeded in accordance with the 1989 regulations; Supreme Court decision that it was improper to rely on the 1989 regulations as the basis for the enquiry and as a result Supreme Court granted order of prohibition prohibiting any further enquiries into the alleged misconduct; order terminating the plaintiff's suspension made in 1993; plaintiff paid money intended to represent the one third of the pay which was not paid during the period when the plaintiff was receiving suspension pay; whether plaintiff entitled to additional pay that would have received for weekend and night duty work he would have carried out but for the suspension; whether plaintiff entitled to interest on the monies held back when he was lawfully entitled to them; whether plaintiff entitled to claim damages for missed opportunity to buy his house and loss suffered as a result; whether plaintiff entitled to damages for personal injuries and loss and distress suffered by reason of his loss of standing in the community; whether fact that it was plaintiff's institution of proceedings which delayed the conclusion of the enquiry means that defendant is not repsonsible for the delay; whether plaintiff's claim statute barred; Garda Síochána (Discipline) Regulations 1971; Garda Siochana (Discipline) Regulations 1989.
Held: Damages awarded; had plaintiff not been under unlawful suspension would have been entitled to roster duties and therefore additional pay; plaintiff not entitled to damages for loss of opportunity to buy his house as he had not taken every reasonable step to obtain a loan for the house; plaintiff entitled to general damages for the stress and anxiety and general disruption to his enjoyment of life.

Brennan v. Lissadell Towels Ltd.
Supreme Court: Denham J., **Hardiman J.**, Fennelly J.
15/11/2000

Assessment of damages; personal injuries; plaintiff had fellen on defendant employer's premises and as a result of fractured right elbow and a bang to the head, suffered headaches, clumsiness, loss of grip, was unable to work as computer assisted designer for defendant and to continue her hobby of painting or exhibiting; plaintiff had disc degeneration which was a pre-existing degenerative condition; whether trial judge's findings of fact were reasonable; whether trial judge entitled to reject plaintiff's contention that she was entitled to damages for loss of earnings for a full working life and instead opt for the longer of the periods envisaged by consultants before serious symptoms would have arisen; whether trial judge entitled to accept evidence that had the plaintiff been made redundant whilst uninjured she would have got alternative employment; whether trial judge's award for damages excessive.
Held: Appeal dismissed; High Court order affirmed.

Whelan v. Mowlds
High Court: **Herbert J.**
12/10/2000

Damages; personal injuries; plaintiff accidentally kicked in coccyx in swimming pool, of which defendant was secretary; plaintiff suffered moderate to mild soft tissue injury resulting in low to medium grade pain and discomfort in the right sacro-iliac and coccygeal zones of her body; pain diminished with time until it became quite minor and did not significantly interfere with her day-to-day activities, although there are intermittent episodes of increased pain and discomfort from time to time.
Held: General damages assessed in the sum of £10,000.00; special damages in the sum of £1,394.00, entitling the plaintiff to a decree in the sum of £11,394.00, with appropriate costs; no order made under s.14(5), Courts Act, 1991.

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Education

Downey v. The Minister for Education
High Court: **Smyth J.**
26/10/2000

Education; injunction; autistic child; application for interlocutory injunction in which relief claimed is finance to enable plaintiff's next friend to provide for free primary education suitable to plaintiff's needs; issues between the parties

unresolved; plaintiff's next friend incurring considerable expense in providing care and education for the plaintiff; whether the injunction for the payment of sum of money which plaintiff is seeking can be fairly viewed as advance payment of damages which he believes he will be awarded, the inference being that there is no liability to be tried; whether liability of the defendant established.
Held: Relief refused.

Employment

Dower v. Radio Ireland Limited
High Court: **Carroll J.**
14/09/2000

Employment; termination; contract for services; arbitration; plaintiff had first been retained for three months as freelance Disc-Jockey by defendant; three years later plaintiff was given three months notice by defendant; plaintiff issued proceedings claiming to be still employed by defendant and sought injunction requiring the continuing payment of his remuneration; whether status of plaintiff's working arrangement changed to a contract of service, given that he was clearly initially employed on a contract for services; whether, if employed as an independent contractor on a contract for services, the terms of the arbitration clause in the contract headed "Agreement for Services" continued to apply after the expiration of the fixed term of three months.
Held: Contract was a contract for services which continued to be subject to the arbitration clause; proceedings stayed for referral to arbitration.

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Family Law

Eastern Health Board v. E.M.
Supreme Court: **Keane C.J.**, Denham J., Murray J., McGuinness J., Fennelly J. (ex tempore)
19/10/2000
Family; custody of child; in context of custody proceedings under Article 40.4.2 of the Constitution, High Court had made certain orders; on date of second order, first and second respondents had ceased to have custody of baby; at all relevant times baby had been lawfully in applicant's custody, leading respondents to abandon claim to be entitled to custody; High Court had considered that it had decided a moot and had so indicated in its reserved judgment; first and second respondents appeal on ground that High Court had decided a moot; whether High Court order should be allowed to stand.
Held: Appeal allowed; order reciting that at date of hearing in High Court child was in lawful custody of applicant and that respondents were not asserting any claim to be entitled to custody of child and that no order was made on Article 40 enquiry substituted for impugned order of the High Court.

P.F. v. G. O'M
Supreme Court: Murray J., McGuinness J., Geoghegan J.
28/11/2000

Grounds of nullity of marriage; respondent had conducted a sexual relationship with another both prior to and after her marriage to petitioner; petitioner would not have consented to marriage had he known of affair; High Court had refused petition for a decree of nullity; petitioner appeals; whether non-disclosure of unfaithfulness before or during marriage is capable of vitiating full, free and informed

consent to marriage such as to sustain a decree of nullity; High Court had exercised its discretion not to make an order as to costs; respondent cross-appeals as to costs; s. 27, Martrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870.
Held: Appeal dismissed; cross-appeal dismissed.

Fisheries

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SI 359/2000

Cod (restriction on fishing) (no. 10) order, 2000
SI 379/2000

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SI 380/2000

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SI 360/2000

Monkfish (restriction on fishing) (no. 11) order 2000
SI 381/2000

Garda Síochána

Callanan v. Minister for Finance
High Court: **O'Sullivan J.**
06/12/2000

Garda Síochána; assessment of damages; non-financial element of claim for damages made by dependants of deceased member of An Garda Síochána; s. 10 (1)(a)(iv), Garda Síochána (Compensation) Act, 1941, as substituted by s. 2 (2), Garda SÌoch·na (Compensation) (Amendment) Act, 1945.
Held: Damages awarded; amount of compensation available under this head of damages is not limited to pecuniary loss; amount must be reasonable in all the circumstances; amount must be somewhat less than general damages, but should be generous; compensation is not limited to amounts which would be available under the heading of mental distress in the Civil Liability code; assistance may be derived from cases dealing with such concepts as *consortium or solatium*.

Mullins, In re
High Court; **Murphy J.**
14/04/2000

Garda compensation; personal injury; damages; applicant had sustained severe personal injuries when assaulted in the course of arresting a suspect; whether applicant, regardless of personality predisposition, was entitled to be compensated if as a result of malicious incident, he suffered either physically or psychologically; whether claim for interest on overdrawings is within scheme of ss. 8 and 10, Garda (Compensation) Acts, 1941-1945.
Held: Applicant awarded £28,000 general damages, together with £6,000 future damages and £6,011 agreed special damages; no order made in respect of interest claimed.

Health

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O'Sullivan, Richard
2000 (August/September) GLSI 22

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Article

On the never-never
McConnell, Keith
2000 (December) GLSI 20

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Social and affordable?
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Power, Ann
6(1) 2000 BR 14

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SI 352/2000

Negligence

Guckian v. Genport Limited
High Court: **O'Donovan J.**
02/11/2000

Negligence; personal injuries; damages; plaintiff had suffered injuries as a result of a fall in a nightclub in the basement of defendant's hotel; plaintiff had suffered displaced fracture of left tibia and fibula requiring surgery and fixation with an intra-madullary nail which was subsequently removed; plaintiff's left leg sensitive to trauma, with residual scarring which she prefers not to have on view and as a result of which she cannot kneel; whether defendants aware or ought to have been aware of defect in tiling at top of entrance steps and taken steps to avoid potential danger; whether plaintiff's fall precipitated by tiling defect.
Held: special damages agreed in the sum of £1,500.00; general damages assessed at £30,000.00, with a further £20,000.00 for future damages; total of £51,500.00 awarded.

Hamilton v. Cahill
High Court: **O'Higgins J.**
15/02/2000

Medical negligence; appeal; defendant extracted plaintiff's tooth due to large cavity in lower first right molar; plaintiff consulted another practitioner as her condition had worsened and was told that this was because a portion of root of extracted tooth had been left in her jaw; whether x-ray disclosed that portion of root left in jaw; whether defendant negligent in failing to advert to the fact fragment of tooth remained; whether defendant fell below requisite standard of care in his interpretation of the x-rays taken pre-and post the operation.
Held: Appeal allowed; plaintiff's case dismissed.

Pierce v. Mitchell
High Court: **Herbert J.**
11/10/2000

Negligence; road traffic accident; damages; plaintiff and defendant involved in a collision on a roundabout; plaintiff performed poorly in examinations due to trauma and suffered injury to her back, neck shoulder hip and groin; whether sole cause of collision was defendant's lack of due care and attention; whether defendant guilty of negligence; whether plaintiff guilty of neligence or contributory negligence.
Held: special damages of £8,350 agreed; £20,000.00 awarded in respect of pain, suffering and loss of amenity to date together with a further sum of £6,500.00 in respect of future pain, and loss of amenity; a total of £34,850.00 damages awarded.

Shinkwin v. Quin-Con Ltd.
Supreme Court: Keane C.J., Geoghegan J., **Fennelly J.**
21/11/2000

Negligence; personal injuries; proximity; plaintiff suffered serious injuries whilst in factory premises where employed by the first named defendant; second defendant was effective sole shareholder and day-to-day manager of the first named defendant; although plaintiff had never been instructed in its use, he had moved jig in electric saw when in motion and inadequately guarded; defendant appealing plaintiff's award of £300,000.00 for loss of three fingers and part of thumb; whether second-named defendant involved himself so closely in the operation of factory and supervision of plaintiff as to make himself personally liable for any acts of negligence which injured plaintiff.
Held: appeal dismissed.

Article

Pure economic loss - can defendants avoid paying for it?
Wade, Byron
6(2) 2000 BR 115

Pensions

Clare v. Minister for Education
High Court: **Morris P.**
09/11/2000

Pension entitlements; plaintiff a retired secondary school teacher in receipt of a pension; plaintiff claims that as a result of miscalculations she has been deprived of a number of days service which if added to her period of service would have made up the requisite number of days to entitle her to a full pension; arrears of increments and damages sought; whether an ASTI agreement, to which plaintiff was subject, permitted teaching or non-teaching civil service experience earlier than 1st October, 1966, to be taken into account; whether plaintiff's period of teaching service in Australia and in a certain Irish school had been miscalculated.
Held: Orders refused.

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Blackwell, Jonathan
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Macken, James
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Quinn, Sean
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SI 349/2000

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SI 350/2000

Practice & Procedure

Local Ireland Limited v. Local Ireland-Online Limited
High Court: **Herbert J.**
02/10/2000

Interlocutory injunction; in 1997 plaintiffs registered domain names of local.ie, localireland.com, local-ireland.com, local-ireland.org and local-ireland.net; plaintiffs maintained Internet sites providing information relating to Ireland; defendant company was incorporated in June 2000 and was trading under the business name Local Ireland-Online; defendant had registered this domain name in June 2000; plaintiffs sent cease and desist letters to the defendants; once proceedings were commenced the defendants changed the domain name to locallyirish.com.; plaintiffs claim that they have established a substantial and exclusive reputation in their business name and that the similarity between the business and domain names would as a reasonable probability result in confusion; whether criteria for granting of an interlocutory injunction have been satisfied.
Held: Balance of convenience lies in granting the relief sought.

Ewing v. Anthony Kelly
High Court: **O'Sullivan J.**
16/05/2000

Practice and Procedure; motion to strike out proceedings; inherent jurisdiction of the court; multiple defendants; whether proceedings unnecessary or scandalous; whether pleadings disclose no reasonable cause of action; O. 19 r. 27; O. 19 r. 28.
Held: Orders dismissing plaintiff's claim granted.

Windmaster Developments Limited v. Airogen Limited
High Court: **McCracken J.**
10/07/2000

Practice and Procedure; security for costs; order for security for costs granted pursuant to s.390 Companies Act, 1963; assessment of amount of security for costs sought; assessment based on a full trial of the action.
Held: "Sufficient security" in s.390 Companies Act, 1963 means that the security required is to approximate the probable costs of the Defendant should they succeed.

Criminal Assets Bureau v. Kelly
Supreme Court: **Keane C.J.,** Murphy J., McGuinness J.
07/07/2000

Practice and procedure; High Court had given judgment against defendant in respect of a tax claim; application by defendant to extend time within which to appeal against High Court order; whether defendant's application should be allowed where grounding affidavit sworn by solicitor was seriously inadequate and misleading.
Held: Application refused.

O'Brien v. Judge O'Halloran
Supreme Court: Denham J., McGuinness J., **Geoghegan J.**
29/11/2000

Practice and procedure; jurisdiction of District Court; applicant had been convicted of a road traffic offence on foot of a summons returnable for a particular District Court area; heading of summons had referred to a different District Court area within the same district; because of state of repair of the courthouse serving the latter area, all of its lists were being heard in the former area; on return date, applicant's solicitor had appeared to contest jurisdiction and District Court Judge had assumed jurisdiction; High Court had granted order of *certiorari* quashing order ultimately made by District Court Judge; whether jurisdiction of District Court is based on District Court areas or on districts; whether in circumstances of case applicant had by the summons been properly put on notice of the location of proceedings; Courts (Establishment and Constitution) Act, 1961; ss. 32 and 33, Courts (Supplemental Provisions) Act, 1961; s. 21, Court of Justice Act, 1953; s. 47, Court Officers Act, 1926; District Court Districts and Areas (Amendment) and Variation of Days (No.5) Order, 1998 (SI No. 376 of 1998).
Held: Appeal allowed; order refusing judicial review substituted for order of High Court; exercise of jurisdiction of District Court has always been based on districts and not on District Court areas.

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SI 344/2000

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SI 345/2000

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SI 346/2000

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SI 347/2000

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SI 348/2000

Refugee act 1996 (commencement) order, 2000
SI 365/2000

Road Traffic

Road Traffic

Dublin Bus v. The Motor Insurance Bureau of Ireland
Circuit Court: **McMahon J.**
29/10/1999

Road traffic; stolen vehicles had been driven into the rear of the respondent's buses; users of vehicles unknown; damages had been awarded in District Court; appeal; clause in 1988 agreement between the Minister for the Environment and appellant had stated that the appellant was not liable for damage caused by a vehicle whose owner or user remained untraced; clause had been drafted to give effect to a provision in Directive 84/5/EEC on the Approximation of the Laws of Member States relating to Insurance against Civil Liability in regards of the use of Motor Vehicles; appellant on record as not having enforced clause since April 1996; whether the phrase ëowner or user' to be read disjunctively to exclude liability of appellant; whether respondents could pursue appellants for damage caused.
Held: Appeal dismissed; exclusion in clause more excessive than that permitted by Directive which only allowed exception when vehicle itself was unidentified; clause unsuccessfully transposed EC obligations into Irish law; fact that clause not enforced since 1996 insufficient; appellant public body liable in damages for failure properly to implement Directive.

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SI 367/2000

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Kennedy, Brian
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Article

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Fanning, Eugene
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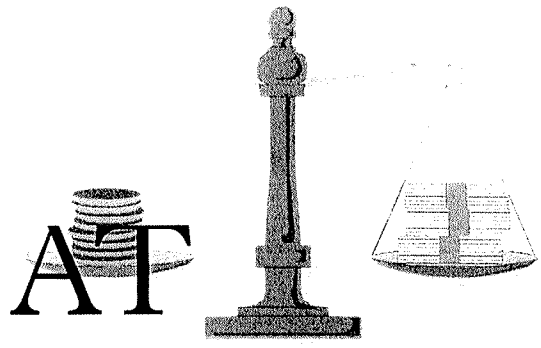

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SI 333/2000

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SI 334/2000

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SI 335/2000

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SI 310/2000
[DIR 97/67]

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[DIR 72/160]

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Court of Justice of European Communities
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(Public service contracts-Directive 92/50/EEC Procedure for the award of public procurement contracts-Equal treatment of tenders-Discrimination on grounds of nationality-Freedom to provide services)

C-395/99 Commission of the European Communities V Italian Republic
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11/2000 CRIMINAL JUSTICE (UNITED NATIONS CONVENTION AGAINST TORTURE) ACT, 2000
SIGNED 14/06/2000

12/2000 INTERNATIONAL DEVELOPMENT ASSOCIATION (AMENDMENT) ACT, 2000
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13/2000 STATUTE OF LIMITATIONS (AMENDMENT) ACT,2000
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14/2000 MERCHANT SHIPPING (INVESTIGATION OF MARINE CASUALITIES) ACT, 2000
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15/2000 COURTS (SUPPLEMENTAL PROVISIONS) (AMENDMENT) ACT, 2000
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16/2000 CRIMINAL JUSTICE (SAFETY OF UNITED NATIONS WORKERS) ACT, 2000
SIGNED 28/06/2000

17/2000 INTOXICATING LIQUOR ACT, 2000
SIGNED 30/06/2000
SI 207/2000(*commencement other than S's 15, 17 & 27 (S27 = 02/10/'00)*)

18/2000 TOWN RENEWAL ACT, 2000
SIGNED 04/07/2000
SI 226/2000 *(commencement)*

19/2000 FINANCE (NO.2) ACT, 2000
SIGNED 05/07/2000

20/2000 FIREARMS (FIREARM CERTIFICATES FOR NON-RESIDENTS) ACT, 2000
SIGNED 05/07/2000

21/2000 HARBOURS (AMENDMENT) ACT, 2000
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22/2000 EDUCATION (WELFARE) ACT, 2000
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23/2000 HOSPITALS' TRUST (1940) LIMITED (PAYEMENTS TO FORMER EMPLOYEES) ACT, 2000
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24/2000 MEDICAL PRACTITIONERS (AMENDMENT) ACT, 2000
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25/2000 LOCAL GOVERNMENT ACT, 2000
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26/2000 GAS (AMENDMENT) ACT, 2000
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27/2000 ELECTRONIC COMMERCE ACT, 2000
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28/2000 COPYRIGHT AND RELATED RIGHTS ACT, 2000
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29/2000 ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000
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30/2000 PLANNING AND DEVELOPMENT ACT, 2000
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31/2000 CEMENT (REPEAL OF ENACTMENTS) ACT, 2000
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32/2000 ICC BANK ACT, 2000
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Information compiled by Damien Grenham, Law Library, Four Courts.

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

Adventure activities standards authority bill, 2000
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2nd stage - Dail *(Initiated in Seanad)*

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Aviation regulation bill, 2000
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2nd stage - Dail [p.m.b.]

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2nd stage - Seanad *(Initiated in Seanad)*

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Committee - Dail

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Committee - Dail

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

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2nd stage -Dail

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

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Committee - Dail

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

Energy conservation bill, 1998
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Industrial relations (amendment) bill,2000
Committee -Dail *(Initiated in Seanad)*

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Irish nationality and citizenship bill, 1999
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2nd stage - Dail **[p.m.b.]**

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

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Committee - Dail

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2nd stage - Seanad

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Committee - Seanad *(Initiated in Dail)*

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Prevention of corruption bill, 2000
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Private security services bill, 1999
2nd stage- Dail **[p.m.b.]**

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

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Committee - Dail **[p.m.b.]**

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1st stage - Dail

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2nd stage - Seanad

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Committee- Dail *(Initiated in Seanad)*

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

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Registration of lobbyists bill, 1999
1st stage - Seanad

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

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1st stage - Seanad **[p.m.b.]**

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

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Safety health and welfare at work (amendment) bill, 1998
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Safety of united nations personnel & punishment of offenders bill, 1999
2nd stage - Dail **[p.m.b.]**

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1st stage - Dail **[p.m.b.]**

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

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

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Committee -Dail **[p.m.b.]**

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

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

Twenty- first amendment of the constitution (no.5) bill, 1999
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Udaras na gaeltachta (amendment)(no.3) bill, 1999
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UNESCO national commission bill, 1999
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Valuation bill, 2000
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1st stage - Dail

Whistleblowers protection bill, 1999
Committee - Dail

Youth work bill, 2000
2nd stage - Dail

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ABBREVIATIONS

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

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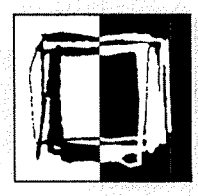

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TAYING PROCEEDINGS ON THE GROUNDS OF FORUM NON CONVENIENS

Patrick McEvoy BL *provides a detailed comparative overview of the law governing stays on grounds of proper forum including choice of forum in exclusive and non-exclusive jurisdiction clauses.*

Introduction

Under the doctrine of *forum non conveniens* the courts may stay proceedings commenced in Ireland on the grounds that there is another jurisdiction abroad which is a more appropriate forum for the trial of the action.[1] The rationale for the doctrine is twofold. Firstly, it is in the interests of justice (and indeed the parties themselves) that the litigation be conducted in the courts of the forum best placed to resolve the dispute. Identifying the most appropriate forum ensures that the dispute can be resolved in the most efficient, cost effective manner. Secondly it diminishes the capacity of a litigant to harass or oppress a defendant by suing in a manifestly inappropriate forum, bearing only a tenuous connection to the parties dispute. A defendant may well be subject to significant injustice by being required to defend his case in a jurisdiction bearing little or no connection with the dispute. Deprived of a power to stay such proceedings, the courts would be unable to prevent the plaintiff abusing his rights in this manner.

The purpose of this article is to examine the principles on which the Irish and English Courts exercise their discretion in determining whether to strike out proceedings on the grounds of *forum non conveniens*. The doctrine has been litigated at length in the English Courts, and therefore considerable reference is made to English case law.

The distinction between *forum conveniens* and *forum non conveniens*

It is necessary at the outset to distinguish between *forum conveniens* and *forum non conveniens*. Although the two terms are often used interchangeably and encapsulate the same basic principle, there is an important difference in terms of the burden of proof. Under Order 11 of the Rules of the Superior Courts 1986 it is necessary to obtain the leave of the Court in order to serve out of the jurisdiction. The power of the court to permit service out is discretionary, and in order to persuade the court to exercise its discretion in favour of granting leave it must be shown that Ireland is the appropriate forum (i.e. forum conveniens) for the trial of the action. Thus in Order 11 cases it is the plaintiff who is seeking to persuade the court to exercise its discretionary power to permit service outside the jurisdiction, and the burden of proof is therefore upon him to demonstrate that Ireland is the *forum conveniens*. Where however Irish jurisdiction has been founded as of right, i.e., where the defendant has been validly served within the jurisdiction, the burden is on the defendant in seeking a stay to show that Ireland is not the appropriate forum for trial of the action, in other words that it is *forum non conveniens*.

Despite this important difference in terms of burden of proof it is clear that both doctrines have much in common, and may usefully be examined together, as "the question in both groups of cases must be, at bottom...to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice."[2] Accordingly, as the same underlying principle applies, the discussion below includes consideration of principles developed and applied in cases falling within Order 11.

The test to be applied

The leading statement on the principles to be applied in determining whether to stay proceedings on the grounds of *forum non conveniens* is to be found in the speech of Lord Goff in the House of Lords in *Spiliada Maritime Corporation v Cansulex*,[3] recently approved in Ireland by the Supreme Court in *Intermetal Group Ltd v Worslade Trading Ltd*[4] as representing a correct statement of the law in this jurisdiction. The test may be summarised as follows:

- According to Lord Goff the basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e., in which the case may be tried more suitably in the interests of all the parties and the ends of justice.[5]

- The burden of proof is on the defendant to show that not only is Ireland not the natural or appropriate forum, but also that there is another available forum which is clearly or distinctly more appropriate than the Irish forum.[6] Each party may however seek to establish the existence of certain matters which may assist them in persuading the court to exercise its discretion in their favour. In respect of such matters the evidential burden will rest on the party who asserts its existence.[7]

- In deciding whether there is another forum clearly more appropriate, the court will seek to identify the natural forum, meaning "that with which the action has the most real and substantial connection."[8] If the Court concludes that there is another *prima facia* more appropriate forum, a stay will usually be granted, unless there are special circumstances by reason of which justice requires that a stay should not be granted. On this enquiry the burden of proof shifts to the plaintiff to show that there are special circumstances which justify allowing the action to continue in Ireland. The court will consider all the circumstances of the case. Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum will the court refuse to grant a stay.[9]

In summary therefore it is clear that the test involves a two stage process. Firstly it must be shown by the defendant that there is some other available forum which is clearly or distinctly more appropriate than the Irish forum. If he succeeds in this, the burden then shifts to the plaintiff to show that, despite this, justice nevertheless requires that a stay should not be granted. The plaintiff can meet this burden by showing that "substantial justice" would not be done in the foreign forum.

Another forum clearly or distinctly more appropriate.

As stated above the task of the court is to identify the natural forum, meaning "that with which the action has the most real and substantial connection." The court will have regard to a multiplicity of factors, including factors affecting convenience and expense, the law governing the transaction as well as the residence of the parties. The nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense must all be taken into account. In *Intermetal*, for example, the Supreme Court took into account the fact that the determination of the issue would involve evaluating the credibility of witnesses who would give their evidence in Russian, and concluded that Russia was the forum most closely connected to the dispute. The court also took into account the fact that the relevant law was that of Russia, the overwhelming number of witnesses were Russian as well as the fact that the legal effect of various communications would have to be construed according to Russian law.[10]

A factor which is of considerable importance in determining whether to grant a stay is the proper law to be applied to the parties dispute. Where a contract is governed by a foreign law, it is normally regarded as preferable to allow the foreign court adjudicate on the dispute as it *prima facia* better placed to deal with the issues involved: *Trendex Trading v Credit Suisse*[11] per Robert Goff J, approved on appeal by the House of Lords.[12] In addition it avoids the expense of having to bring expert witnesses before the court to testify on disputed issues of foreign law. In *Credit Chemique v J Scott Engineering*[13] the extent and complexity of the questions of French law likely to be involved persuaded Lord Jauncey that the matter was best litigated in France. He considered that there was a risk that a Scottish Court would come to a wrong conclusion which would not be in the interests of the parties or the ends of justice. This factor may be of even greater importance where there is some dispute between the parties as to the interpretation of the foreign law. Thus in the *Nile Rhapsody* case, [14] Hirst J held that the fact that there was a fundamental dispute between the two expert witnesses on the interpretation of Egyptian law pointed strongly in favour of the Egyptian courts as the more appropriate forum to resolve the dispute.

"It must be shown by the defendant that there is some other available forum which is clearly or distinctly more appropriate than the Irish forum. If he succeeds in this, the burden then shifts to the plaintiff to show that, despite this, justice nevertheless requires that a stay should not be granted. The plaintiff can meet this burden by showing that "substantial justice" would not be done in the foreign forum."

In determining whether another forum is more appropriate the Courts will also take into account the fact that separate proceedings have already been commenced in the other jurisdiction. As Lord Diplock explained in The *Abidin Daver*,[15]quite apart from the inconvenience and expense which would result from parallel proceedings, there would in addition be a risk of conflicting judgments, possibly giving rise to novel problems of estoppel *per rem judicatam* and issue estoppel. Moreover it could also serve to encourage an unseemly race to judgment. Thus in *Cleveland Museum of Art v Capricorn Art International*,[16] Hirst J in granting a stay of English proceedings took into account the fact that the foreign proceedings (in Ohio) had been underway for a substantial time, had involved the parties in substantial costs and were ready for trial. He noted the undesirable consequences of concurrent litigation, both in terms of increased cost and expenditure, and also in terms of the possibility of conflicting judgments, concluding that Ohio was the more appropriate forum for the trial of the action. Equally, in the *Spiliada*,[17] the fact that a closely related action had already commenced in England (with a substantial part of the action having already been heard) pointed towards England being the most appropriate forum. According to Lord Goff the accumulated knowledge and expertise of the lawyers and experts on both sides would result in advantages of efficiency, expedition and economy thereby avoiding unnecessary duplication.

The weight to be attached to this factor, however, will vary according to the circumstances of the case. The fact that there are concurrent proceedings already underway in another jurisdiction, though an important consideration, will not necessarily be decisive. In *EI Du Pont v Agnew*[18] the Court of Appeal refused a stay despite the fact that proceedings had been commenced first in the foreign forum (Illinois). Bingham LJ found that the contract was governed by English law and that questions of English public policy would arise which no foreign court would be capable of resolving. Similarly if no significant progress has been made in the foreign proceedings,[19] or if the foreign proceedings are unlikely to survive jurisdictional challenge in that country,[20] little weight is likely to be given to this factor. If however the foreign proceedings are well advanced, or have already involved the parties in substantial costs, then this factor is likely to be given a considerable weight. In The *Abidin Daver*[21] one of the factors which pointed towards Turkey as the natural forum for the action was the fact that proceedings had been started promptly there and were proceeding with all due dispatch, the Turkish Court having already appointed a surveyor to interview relevant witnesses and prepare a report for the court.

Jurisdiction Clauses

Where proceedings are commenced in breach of an *exclusive* jurisdiction clause in a contract the court will have power to stay the proceedings. While the power to stay proceedings commenced in breach of an exclusive jurisdiction clause is discretionary, the court will normally respect the agreement of the parties.[22] Although the principles which apply to the exercise of this discretion, and the discretion arising under the doctrine of *forum non conveniens*, are similar, and attempts have occasionally been made to assimilate them,[23] the two discretions are nevertheless distinct. The purpose of the doctrine of *forum non conveniens* is to identify the forum in which the case can most suitably be tried for the ends of justice. The purpose of the discretion to stay where proceedings are commenced in breach of a jurisdiction clause however is not to identify the natural forum, but rather to vindicate the defendantís contractual right to be sued in the contractual forum. This reflects the law's traditional concern that parties should normally be held to their bargain.

"The purpose of the discretion to stay where proceedings are commenced in breach of a jurisdiction clause however is not to identify the natural forum ... Therefore factors such as inconvenience for witnesses, location of documents, the timing of trial, and like concerns are matters which the defendants are simply precluded from raising."

In addition, a number of practical consequences flow from the distinction between the two discretions. Firstly where there is an exclusive jurisdiction clause the burden of proof rests on the plaintiff to show that the proceedings should nevertheless be allowed to continue in the particular forum notwithstanding breach of the exclusive jurisdiction clause. By contrast under the doctrine of *forum non conveniens* the burden of proof rests on the defendant to show why proceedings should be stayed in favour of the foreign forum. Secondly, it appears that where a party agrees to the jurisdiction of a foreign forum he will not normally be heard to complain about the procedures operating there, as that forum has been agreed to by the parties. By so agreeing that party has assented to the rules and procedures operating in the forum.[24]

The two discretions are however closely related, and jurisdiction clauses (whether exclusive or non-exclusive) often feature in transnational litigation of this nature. Indeed where the jurisdiction clause is non-exclusive traditional *forum non conveniens* principles apply. Therefore brief consideration will be given to the principles applied in cases involving jurisdiction clauses.

The principles on which the discretion for staying proceedings commenced in breach of an exclusive jurisdiction clause is to be exercised were identified by the Supreme Court in *Kutchera v Buckingham.*[25] In Kutchera the defendants argued that the balance of convenience favoured the alternative forum (Alberta) notwithstanding an exclusive jurisdiction clause in favour of Ireland. Nevertheless the Supreme Court held the defendant to the exclusive jurisdiction clause. According to Walsh J (Finlay CJ and Hederman J concurring) "... agreement by contract to submit to the jurisdiction of a foreign court is an unequivocal acceptance of the jurisdiction of that court."[26] He noted the principle established in the English case law that where a party sues in England in breach of an exclusive jurisdiction clause referring the dispute to a foreign court "there is a very heavy burden on such a plaintiff to prove that there is strong cause for the court not to exercise its jurisdiction to stay the proceedings." [27] Walsh J concluded that "in general the court should act in a way calculated to make people honour their contracts save where there is shown to exist some very grave cause to do otherwise. No such cause has been shown in the present case."[28] McCarthy J expressed what he considered to be the correct approach stating:

> "In my view, it must be the policy of this and other courts to hold parties to the bargains into which they enter. Whilst that remains the policy, there may be circumstances of a compelling nature in the light of which the court may permit a party to renege upon his bargain. In my view, no such reason has been established in the present case."[29]

Some guidance as to what might constitute 'strong cause' has been given in the English decision of *BAe v Dee Howard.*[30] In *BAe v Dee Howard* Waller J held that where the parties have freely agreed to an English jurisdiction clause it is not open to the defendant to argue that England is not an appropriate jurisdiction and in effect seek to displace the bargain they had made, viz., that he would not object to English jurisdiction, at least where the factors relied on were foreseeable at the time of entering into the contract. According to the learned judge the parties were precluded from relying on factors which were "eminently foreseeable" at the time they entered into the contract. Therefore factors such as inconvenience for witnesses, location of documents, the timing of trial, and like concerns were matters which they (the

defendants) were simply precluded from raising. Waller J also stated that the defendant would be unable to rely on any proceedings commenced in the foreign forum in breach of the exclusive jurisdiction clause.

Waller J emphasised that the defendants could only rely on some factor which was not readily foreseeable at the time they entered into the contract in order to displace their bargain. Thus he took into account the fact that lawyers for the defendant had built up a considerable expertise in this type of litigation in the alternative forum (Texas). Nevertheless this factor was not enough to override the contractual forum of the parties. A similar approach is evident in the decision of the Singapore Court of Appeal in *The Vishva Apurva.* [31] In that case the plaintiff sought to sue in Singapore in breach of a jurisdiction clause for the courts of India. The test the court applied was whether the interests of justice favoured allowing the plaintiff break his contract. The plaintiffs pointed to a number of potential injustices in the Indian forum: a limit on recoverable costs, exchange control restrictions on export of monetary awards, uncertainty in relation to Indian law and delay in trial. However, the court rejected these arguments. The plaintiffs had chosen India and therefore had only themselves to blame if they did not like what they had chosen.

"Factors which make it financially difficult or uneconomic for the plaintiff to litigate in the foreign forum may be particularly potent ... The mere fact that a lower level of damages is available in the foreign forum is not of itself a ground for refusing a stay provided 'substantial justice' will be achieved. Where however the level of damages awarded is so low as to be derisory a stay may be refused."

It is clear therefore that as a result of the decision of the Supreme Court in *Kutchera* the Irish courts will not readily allow factors of convenience and expense to override the contractual forum. It is submitted that this approach is correct. It is a fundamental principle of the law of contract that, subject to limited exceptions, parties should normally be held to their bargain: *'pacta sunt servanda'*. This should be especially so in international litigation where one is dealing with sophisticated parties negotiating on an arms length basis. Nevertheless it is suggested that a limited discretion can be justified on the basis of the principles identified by Waller J in *Dee Howard* and by Walsh and McCarthy JJ in *Kutchera.* Thus where there is some factor which was not readily foreseeable at the time the parties entered into their contract which would render it unjust to hold one of the parties to their bargain, the Court may override the jurisdiction clause. An example of such a situation may be found in *Citi Marche v Neptune*[32] where Colman J refused to stay English proceedings on the ground that certain co-defendants were not amenable to the contractual forum (Singapore), but could be joined in the English action. Thus given that the plaintiffs could not easily have foreseen at the time of entering into the contract that not all of the co-efendants would have been amenable to the contractual forum, it might be thought justifiable not to enforce the jurisdiction agreement.

Where a foreign jurisdiction clause is non-exclusive (that is to say, it permits, but does not oblige a party to sue in a particular jurisdiction) the courts will have regard to the traditional principles of *forum non conveniens*. The fact that the parties have agreed that a particular country is to have jurisdiction however creates a strong *prima facia* case that the jurisdiction is an appropriate one. As Hobhouse J commented in *S & W Berisford v New Hampshire Insurance* "...[the contractual forum] should in principle be a jurisdiction to which neither party can object as inappropriate; they have both implicitly agreed that it is appropriate."[33] Thus in the normal course of events a defendant will not be permitted to object to jurisdiction unless he can demonstrate strong reasons for doing so.

Requirements of Justice.

If the court concludes that there is another forum which is clearly or distinctly more appropriate, the burden then shifts to the plaintiff to show that there are special circumstances by reason of which justice requires that a stay should not be granted. In determining whether justice requires that a stay should not be granted the court will take into account all the circumstances of the case. One such obvious circumstance would be where the plaintiff can, by cogent evidence, establishes that he will not obtain justice in the foreign forum for political, racial, religious or other reasons.[34]

In general, however, if there exists a clearly more appropriate forum overseas the plaintiff will have to take that forum as he finds it, even if it is less advantageous than the national forum. Thus the fact that the plaintiff would obtain certain procedural advantages from litigating in Ireland, such as higher damages, a more complete discovery procedure, or more generous rules of evidence, will not necessarily deter the courts from granting a stay. Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum will the court refuse to grant a stay, *Intermeta*l, per Murphy J. [35]

Thus, by way of example, in the *Spiliada* Lord Goff referred to the different systems of discovery prevailing in different jurisdictions, ranging from the generally limited discovery available in civil law jurisdictions to the much more generous discovery procedure available in the United States of America. He concluded: "No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas."[36]

The courts will take into account a range of factors in determining whether or not justice requires that a stay should be refused. Factors which make it financially difficult or uneconomic for the plaintiff to litigate in the foreign forum may be particularly potent. Thus in *Roneleigh Ltd v MII Exports Inc*[37] it was held that if the evidence shows that the plaintiff's success in the foreign forum is likely to be adversely affected by the fact that he will be unable to recover any costs if successful (particularly where the claim is a relatively small one) this may

provide a ground for concluding that 'substantial justice' would not be done in the foreign forum. Similarly in *The Al Battani*[38] Sheen J held that the fact that the plaintiff would be unable to recover any costs if successful (and hence would be deprived of the fruits of any victory), and that interest would only be awarded as from the date of final judgment on appeal (likely to take 5 years), was a ground for refusing stay. These factors made the financial burden of litigating in the foreign forum so heavy that justice required that a stay should not be granted.

The mere fact that a lower level of damages is available in the foreign forum is not of itself a ground for refusing a stay provided 'substantial justice' will be achieved.[39] Where however the level of damages awarded is so low as to be derisory a stay may be refused. In *The Adhiguana Merantia* the Hong Kong Court of Appeal held that it would be unjust to require the plaintiffs in that case to litigate in Indonesia and thereby confine them to a derisory level of damages.[40] It may however be possible for the defendant to neutralise this factor by undertaking not to invoke any limit as to damages applicable in the foreign forum: *BMG Trading Ltd v McKay*.[41] In such a case the stay, if granted, would be subject to a Tomlin order enabling the plaintiff to reopen the case should the foreign courts, against the agreement of the parties, apply any such limit.[42]

The unavailability of legal aid in the alternative forum will generally not be a factor which the courts will take into account in exercising their discretion. Exceptionally however the unavailability of financial assistance in the appropriate forum may prevent substantial justice being done, thereby resulting in a stay being refused. Thus in *Connelly v RTZ*[43] the House of lords refused to grant a stay in circumstances where legal aid was available in England but not in the appropriate forum, namely, Namibia. The House held that the nature and complexity of the case were such that it was clear that it could not be tried at all without the benefit of financial assistance. Therefore the interests of justice weighed in favour of trial being allowed proceed in England. As Bingham LJ put it in the court below: "But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights."[43] Lord Goff indicated however that the position might well have been different if the plaintiff had been seeking financial assistance to enable him to make a 'Rolls Royce' presentation of his case in England, as opposed to a more rudimentary presentation in the appropriate forum.[45]

An important factor in determining whether justice requires that a stay be refused will be whether a limitation period has expired in the foreign jurisdiction. If a limitation period has expired the courts may be reluctant to grant a stay as this would mean that the plaintiff would in effect be shut out from pursuing his claim. On the other hand a litigant might deliberately allow a time bar to expire in a foreign forum in the hope that he could then use this fact to persuade the courts of his preferred forum to accept jurisdiction. In the *Spiliada* Lord Goff dealt with this difficulty by holding that where a party has not acted unreasonably in failing to issue a protective writ in the alternative jurisdiction, practical justice required that a stay should be refused. Where however the defendant has been at fault, or negligent, in failing to issue a protective writ, a stay will be granted even if his claim is barred in the foreign jurisdiction. In *The Pioneer Container* [46] the Hong Kong Court of Appeal applied these principles and found that the plaintiff had acted unreasonably by deliberately and advisedly allowing a time bar to elapse in the foreign forum in the (unsuccessful) hope that it could persuade its preferred forum to accept jurisdiction.

A factor which will often be of critical importance in determining whether or not to grant a stay will be whether all the defendants are amenable to the alternative forum. Where there are a number of co-defendants, some of whom are not amenable to the foreign forum, but all of whom are amenable to the domestic forum, justice will usually require that a stay be refused, *The Golden Mariner*.[47] The fact that the plaintiff can proceed against all the defendants in one forum, without the need to commence separate proceedings abroad, with all the attendant expense and risk of inconsistent judgments, will be a powerful factor in favour of refusing a stay. This factor will however work both ways. The fact that the defendant would be able to join a number of potential defendants in the foreign forum (but not in the domestic forum) will be a weighty factor in favour of granting a stay. In *Piper Aircraft Co. v Reyno* [48] the fact that the defendant was unable to join a number of potential third party defendants (who could potentially relieve the defendant of all liability) in the American jurisdiction, but who were all amenable to Scottish jurisdiction, was enough to persuade the US Supreme Court to grant a stay in favour of Scotland. The court noted that it would be far more convenient to resolve all claims in one trial and concluded that it would be "burdensome" to force the defendant to rely on separate actions for indemnity or contribution.[49]

Where the courts of the alternative forum are compelled to apply a mandatory rule of the forum (or there is a risk they will apply such a rule) rather than the proper law of the contract, justice will normally require that a stay be refused, *Coast Lines Ltd v Hudig & Veder NV;*[50] *The Magnum*.[51] It has also been held that it is not conducive to justice to require a party with an arguable claim under the proper law of the contract to litigate in a jurisdiction which would apply its own law and summarily reject the claim, *Banco Atlantico v BBME*.

Inordinate delay in the foreign forum may also be a ground for refusing a stay. In *The Vishna Ajay* [53] likely delays of a magnitude of between 6 to10 years were held by Sheen J to amount to a denial of justice and justified the court in refusing to grant a stay in favour of the Indian forum. In *Intermetal* the Supreme Court held that the trial judge was correct in refusing a stay in circumstances where justice required that the action and in particular certain interlocutory matters relating to the action be dealt with as expeditiously as possible.

Conclusion

The ever increasing growth in international commercial activity is likely to result in a corresponding growth in international commercial litigation. Increasingly the Irish courts are likely to be called upon to adjudicate on transnational disputes. The doctrine of *forum non conveniens* provides the courts with a useful device for mitigating the worst effects of forum shopping and for ensuring that the litigation is conducted in the forum best placed to resolve the parties' dispute in the most efficient manner possible. •

1. *Intermetal Group Ltd and Trans-World Ltd v Worslade Trading Ltd* [1998] 2 IR 1.
2. *Spiliada Maritime Corporation v Cansulex* [1987] AC 460 at 480, per Lord Goff.
3. [1987] AC 460.
4. [1998] IR 1 at 35.
5. At page 476 of the judgment.
6. At page 477 of the judgment.
7. At page 476 of the judgment.
8. At page 478 of the judgment, quoting Lord Keith in *The Abidin Daver* [1984] AC 398.
9. *The Spiliada, op. cit.*, at 482; *Connelly v RTZ Corpn.* [1998] AC 854 at 873; *Intermetal, op. cit.*, at 35.
10. *Op. cit.*, at 36.
11. [1980] 3 All ER 721 at 735 (HC).
12. [1982] AC 679 (HL). Lord Roskill stated (at p.705) that the trial judge's exercise of his discretion had been "entirely correct in principle."
13. 1982 SLT 131.
14. *The Nile Rhapsody* [1992] 2 Lloyd's Rep. 399.
15. *The Abidin Daver* [1984] AC 398 at 411.
16. *Cleveland Museum of Art v Capricorn Art International S.A. and Another* [1990] 2 Lloyd's 166.
17. *Spiliada Maritime Corporation v Cansulex* [1987] AC 460 at 485-486.
18. *EI Du Pont de Nemours & Co v Agnew and Kerr* [1987] 2 Lloyd's Rep 585.
19. *Arkwright Mutual Insurance v Bryanstown* [1990] 2 Lloyd's Rep. 270.
20. *Meridien Biao GmbH v Bank of New York* [1997] 1 Lloyd's Rep. 437.
21. *The Abidin Daver op. cit.*, at 410, 421.
22. *Kutchera v Buckingham* [1988] ILRM 501; *Baghlaf Al Zafer v PNSC* [1998] 2 Lloyd's Rep. 229.
23. See Barma and Elvin (1985) 101 LQR 48 at 65-67; *Citi March v Neptune Orient Lines* [1997] 1 Lloyd's Rep. 72. See generally Cheshire and North, *Private International Law* (13th ed., 1999), pp 350-359.
24. *Trendex Trading v Credit Suisse, op. cit.; The Vishva Apurva* [1992] 2 Sing. L.R. 175.
25. [1998] ILRM 501. Henchy J dissented.
26. At 505.
27. At 507-508.
28. At 508.
29. At 518.
30. [1993] 1 Lloyd's Rep. 368.
31. [1992] 2 Sing. L.R. 175. Cited by Briggs in [1993] 109 LQR 382.
32. [1997] 1 Lloyd's Rep. 72.
33. [1990] 1 Lloyd's Rep. 454
34. *The Abidin Daver*, at 411. A striking example of this is to be found in *Oppenheimer v Rosenthal* [1937] 1 All ER 23 where the litigant, a German national of the Jewish faith, would have been at grave personal risk had he travelled to Germany to conduct his case.
35. *Intermetal, op. cit.*, at 35; see also *The Spiliada, op. cit.*, at 482; *Connelly v RTZ Corpn.* [1998] AC 854 at 873.
36. *Op. cit.*, at page 482. A different approach appears to prevail in the United States however where stays of proceedings have been granted on the condition that the defendant agreed to accept discovery in accordance with the provisions of the United States Federal Rules of Civil Procedure. See for example *Re Union Carbide Corp.* (1986) 634 F.Supp. 842.
37. [1989] 1 WLR 619.
38. [1993] 2 Lloyd's Rep. 214.
39. *Herceg Novi v Ming Galaxy* [1998] 4 All ER 238.
40. [1988] 1 Lloyd's Rep. 384. It was feared that the limit on damages in the Indonesian forum could have been as low as $2541.
41. [1998] IL Pr 691.
42. *Op. cit.*, at 699.
43. [1998] AC 854.
44. Cited at page 866 in Lord Goff's judgment in *Connelly*.
45. Op. cit., at 874.
46. [1994] 2 ALL ER 250. The Court's exercise of its discretion was approved by the Privy Council on appeal.
47. [1989] 2 Lloyd's Rep. 390.
48. *Piper Aircraft Co. v Reyno*, 454 US 235 (1981).
49. *Op. cit.*, at 259.
50. [1972] 1 Lloyd's Rep. 53.
51. [1989] 1 Lloyd's Rep. 47.
52. [1990] 2 Lloyd's Rep. 504.
53. [1989] 2 Lloyd's Rep. 558.

PRE-TRIAL DISCOVERY NORWICH PHARMACAL RELIEF

Elizabeth O'Brien BL, Attorney-at-Law (New York), considers the rules and principles governing pre-trial discovery as they appear from a detailed consideration of decided cases from other common law jurisdictions.

Norwich Pharmacal relief

The purpose of this article is to consider the nature and scope of what has come to be termed 'Norwich Pharmacal relief', the equitable jurisdiction whereby a would-be plaintiff may seek to identify the proper person to proceed against and other necessary pre-trial discovery. This jurisdiction was affirmed in the leading decision of the House of Lords in *Norwich Pharmacal Co. and Others v. Commissioners of Customs and Excise* [1974] AC 133, but as recognised by Sir Robert Megarry VC in *British Steel Corporation v. Granada Television Ltd*, it also has a more ancient pedigree:

> "The [Norwich Pharmacal] action is a descendant of the old bill of discovery in Chancery. Under the auxiliary jurisdiction, equity used to aid litigants in the Courts of Law, as well as litigants in equity, by compelling discovery; the Courts of Law had no means of doing this. But in addition to this process, which has now long been part of the ordinary process of litigation, there was a procedure whereby a would-be plaintiff could bring a bill of discovery in equity in order to find out who was the proper person to bring his action against; and it is this process which led to the Norwich Pharmacal Case."

In the Norwich Pharmacal case itself, Lord Reid, having referred to a series of judicial authorities in which the jurisdiction was exercised, set out the ambit of the relief and the duty giving rise thereto, as follows:

> "They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving them full information and disclosing the identity of wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did."[1]

The principle has been considered and applied in at least 8 common law jurisdictions in over 200 decided cases, and has been accepted as an inherent jurisdiction of the Court which will be exercised in favour of an applicant in all cases where "justice does require the granting of the relief."[3] In some jurisdictions this type of discovery has been incorporated into Court Rules of Procedure, for example in the State of Victoria and in the Federal Court Rules of Australia.[4]

In order to found the jurisdiction, there must, first, have been a wrong committed for which the plaintiff should have some redress. Secondly, there must be a duty on the part of the defendant, by virtue of having become "mixed up in a transaction concerning which discovery was required"[5] to come to the aid of the plaintiff in order that justice may be done. The court's jurisdiction to order disclosure is thus based

"In order to found the jurisdiction, there must, first, have been a wrong committed for which the plaintiff should have some redress. Secondly, there must be a duty on the part of the defendant, by virtue of having become "mixed up in a transaction concerning which discovery was required" to come to the aid of the plaintiff in order that justice may be done. The court's jurisdiction to order disclosure is thus based on a particular duty to assist another who has been wronged."

"It is not necessary that the court reach any conclusions as to the likelihood of ultimate success at trial. If the evidence, although falling short of establishing all the elements of a prima facie case, nonetheless points to the existence of a case for relief, then preliminary discovery should not automatically be refused."

on a particular duty to assist another who has been wronged which arises by virtue of having been in some way involved in the wrong and, a *fortiori*, if the respondent is also a wrongdoer.[6]

A wrong must have been committed

In this regard it is worth noting that it is not necessary to "pigeonhole" the wrong as a "cause of action" as this may result in justice being denied to a potential plaintiff where the wrong visited upon him may not fall within an established category. According to one Privy Council decision:

> "[P]ractising lawyers tend to think in terms of the established categories of causes of action, such as those in contract or tort or trust or arising out of statute. They do not always appreciate that the range of causes of action already extends very widely, into areas where identification of the underlying 'right' may be elusive ... A cause of action is no more than a lawyer's label for a type of fact which will attract remedy from the court. If the court will give remedy, ex *hypothesi*, there is a cause of action."[7]

Nonetheless, authority suggests that the plaintiff will be required to show a strong prima facie case that a wrong has been committed. In the case of *Shelley Films Ltd. v. Rex Features Ltd,*[8] the plaintiff moved *ex parte* against the defendant for an injunction restraining further use of a photograph which had been supplied by the defendant to a newspaper, and for disclosure of the source of the photograph. The plaintiff's application was dismissed, the court holding that in order to grant the relief sought, the court would have to be satisfied that the plaintiff had shown "a strong *prima facie* case that the plaintiff had suffered a serious wrong at the hands of the person to be identified."

In contrast to this line of authority, in *A v. Company B Ltd. (P v. T Ltd.)*[9] it was not certain whether a tort had been committed at all, although the plaintiff thought it had. The Chancery Division of the English High Court held that, without the information sought, it was not possible for the plaintiff to know for certain whether he had a viable cause of action against the informant, and that, in the circumstances, there was no reason why the principle should not assist a prospective plaintiff to obtain information and documents necessary for the bringing of an action of libel or malicious falsehood. The protection of the plaintiffis reputation was considered of paramount importance.

At all events, it is not necessary that the court reach any conclusions as to the likelihood of ultimate success at trial. If the evidence, although falling short of establishing all the elements of a *prima facie* case, nonetheless points to the existence of a case for relief, then preliminary discovery should not automatically be refused. Accordingly, while the wrong complained of may not necessarily fit squarely within the ambit of a defined cause of action, that is not to say that relief should be denied: broader considerations of justice enter the equation.

The respondent must be *mixed up* in the wrongdoing

It is important to note in this context that the expression "mixed up" does not connote any impropriety.[11] However, Norwich Pharmacal discovery will not generally lie against a "mere witness," the reasoning behind such rule being that such person's testimony would be compellable in any event at the trial of the action. For example, in *First Malaysia Finance BHD v. V. Dato'Mohd Fathi Bin Haji Ahmad,* the Supreme Court of Quala Lumpur held that a person is not liable to disclose the identity of a tortfeasor if, although he knows that identity, he has not himself either committed, facilitated or otherwise become mixed-up in the commission of the wrong.[12] However, as qualified by Morritt LJ in *Axa Equity & Life Assurance Plc. & Others - v - National Westminster Bank Plc. & Others,*[13] the "mere witness" rule is not absolute and will not apply in cases where the identity of the alleged wrongdoer is not known at all, for in such cases there will be no trial unless the order for discovery is made. Thus where the subject of discovery has become mixed up in the wrongdoing complained of, and where absent discovery from that subject there will be no trial, there is clearly a basis for Norwich Pharmacal relief. In addition, the "mere witness" rule will not operate so as to preclude discovery where the proposed claim is in respect of trust property which may be dissipated, nor to a post-judgment Mareva injunction.[15]

Extent of the duty of disclosure

There has been a tendency by some members of the judiciary to restrict Norwich Pharmacal relief by limiting its application to the identity of the wrongdoer alone. However, authority weighs strongly against such a narrow interpretation. In *Societé Romanaise de la Chaussure FA v. British Shoe Corporation Ltd,*[16] it was observed that the obligation to assist a wronged plaintiff extended to giving full information, which is deemed to include all information necessary to enable the plaintiff to decide whether it is worth suing the wrongdoer or not. The jurisdiction of the court is thus not confined to ordering disclosure of merely the identity of wrongdoers. For example, in *CHC Software Products v. Hopkins & Wood*[17] the plaintiff was allowed to obtain discovery of the names of recipients of certain letters, which letters tended to cast aspersions on the quality or reputation of the plaintiff's product. The plaintiff's purpose in seeking discovery was to protect itself against the damaging consequences of the alleged tortious document disseminated by the defendants by writing to the recipients to set the record straight. This was recognised as a legitimate purpose relating to the issues raised in the action.

The plaintiff in *P v. T Ltd* was entitled to obtain information and documents necessary for the bringing of an action in libel or malicious falsehood. Again, he was not confined to obtaining identity information only. More recently, in *Axa Equity & Life Assurance Plc. & Others - v - National Westminster Bank Plc. & Others,* Lord Justice Morritt, while not deciding the point, favoured the proposition that where a trial could not proceed absent disclosure of information, notwithstanding knowledge of identity of the wrongdoer, there would be jurisdiction to grant Norwich Pharmacal type relief. He concluded that

> "The consequence would be that the principle of Norwich Pharmacal would be applicable in any case where, for whatever reason, the action for which the document or information was required could not in its absence proceed to trial and would not be confined to cases in which the reason why the action could not so proceed was ignorance as to the identity of the proper defendant. The establishment of such a proposition would also enable effect to be given to the reference made by Lord Reid in Norwich Pharmacal to the duty to provide "full information" as well as the identity of the wrongdoer without giving rise to a general obligation to give disclosure."

In the case of *Mercantile Group AG v. Aieyla* [18] the English Court of Appeal considered whether the court could order discovery from a person against whom there was no substantive cause of action. The wife of a person against whom a post judgment Mareva injunction was in force appealed an order of the High Court which required her to disclose financial information about herself and her husband. The appeal was dismissed and the order requiring disclosure was upheld.

"The obligation to assist a wronged plaintiff extended to giving full information, which is deemed to include all information necessary to enable the plaintiff to decide whether it is worth suing the wrongdoer or not. The jurisdiction of the court is thus not confined to ordering disclosure of merely the identity of wrongdoers."

Absence of physical harm or financial loss does not preclude relief

The plaintiff in the case of *Harrington v. Polytechnic of North London and Others*[19] had not suffered any physical harm or financial loss. He was, however, prevented from exercising a right, namely the right to attend lectures. The plaintiff was entitled to the relief in order to ascertain the names of individuals for the purpose of serving them with restraining orders.

Although not dealing specifically with Norwich Pharmacal type relief, the decision of the Supreme Court of Victoria in *La Chemise Lacoste and Crestknit Aywon Consolidated Ltd. v. the Comptroller General of Customs and the Importer of the Labels (the identify of whom is currently unknown to the plaintiff)*[20] is of some interest. In this case, the Comptroller sought a ruling of the Court as to whether he was obliged to deliver information disclosing identities of certain third parties who appeared to be infringing the plaintiffis trade mark. The Court ultimately ruled that the Comptroller was obliged to impart that information, on the grounds that if the Comptroller were to refuse the plaintiff information about the identity of the consignee, then the value of the registered device would be debased and diminished and a breach of the Trade Marks Act would *probably* ensue. Again, the Court took into account the fact that what the relief sought would facilitate was the prevention of further damage.

The plaintiff need not wish to directly pursue a cause of action

Camelot Group Plc v. Centaur Communications Ltd [21] concerned an appeal from an order requiring disclosure of the identity of an employee who had disclosed confidential information. The English Court of Appeal, having balanced the important public interest in the press being able to protect the anonymity of its sources as against the interests of justice in the disclosure of a source, dismissed the appeal. The Court held that the relief should be ordered in circumstances which would enable the plaintiff to take some positive action on foot of the information, distinct and apart from seeking damages in respect of the wrong complained of. In the instant case, the positive action contemplated was to identify a disloyal employee so as to terminate his employment in accordance with the governing contract of employment.

In *Re Goodwin,*[22] a case of the Chancery Division, a journalist was required to disclose a source of information which had been derived from confidential documents stolen from a person in circumstances where that person contemplated legal proceedings to recover the stolen documents. The court recognised that it was in the interests of justice that the person should be able to bring civil proceedings against a source to recover the documents and to obtain an injunction restraining further publication, and, therefore, should know whom to sue. In this case the plaintiff wished to take action to prevent further disclosure while the information was still sensitive, and the decision supports the conclusion that where a plaintiff seeks more than mere damages, but seeks to protect his interests against further damage, the interest in granting the relief is all the greater. In such a case the "labelling" of the wrong is not of major importance - the protection of the plaintiffis interests is paramount. Lord Justice Hirstí's comments in the case of *Credit Suisse Fides Trust SA v. Cuoghi et al*[23] are interesting in this regard:

"[T]here are dicta at the highest level which support the view that discovery in accordance with the principle in Norwich Pharmacal may be available even though the applicantís purpose is not to pursue court proceedings, but is to seek redress or to vindicate rights in some other way. It is not necessary for the purpose of a Norwich Pharmacal application to show that it is actually in aid of foreshadowed proceedings."

Refusal to entertain mere fishing expeditions

The plaintiff must demonstrate a real probability of the existence of a claim against someone, though not of the probability of a claim being established at trial. Thus, in *Hetherington Ltd v. Carpenter*,[25] while the Court of Appeal in Wellington was anxious to ensure that a court would not entertain applications purely intended to garner information, the Court held nonetheless that it could not be intended, at the pre-commencement discovery stage, to reach any conclusion as to the likelihood of ultimate success at trial. Evidence, although falling short of establishing all the ingredients of a *prima facie* case, might point sufficiently to the existence of a case for relief such as to make it proper, in the interests of justice, that preliminary discovery be ordered so that proceedings for that relief could be brought. In *Ex parte Matshini and Others*,[26] a decision of the Supreme Court of South Africa, Kannemeyer J. alluded to the importance of discouraging "fishing expeditions" masquerading as pre-trial discovery, and, referring to authority, formulated the following test of relevancy:

"From the above cases it is clear that the test is whether the administration of justice would, not might, be defeated unless an order is granted for the production of information, documents or real evidence which are "essential" or "absolutely necessary" for the prosecution of the plaintiff's case..... They [the plaintiffs] must satisfy us that the evidence in question is essential or absolutely necessary in order for them to prove their claims and that its non-availability at the trial would result in the administration of justice being defeated."

As already indicated, it appears clear that where absent the discovery order a trial will not proceed, either because the identity of the wrongdoer is unknown or because the plaintiff requires a vital piece of evidence to plead his case effectively, then an order for discovery is justified. However it is important to note that this exception is available only where the inability to plead may result in a claim not proceeding - it does not apply where, as is suggested by Kannemeyer J. above, the Plaintiff can proceed to trial but seeks discovery to prove his claim.

Factors informing the exercise of the Court's discretion

The court must take into account a number of factors before exercising its discretion in either granting or refusing the relief sought. These factors include:

- Whether the disclosure of the information sought would be in breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed, *British Steel Corporation v. Granada Television Ltd* [1981] AC 1096; also *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171, 2 February 1977.

- The courts have also given consideration to the so-called "Newspaper Rule" which is aimed at protecting the public or social interest in the fair dissemination of news, information or matters of public interest or concern. This rule operates as an exception to the principle that where information is relevant and admissible it ought to be disclosed, regardless of confidentiality considerations, unless there are good reasons of public interest for not doing so.[27]

- Whether any immunity attaches to the information sought to be disclosed, for example public interest or crown immunity.[28]

- On the other hand, it appears that confidentiality will prevail only in exceptional cases. As stated by Ackner LJ in *Campbell v. Tamesside Metropolitan Borough Council*:[29]

"The fact that information has been communicated by one person to another in confidence is not, of itself, sufficient ground for protection from disclosure in a court of law of either the nature of the information or the identity of the informant if either of these matters would assist the court to ascertain facts which are relevant to an issue on which it is adjudicating... The private promise of confidentiality must yield to the general public interest, that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or identity of the informant from disclosure in a court of law..."

The first question which must be addressed in this context is "Is there a recognised public interest in preserving confidentiality of source and information?" In order to answer this question it is necessary to address the circular problem in the following way. If there was found to be a public interest in preserving confidentiality, on what basis would it be formed? In

"It appears clear that where absent the discovery order a trial will not proceed, either because the identity of the wrongdoer is unknown or because the plaintiff requires a vital piece of evidence to plead his case effectively, then an order for discovery is justified.. However,... it does not apply where the Plaintiff can proceed to trial but seeks discovery to prove his claim."

general, it can be said that where a person is so situated that it becomes right in the interest of society that he should tell to a third person certain facts, he is privileged in so doing.[30] Yet, in the present context, it appears that the recipient must also have a strong interest in receiving the communicated information. In particular, the facts must be important for the person in question to know for the guidance and regulation of his conduct. Thus, if the communication cannot influence conduct there is no privilege. In addition, there must be reciprocity, that is there must not only be an interest in the recipient of the communication but an interest or duty in the person making the communication to make the communication in question. In each case however there must be a careful balancing of the competing claims of "public interest."

- Whether irreparable harm would be caused to either party if the order sought was granted. This consideration involves the question of where the balance of convenience lies. In other words where the relief sought will not affect the defendant in any substantial way, but yet in circumstances where it was not granted irreparable harm might result to the plaintiff, then the relief sought should be ordered. According to Millett J (as he then was) in *Societe Romanaise de la Chaussure SA v. British Shoe Corporation Ltd:*

"If the test is the balance of convenience I have no doubt that it lies in favour of making an order. The defendants have not given any good reason for withholding information. They will suffer no harm, let alone irreparable harm, if they are ordered to supply the information now rather than later, while the plaintiffs may suffer irreparable harm, the nature of which will depend upon a course they decide to take, should they be left to speculate. If the test is the plaintiffs will suffer irreparable harm by failure to obtain this information now, then I am satisfied that there is a possibility of suffering such harm, at least if they decide not to sue the manufacturers and to rely upon the answers given and hope that it is sufficiently well-based."

- Whether the interests of justice would be served by the granting of the relief or whether a refusal of the relief would result in a denial of justice. In general, the measure of justice is whether the applicant will, if denied relief, be left without a remedy:

Thus, it has been argued that the "interests of justice" ground for granting Norwich Pharmacal relief can only be sustainable where the plaintiff has no alternative method or avenue of relief open to him. On this view, assuming that the plaintiff has established a *prima facie* case, the "interests of justice" will justify the exercise of a court's discretion in favour of granting the relief only if, in declining to order that the facilitator impart the information sought, the plaintiff will be denied an opportunity to pursue his cause of action against the ultimate tortfeasor.

However, the authorities clearly show that the "interests of justice" consideration need not be given such a narrow application. Regard to the interests of justice generally is an ingredient which must be added to the pot in the exercise of the court's discretion one way or the other. For example, in *British Steel Corporation v. Granada Television Ltd,*[33] highly classified documents, the property of the respondents, were delivered to the appellants by a source who was given an undertaking on behalf of the appellants that his identity would not be disclosed. The respondents issued a writ and notice of motion seeking *inter alia* an order for delivery up of the documents. Delivery up did not disclose the identity of the source and subsequently the respondents amended their notice of motion and writ, so as to claim an order that the appellants would disclose the names of the source. The order sought was granted, and on ultimate appeal to the House of Lords it was held *inter alia* that the Norwich Pharmacal remedy (being equitable) was discretionary and that although the media, and a journalist, had no immunity, it remained true that there might be an element of public interest in protecting the revelation of the source, for there was a public interest in the free-flow of information which would vary from case to case; that in the present case the balance of interests was strongly in the respondents' favour since, to confine them to the remedy against the appellants and to deny them the opportunity of remedy against the source, would be a significant denial of justice.

"It has been argued that the "interests of justice" ground for granting Norwich Pharmacal relief can only be sustainable where the plaintiff has no alternative method or avenue of relief open to him.... However, the authorities clearly show that the "interests of justice" consideration need not be given such a narrow application."

Although in this case the court had regard to the fact that the source of the information was an employee who broke his contractual duty to the respondents in order that the appellants might act in breach of their duty to the respondents, it may be deduced from this case that, where damages might compensate a Norwich Pharmacal plaintiff, he having a remedy for such against someone other than the source, yet where in the interests of justice the disclosure of the source ought to be ordered, then the relief will be granted notwithstanding the availability of a cause of action against another party for damages.

That justice, or rather the interests of justice, can be used as a valid ground for the exercise of a court's discretion in favour of granting Norwich Pharmacal relief, is clearly set out in the decision of *P v. T Ltd.*, where Sir Richard Scott V-C states:

"The purpose of any order I make, as I suppose of any order that a judge ever makes, is to try to enable justice to be done. It seems to me that in the circumstances of the

"The question of whether the availability of an alternative remedy will preclude the granting of Norwich Pharmacal relief has not been conclusively answered.... In one Australian case, relief was even granted for the purposes of facilitating an additional cause of action.... This decision must be regarded as exceptionaland, to the extent that it may suggest that pre-trial discovery may assist the identification of all tortfeasors, it appears wrong in principle."

present case, justice demands that [the plaintiff] should be placed in a position to clear his name if the allegations made against him are without foundation ... For my part, I see no reason whatever why the Norwich Pharmacal principle should be regarded as inapplicable to assist a prospective plaintiff to obtain information and documents necessary for the bringing of an action of libel or malicious falsehood in circumstances such as exist in the present case."[34]

Concluding Remarks

An examination of the comparative authorities following Norwich Pharmacal reveals certain differeces of approach which are not entirely reconcilable. Perhaps the prime example of a departure from the established guideline is the case of *P. v. T. Ltd* Despite previous utterances and proclamations to the effects that a Norwich Pharmacal plaintiff must show a strong *prima facie* case before relief will be granted, the honourable Sir Richard Scott V-C chose to grant the relief in circumstances where it was not at all certain that a tort had been committed. It may, however, be open to argument that the Court was here drawing a distinction between a "tort" and a "wrong" which may not have necessarily fallen within the category of a tort. If this is in fact the case, it is arguable that the earlier line of authorities requiring a showing of a *strong prima facie* case were referring in that regard to the existence of a *strong prima facie* case of a "wrong" having been committed.

Another area where there is divergence of opinion in respect of the considerations to be taken into account is the availability or non - availability of an alternative avenue of redress. Having proved that in fact a wrong has been committed, in some circumstances the courts have required the plaintiff to further show that *without* Norwich Pharmacal relief the plaintiff would be unable to secure any recompense. For example, in *Roamer Watch Co S.A. and another v. African Textile Distributors* the court required the plaintiff to show *inter alia* that he had no other complete remedy. In this regard, however, the court intimated that another appropriate remedy might consist either of an adequate claim against a party who was known to him in respect of the same damages which he claimed to have suffered, or indeed the possibility of securing the relevant information from another source. In this particular case the application was refused on the basis that the applicant might have been able to get the necessary information from another source but had not sought to do so.

The question of whether the availability of an alternative remedy will preclude the granting of Norwich Pharmacal relief has not been conclusively answered. The 'interests of justice'consideration has been used alternatively as a sword and a shield in this connection, and the courts have therefore alternatively struggled with the concept from both perspectives. In consequence, the only guidance arising from the authorities appears to be that the interests of justice may justify the exercise of the court's discretion one way or another depending on the circumstances. In one Australian case,[35] relief was even granted for the purposes of facilitating an additional cause of action. The applicant in this case sought to identity the source of information which had been published by the "Herald" in circumstances where defamation proceedings against the newspaper for the same publication were already in being. The respondent resisted the application on the grounds *inter alia* that the applicant's interest in identifying the informants was not directed to seeking compensation but was merely in the nature of a punitive exercise. The Supreme Court of Victoria in granting the relief took into account the applicant's explanation as to her belief that if she succeeded in the current action for defamation against the Herald her reputation would not necessarily be vindicated. She wanted in addition that the source of the information be brought to justice. The Judge took into account the fact that he had no doubt that the applicant would ultimately issue proceedings against the source of the information. He also took into account the general consideration "that a person should not except for good cause be precluded from pursuing all tortfeasors involved in the tort complained of, in order to obtain the relief to which he is entitled."

This decision must be regarded as exceptional and, to the extent that it may suggest that pre-trial discovery may assist the identification of all tortfeasors, it appears wrong in principle. More generally, it is submitted, the guiding principle is as set out in the following statement from the judgment of Jenkinson J. in *Re Nylex Corporation Limited and Sabco Limited:*

> "the discretionary powers, the exercise of which the applicant seeks to invoke are, in my opinion, available in order to prevent injustice to a person which would be suffered if he were left in ignorance of the identity of one who has fallen under a legal liability to him, and not so that he may, if he chose, bring legal proceedings against every person who has fallen under such a liability." •

1. [1981] AC ??, at pp 1104-05
2. P v. T Ltd [1997] 4 ALL ER 200
3. Order 32, rule 3(1) and (2), as follows:
   "(1) Where an applicant, having made reasonable inquiries, is unable to ascertain the description of a person sufficiently for the purpose of commencing a proceeding in the Court against that person (in this Rule called "the person concerned") and it appears that some person has or is likely to have knowledge of facts, or has or is likely to have or has had or is likely to have had in his possession any document or thing, tending to assist in such ascertainment, the Court may make an order under paragraph (2).
   (2) The Court may order that the person, and in the case of a corporation, the corporation by an appropriate officer, shall: attend before the Court to be orally examined in relation to the description of the person concerned; make discovery to the applicant of all documents which are or have been in his or its possession relating to the description of the person concerned."
4. Order 4, rule 17 (in similar terms).
5. *Ng Au Yuen Ngar Pamela v. Ng Douglas and Others*, Court of Appeal, 1997-2 HKC 465.
6. *Sham John v. Eastweek Publisher Ltd.*, High Court, 1994-1 HKC 687.
7. *Mercedez-Benz AG v. Herbert Hynes Horst Leiduck*, Privy Council Appeal No. 18 of 1995.
8. Unreported, High Court (Chancery Division), 26 November 1993
9. [1997] IRLR 405
10. *See Hetherington Ltd. v. Carpenter*, Court of Appeal, Wellington [1997] 1 NZLR 695. See also *Taylor v Anderton*, Chancery Division, The Times, 21 October 1986; *Kerr v Haydon* [1981] 1 NZLR 449; *Roamer Watch Co. S.A. v African Textile Distributors*, Supreme Court of South Africa ó Witwatersrnd, Local Division [1980] RPC 457; and *Rice et al v. Johnston* et al, Prince Edward Island Supreme Court, 109 D.L.R. 3d277, January 25 1980.
11. See *Credit Suisse Fides Trust SA v. Cuoghi; Credit Suisse Trust Fides SA v. Amhurst Brown Colombotti*, Court of Appeal (Civil Division), 14 December 1995.
12. *1993-2 MLJ 497. See also Smith Kline and French Laboratories Ltd. v. Global Pharmaceutics Ltd* [1986] RPC 394; *Exchange Commerce Corporation Ltd. v. New Zealand News Ltd* [1987] 2 NZLR 160, 30 September 1987; Ex parte Matshini and Others [1986] FSR 454; *The Mercantile Group (Europe) AG v. Aiyela and Others* [1993] FSR 745; Kerr v. Haydon [1981] 1 NZLR 449; and *Nam Tai Management Services Ltd. & Anor v. Ng Yiu Ming*, 1989-2 HKC 479; 1989 HKC LEXIS 479, 02 October 1989.
13. [1998] EWCA 1156
14. *Arab Monetary Fund - v - Hashim* (No. 5) [1992] 2 AER 911
15. *Mercantile Group (Europe)* - v - Aiyela [1994] QB 366
16. [1991] FSR
17. Unreported, English High Court (Chancery Division), 8 October 1992
18. [1994] QB 366
19. Queen's Bench Division, 1984-H-1722
20. Industrial Property List, IP 28 of 1986
21. [1998] 1 All ER 251
22. [1990] 1 All ER 608
23. *Credit Suisse Fides Trust SA v. Cuoghi; Credit Suisse Fides Trust SA v. Amhurst Brown Colombotti*, Court of Appeal (Civil Division), (Transcript: John Larking), 14 December 1995.
24. See also, *Hong Kong Tramways Ltd. & Ors v. Realty Development Corp. Ltd. & Ors*, High Court, 1982 HKC 346; 1982 HKC LEXIS 217, 07 July 1982.
25. [1997] 1 NZLR 695
26. [1986] FSR 454
27. See for example: *British Steel Corporation v. Granada Television Ltd* [1981] AC 1096; *Sham John v. Eastweek Publishers Ltd.*, Court of Appeal, 1995-HKC 264; 1994-HKC LEXIS 774, 21 October 1994; *Handmade Films (Productions) Limited v. Express Newspapers Plc* [1986] FSR 463; *Camelot Group plc v. Centaur Communications Ltd.* [1998] 1 All ER 251; *The Broadcasting Corporation of New Zealand v. Alex Harvey Industries Ltd* [1980] 1 NZLR 163; *British Broadcasting v. Precord Ltd.*, Chancery Division (Transcript), 11 November 1991.
28. See for example, *X v Y & Others* [1988] 2 All ER 648; *Re Saskatchewan Foundation for the Environment Inc. and Minister of the Environment and Public Safety for Saskatchewan; Saskatchewan Power Corp. et al., Intervenors* (1992) 86 DLR 4th 577; *D v National Society for the Prevention of Cruelty to Children [1976] 2 All ER 993; and D v National Society for the Prevention of Cruelty to Children* [1928] AC 171.
29. (1982) 2 All ER, at 796
30. *Braddock v. Bevins* [1948] 1 K.B. 580.
31. [1991] FSR 1. See also for example *Grupo Torras S.A. & Another v Sheikh Fahad Mohammed Al-Sabah & Others*, Court of Appeal, Civil Division, 16 February 1994; *Sega Enterprises Ltd v Alca Electronics Ltd & Others* [1982] FSR 516 (CA); *Merchantile Group (Europe) AG v Aiyela & Others* [1994] QB 366 (CA); *Rank Film Distributors Ltd & Others v. Video Information Centre & Others* [1982] AC 380 (CA); and *La Chemise Lacoste and Crestknit Aywon Consolidated Ltd. v. The Controller General of Customs and the Importer of the Labels (the identity of whom is currently unknown to the plaintiff)*, Supreme Court of Victoria, Industrial Property List, IP 28 of 1986, Melbourne, 1986 VIC LEXIS 898; BC8600077.
32. Re *Nylex Corporation Ltd. and Fabco Ltd*, Federal Court of Australia, Victoria District Registry, General Division, No. VG 331 of 1986.
33. [1981] AC 1096 (HL)
34. See also: *Territory Ford Pty Ltd. & Leonard Sydney Michalowski*, Federal Court of Australia, Northern Territory District Registry, General Division, No. NTG 15 of 1981; *X Ltd. & Another v. Morgan-Grampian (Publishers) Ltd. & Others* [1991] 1 AC 1; *Re Corrs Pavey Whiting & Byrne & Collector of Customs for the State of Victoria & Alphapharm Pty Ltd.*, Federal Court of Australia, Victoria District Registry, General Division, No. VG6 of 1987; and *X Ltd. & Another v. Morgan-Grampian (Publishers) Ltd. & Others* [1991] 1 AC 1.
35. *The Guide Dog Ownersi and Friendsi Association and Phyllis M. Gration v. the Herald and Weekly Times Limited, Penelope DeBelle, Ann-Marie McCarthy and William Hitchings*, Supreme Court of Victoria, no. 2196 of 1988, 20 September 1988
36. No. VG 331 of 1986, Federal Court of Australia, Victoria District Registry, General Division, October 22 1986; See also *Ex Parte Matshini and Others*, Supreme Court of South Africa, [1986] FSR 545, 29 March 1985.

THE RIGHT TO BODILY INTEGRITY THE EVOLUTION OF A RIGHT TO A HEALTHY ENVIRONMENT

In the first part of a two-part article, ***Maria Colbert BL*** *considers the German constitutional authorities supporting the existence of a right to a healthy environment as an aspect of the established right to bodily integrity*

"Come, friendly bombs, and fall on Slough
It isn't fit for humans now"[1]

Introduction

Traditionally, Ireland has been an environmentally "rich" country, by contrast with Germany which is environmentally "poor". This is so because, although just over five times bigger than Ireland, Germany has twenty-three times the population. Ireland has an average of 51 inhabitants per square kilometre; in Germany the average is 248.[2] Ireland had a very delayed and limited industrial revolution and was predominantly agricultural until well into the 1950s. Germany has experienced all the advantages and disadvantages of industrial boom and decline. Because of its high density of population and small surface area, there is a strong environmental consciousness in Germany. Almost sixty per cent of Germans feel themselves to be represented by environmental organisations and it is clear that environmental awareness is as much motivated by economic and pragmatic as by moral considerations. Ireland has been slow to awaken to an awarenessof its environmental riches, and to the realisation that environmental decline almost inevitably leads to a decline in public health. While we are largely free of industries carrying severe risks to public health, our European neighbours are not, and it is well established that pollution has no regard for borders.

Over the last few decades, the necessity to maintain a healthy environment has become a necessity so widely recognised that environmental concerns have permeated most fields of law, and have in particular found voice in the field of human rights law. This article focuses on the development of the right to bodily integrity to protect individuals from environmental pollution which endangers human health, in other words the development of the right to a "clean" or "safe" or "healthy" environment as a facet of the right to bodily integrity. In particular, public opposition in Germany to the construction of nuclear reactors, noise pollution from increased air traffic and the storage of chemical weapons has resulted in a series of decisions of the German Constitutional Court which have considered the definition of the right to bodily integrity and the extent of the state's duty to protect that right. Part I of this article explores the evolution of the right to bodily integrity in those decisions. Part II, forthcoming, will examine parallel developments in Irish constitutional jurisprudence and under the European Convention on Human Rights and Fundamental Freedoms.

The German Constitution

The fundamental rights secured in the German Constitution (Grundgesetz - GG) symbolise a departure from a regime to which respect for life and bodily integrity were alien.[3] The Fathers of the Grundgesetz were supremely conscious of the flaws in the Weimar Constitution, which led to its ultimate vulnerability and failure at the hands of the National Socialists, and wished to avoid a similar fate for the fledgling Grundgesetz. No less were they desirous of rejecting the abuses of the Third Reich and guarding against any repetition of those atrocities. It was felt that a bill of fundamental rights, anchored fast in the new Grundgesetz, would attain these aims. The Grundgesetz entered into force on 8 May 1949.

The status of constitutional rights has been enhanced principally in consequence of the decisions of the German Constitutional Court (The Courtz.[4] From their inception, the

"Social change has led to the development by the Court of this extra layer of meaning for fundamental rights, in order to cope with changing social circumstances and novel constellations of problems. In the face of technological development, which detrimentally affects the environment, posing a threat to human health, the theory of an objective order of values formed by constitutional rights and the resultant duty to protect those rights is vital."

Court endeavoured to secure and strengthen the effective protection of constitutional rights. It has attempted to deal with the disparity between the historical context of the rights in the Grundgesetz and contemporary threats by orientating the interpretation of the GG around what it terms the "objective value judgements" embodied in the fundamental rights provisions of the GG. Historically intended as shields for the individual against state intrusion[5], from this classical role other roles of constitutional rights have evolved.[6] Firstly, they are subjective guarantees of individual liberty[7], placing a duty on the state. Simultaneously, they are "objective" basic norms.[8]
The theory that constitutional rights not only contain individual rights but also objective principles was approved in early decisions of the German Constitutional Court[9], which established that constitutional rights are primarily shields for the individual against state attack.[10] Contemporaneously, they embody an objective system of values which can address threats not emanating from the state. The legislature, executive and judiciary receive guidance and impetus from that value system, which represents a fundamental constitutional determination,[11] and whose influence radiates through the whole German legal system.[12] Arising out of that objective value system are state *Schutzpflichten,* i.e. state duties to protect certain rights, irrespective of whether an individual is in a position to enforce those rights.[13]

By contrast with the established horizontal enforcement of rights under the Irish Constitution, fundamental rights under the GG do not directly bind individuals as between each other. Instead, the development by the Court of a theory of constitutional rights as having, by virtue of their objective value content, a formative influence on the legal regulation of individual behaviour, and as a directional and guiding force for the exercise of the legislative, executive and judicial power, ensures that individual rights are not eroded by powerful societal forces.[14]

Social change has led to the development by the Court of this extra layer of meaning for fundamental rights, in order to cope with changing social circumstances and novel constellations of problems. In the face of technological development, which detrimentally affects the environment, posing a threat to human health, the theory of an objective order of values formed by constitutional rights and the resultant duty to protect those rights is vital. A State which tolerates and encourages industrial development in the interests of economic growth and the economic security of its citizens is all the more obliged to counteract the resultant dangers to their health.[15] Fundamental rights can no longer be effectively guaranteed by viewing them solely as shields against state action. Threats to fundamental rights emanate ever more seldom from the state,[16] but increasingly from private entities whose actions have the potential to pose still more of a threat than those of the state. Positive action must be taken by the state to realise fundamental rights guarantees. The state duty to protect fundamental rights not only embraces the duty to refrain from violating them, it is also under a duty to secure the existence of conditions under which they are vindicated.[17] The vindication of the fundamental rights of the individual is dependent on the existence of conditions which the individual alone cannot secure.[18] The source of the violation is increasingly immaterial, since the state is in any case under a duty to preserve the integrity of constitutional rights *per se.*[19]

Traditional constitutional rights theory must be understood as a product of its time. In the light of altered social conditions and new threats to fundamental rights, a corresponding reassessment of constitutional rights theory is necessary to protect the right to life and bodily integrity by inferring from the objective content those rights not only a prohibition on state encroachment, but also a state duty to protect life and bodily integrity from interference of powerful private entities.[20]

The Right to Bodily Integrity in the Grundgesetz

Background

According to Article 2 II 1 GG, everyone[21] has the right to bodily integrity, which is a "human right" in GG terminology, i.e. a right held without the prerequisite of citizenship.[22] Bodily integrity is a precondition for the exercise of any other fundamental rights and for the development of the human person, which is secured in other fundamental rights. If bodily integrity is violated or destroyed, all other fundamental rights become redundant. The right to life and bodily integrity is therefore not merely an expression of human dignity, but also the vital precondition for human dignity and all other fundamental rights.[23] It is important that the right to life and bodily integrity should not be seen as fossilised in the past. In a modern democratic state professing itself subject to the rule of law, the danger of the sort of abuses which were commonplace in the Nazi regime, such as state organised killings and compulsory sterilisation, has diminished. Instead, new threats have come to the fore, including threats to human health through environmental pollution caused by private citizens.[1]

Ambit of the Right to Bodily Integrity

The definition of the concept of "bodily integrity" has proven to be decisive in cases where that right is alleged to have been violated by environment. Commonly, exposure to pollution leads not to a sudden injury, but to a slow decline in physical and mental health, affecting the right to bodily integrity not at its core of certain protection, but rather at its less certain periphery. Violations of bodily integrity have been held by the Court to include the involuntary taking of a blood sample[25] or of bodily fluids.[26] In addition, it has been held that there is a threshold of acceptable behaviour: actions which are reasonable, socially acceptable and trivial in nature do not amount to interference with the right to bodily integrity.[27]

The bodily integrity protected in Art. 2 II 1 GG is the integrity of the human body in its biological-physical existence. Bodily integrity is not synonymous with "health", which is an altogether

narrower concept. On the other hand, the bodily integrity protected in Art. 2 II 1 GG is not as wide as the definition of health in the World Health Organisation charter, which asserts that "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The difficulties in arriving at a satisfactory definition were thrown into relief in the context of protection against noise pollution in the *Fluglärm-Urteil* (Airport Noise Decision) of the Court.[29] The Court came to the conclusion that noise pollution emanating from an airport had a detrimental effect on bodily integrity even on the narrowest interpretation of that concept. In this case, the Court left open the question whether the impairment of mental, spiritual and psychological health fell within the ambit of Art. 2 II 1 GG, but did evince a willingness to generously define the ambit of protection of Art. 2 II 1 GG.

"It is impossible to completely separate physical and psychological health; a purely physiological definition of health is therefore impossible...The Court has held that in order to come within the definition of bodily integrity, psychological effects must either have some physical repercussions, or be equivalent to interference with the body."

The Court has held in other cases that the use of the word "bodily"[30] in Art. 2 II 1 GG was not intended to imply that that Article only protected against physical impairment of the body.[31] The historical roots of Art. 2 II 1 GG indicate that its function is not to protect the human person only from physical threats, but also from psychological torture. Thus, the Court has concluded that Art. 2 II 1 GG also protects the psychological health of the human person.[32] This conclusion is supported by the consideration that it is impossible to completely separate physical and psychological health; a purely physiological definition of health is therefore impossible.[33] The inviolability of human dignity, anchored in Art. 1 I GG, indicates that constitutional protection of the human person extends to far more than the biological aspect of that person. [34]However, the Court has held that in order to come within the GG definition of bodily integrity, psychological effects must either have some physical repercussions, or be equivalent to interference with the body.[35]

Violations of the Right to Bodily Integrity

The right to bodily integrity is primarily a negative, "shield" right in the sense of a ban on state interference with the individual's right to bodily integrity, except insofar as that interference is authorised by statute. Accordingly, it confers a subjective entitlement on its holder to ward off violations.[36] Violations of bodily integrity may be by mechanical, other physical, or chemical means. This aspect of Art. 2 II 1 GG requires proof of unconstitutional behaviour, which can directly or indirectly be attributed to the state. Violations are not measured by their presumed effect on the healthy average citizen. Children, the sick and the old, who are more sensitive to threats to their health, also have the right to protection of their bodily integrity; the standard is therefore a subjective one.[37] Long usage, e.g. by means of long term environmental pollution, cannot legitimate violation.[38]

The right to bodily integrity is indeed a high-ranking right, but it does not have absolute priority over other rights.[39] It is limited insofar as, after careful balancing, this is held to be necessary either to protect the public interest or a private right of at least equal status. Limitations must be appropriate, necessary and proportional. [40] A just balance of conflicting rights must be achieved having regard to the particular circumstances of each case. Because of the wide variety of possible factual situations, it is difficult to formulate general propositions. However, it is settled that not every arbitrary public interest may be taken into account. In the course of the balancing exercise the goal and severity of the restriction of the right as well as the implications for the specific right proposed to be limited must be considered. [41] Rights typically colliding with the right to bodily integrity in the case of environmental threats include the freedom to choose and practise a profession, and property rights. The public interest which arises, for example, in the case of nuclear power plants, is the interest in a secure supply of energy, in economic growth, and in full employment. It should be borne in mind that the protection of certain of the personal rights of the individual is, simultaneously and in its accumulation, a protection of the public interest, since the public is composed of individuals. In particular the protection of the individual right to bodily integrity also secures a public interest in protecting public health, with consequent economic benefits for the State.

Duty to Protect (Schutzpflicht)

In practice, the state responsibility flowing from Art. 2 II 1 GG to protect the life and bodily integrity of the individual from dangers caused by others has, in recent times, become more important than the defence function of that article.[42] The point of departure is CourtE 39, 1, 41 (the first abortion decision), in which the Court deduced from the objective quality of Art. 2 II 1 GG a state duty to protect and foster life and bodily integrity, in particular from threats through the medium of the environment. Besides its importance as a shield right, Art. 2 II 1 GG contains an objective value judgement which is decisive for the ordering of the community.

The fulcrum of the guarantee is the duty of state organs to guard and foster the rights guaranteed in Art. 2 II 1 GG and, in particular, to protect them from illegal violation by others.[44] It is this duty which secures rights which are threatened in the relationship between citizens. Underlying the state duty of protection is the recognition that the values protected in fundamental rights provisions may be violated not only by the State, but also by private entities, and that the protection of fundamental human rights would be incomplete if not extended to protect against threats from non-state entities.[45]

The state duty of protection can be viewed as a form of compensation for the missing direct horizontal effect of fundamental rights.[46] The value judgment in Art. 2 II 1 GG from which the *Schutzpflicht* stems is not only decisive for the shaping of the legal system, but comes into play in the interpretation and application of the law in individual cases. Art. 2 II 1 GG contains a duty on the state to protect the bodily integrity of the individual against threats not only from other individuals (who are not expressly bound by fundamental

rights guarantees), but also against threats by natural forces or potential dangers situated outside the state, which reach the state through the environment.[48] The duty to protect arises not only in relation to individuals, but also in relation to the collectivity of all citizens.[49]

In the Chemical weapons case[50] the Court acknowledged a correlation between the duty to protect and the claim to be protected. If the duty to protect is not fulfilled, Art. 2 II 1 GG is violated and the affected citizens may take a court action.[51] However, the state has a wide discretion with regard to the action it takes on foot of its duty to protect, with the result that that duty can only be regarded as neglected if no protective measures whatever have been taken or if the measures taken are obviously unsuitable or completely inadequate. This must be proven conclusively by a complainant.[52]

Decisions of the Constitutional Court

The state duty to protect the bodily integrity of the individual emerged in cases concerning threats to human life and health arising from environmental conditions. The decisions dealt with the state duty to protect human life and health from the threat of abortion[53], terrorist attacks[54], nuclear dangers[55], traffic noise[56] airport noise[57], and from the dangers stemming from storage of chemical weapons.[58]

The point of departure is the first abortion decision of the Court, which derived from the right to life guaranteed in Art. 2 II 1 GG a state duty to preserve criminal sanctions for abortion, on the grounds that these were necessary in the interests of protecting the right to life of the unborn.[59] In the *Schleyer* kidnapping case[60], the Court again applied the duty of protection derived from Art. 2 II 1 GG, as the basis of an obligation on state organs to protect the life of a hostage, but not, notably, of an obligation to take specific measures. The Court held that the state duty to protect the right to life is all-embracing, obliging it to protect and promote that right, and above all, to shield it from threat by others.[61] Due to the irreversible nature of a violation of the right to life, a state duty of protection is especially important with regard to that right. Therefore, the state duty to protect bodily integrity may be slightly weaker, because violations are not of the same finality. It is worth remembering, however, that lesser incidents of environmental pollution, harmless when considered in geographical and temporal isolation, may prove in their accumulation to be as damaging to health and to bodily integrity as any single severe incident.

The Kalkar decision

The principles developed in these two cases were applied by the Court in a challenge mounted against the construction of a nuclear power plant with a "fast breeder" reactor. In the Kalkar decision, the state duty of protection was drawn on in considering whether §7 *Atomgesetz* was in accordance with the constitutional duty to protect life and bodily integrity from the dangers of nuclear power. The court held that it was, but that the legislature might be constitutionally obliged to review legislation which has become inadequate due to changing circumstances. However, in the instant case, the unavoidable uncertainty attached to the use of nuclear power meant that the state was entitled to reach whatever decision it regarded as pragmatic. The court felt that the flexible nature of the provision in question contributed to a dynamic protection of fundamental rights. The state could not be compelled to legislate so as to exclude any possibility of a threat to fundamental rights emanating from technical plants. Such a standard, according to the Court, would be beyond human cognitive capacity and would mean a virtual ban on any use of technology. The court felt that for the regulation of society one had to be content with reasonable estimations as to risk, and further, that some uncertainty was unavoidable and must be accepted as a "residual risk" which could not be eliminated.[62]

The Mülheim-Kärlich decision

In the Mülheim-Kärlich decision, the Court considered whether in the light of Art. 2 II 1 GG a particular administrative regulation concerning the participation of interested parties in the procedure for considering whether to grant a licence to a nuclear power plant was to be interpreted so that those materially affected could legally challenge a failure to comply with that regulation. It was held that the duty of protection contained in Art. 2 II 1 GG was activated not just against violations but also against threats to the values protected therein. In passing substantive and procedural measures governing the licensing of nuclear power plants, the state had fulfilled the duty imposed on it by Art. 2 II 1 GG to adopt measures protecting against the dangers stemming from the use of nuclear power. Should the licensing body ignore the procedural measures adopted by the state in fulfilment of its duty under Art. 2 II 1 GG, the question of whether there was a violation of fundamental rights would have to be considered.[63]

The Airport Noise decision

In the Airport Noise decision, the Court examined whether, despite a worsening situation, the legislature had unconstitutionally neglected to take precautionary measures to protect the health of those living in the vicinity of an increasingly busy airport from the effects of the airplane noise. The decisive issue was whether the legislature had fulfilled its duty to amend noise pollution legislation which, although originally sound, had become unconstitutional due to an increase in air traffic at a busy international airport.[64] After considering the measures which had already been taken, the court rejected as unfounded the assertion that the legislature had clearly breached its duty to amend protective legislation.

"It is worth remembering, however, that lesser incidents of environmental pollution, harmless when considered in geographical and temporal isolation, may prove in their accumulation to be as damaging to health and to bodily integrity as any single severe incident."

The Chemical Weapons decision

In the Chemical Weapons case, the Court came to the conclusion that the storage of chemical weapons in the Federal Republic of Germany (in connection with its membership of NATO) was not a violation of Art. 2 II 1 GG. In order to establish that the duty of protection had been breached, the complainant had to conclusively

prove that the state had either not adopted any precautionary measures, or that the measures adopted were completely inappropriate or absolutely insufficient.[65] Further, the court held that the state had a broad discretion in deciding what measures should be taken in fulfilment of its duty and that the exercise of that discretion could be reviewed by the judiciary only to a limited extent.[66]

The Wismut Decision[67]

In December 1999, the Court reaffirmed and elaborated on its previous decisions concerning the state duty of protection. It considered a challenge to the Act of Reunification of Germany, on the basis of which a former East German statute governing the safe use of radioactive materials was ordered to remain in force. The East German statute provided for far lower standards of safety than those applicable in Western Germany. The complainants, who lived near an uranium mine, argued that the East German law was in violation of the GG, in particular of their rights to life and bodily integrity under Art. 2 II 1 GG .The Court held that the state owed a duty to protect the individual against harm to bodily integrity, but that the state had a wide discretion in assessing, balancing and responding to dangers. The Court could only find that a violation of the state duty had occurred where the state had either not taken any action, or the measures taken by it were utterly unsuitable or totally inadequate to protect the right in question. Determining how the state duty of protection was to be realised was a complex process and the Court would intervene only in limited circumstances. Applying those standards, the Court held that the impugned measures did not violate the right to life and bodily integrity. The radiation safety standards set by the legislation were not a minimum standard and were more stringent than either the applicable standards in comparable western industrial countries or international recommendations and regulations. While these facts were not conclusive, they were persuasive evidence of the adequacy of the East German legislation. Moreover, the German government was not in violation of its duty to protect the right to bodily integrity in failing to establish a procedure allowing the public to participate in decisions involving the mine. The Court had not conclusively decided whether the state was compelled to take such measures. In the instant case, the state had inherited responsibility for the mine as an extant danger to life and bodily integrity and was involved in containing and removing that danger. The Court held that the situation was not comparable to a decision giving permission for a new nuclear installation, with which the public might need to be involved.

"The Court could only find that a violation of the state duty had occurred where the state had either not taken any action, or the measures taken by it were utterly unsuitable or totally inadequate to protect the right in question"

The StateDuty of Protection

Thus the Court has held that the fact and manner of fulfilment of the state duty of protection is dependent on a multiplicity of factors, including the evaluation of the factual circumstances, of the aims of measures undertaken by the state and the importance of those aims, and of the appropriateness of the possible measures and steps. Hence the broad scope allowed to the state, whose organs decide what measures are suitable and necessary to ensure effective protection.[68] Competing private and public interests may be taken into consideration by the state in arriving at its decision.[69] Rarely will the choice of measure available to the state be distilled down, leaving only one avenue open to it, but this may occur if a fundamental right can be effectively protected in only one way.[70] The adoption of statutory prohibitions alone, though necessary, will not suffice to fulfil the duty of protection. Rather the state is required to take positive steps, in the form, for example, of procedural safeguards[71] or of tort law provisions. In particular, the existence of an opportunity for individuals to participate in the licensing process for nuclear power plants was seen by the Court as essential in order to ensure that all arguments for the protection of the values enshrined in Art. 2 II 1 GG were heard before a decision is arrived at, hence the state duty to create that opportunity.[72] The high status of the right to bodily integrity and its symbiotic relationship with the right to life places a heavy duty on the state to take any measures necessary to protect it.[73]

The margin of discretion allowed to the state in fulfilling its duty to protect the right to bodily integrity is in marked contrast to the defence mode of that right, where there is a strict requirement for a formal legal basis for state interference.

Conclusion

These decisions illustrate the development by the German Consitutuinal Court of the right to bodily integrity from its historical origins to encompass novel threats to human health through the medium of the environment. Equally, they illustrate the problems for potential plaintiffs: the difficulty of establishing a causal connection between pollution and danger to health and the temporal and geographical distances which may be involved. Public or private interests may mitigate against an effective protection of health and bodily integrity. It is particularly pertinent that the state duty to protect bodily integrity from attack by individuals is seen as encompassing both the duty to reform procedural law and the law of evidence[74], as well as a state obligation to review the law where new developments have impaired its effectiveness in protecting bodily integrity.

Most eloquent of the high standard necessary to prove that the state has violated its duty and the wide discretion afforded to it in carrying out that duty is the observation that in none of the cases involving damage to health through the environment, in which these principles were developed by the Constitutional Court, did the plaintiff actually succeed. Indeed, in *Wismut*, the Court appears to retrench on the principles established by it in previous cases involving environmental damage, leading to the suspicion that political pragmatism has permeated its reasoning and that the right to a healthy environment in Germany may be more illusion than reality. •

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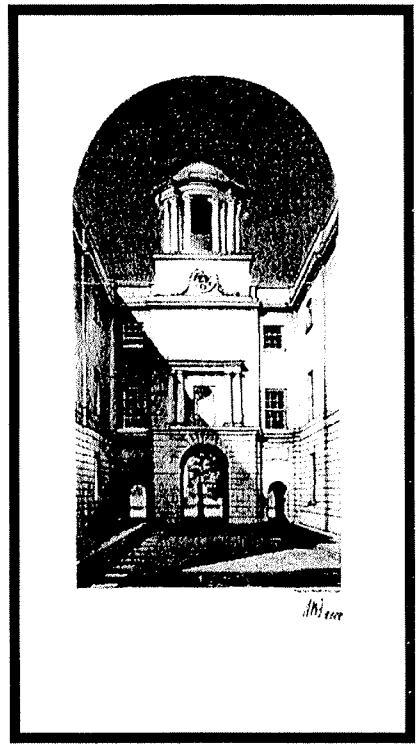
KING'S INNS NEWS

KING'S INNS PRINT SERIES

The fourth print in the King's Inns limited edition series is now available. It depicts the courtyard in King's Inns and has to be seen in full colour (copies on display in the Distillery Building and in the Barristers' Restaurant in the Four Courts). Stephen Woulfe Flanagan has taken to heart Gandon's liking for moderation in decoration and at the same time has captured his magnificent architecture by playing with light, colour and the other tools of a master draughtsman. This particular print is proving to be very popular and, without much effort, we have already sold 150 copies. The cost of the print is IR£115. Further enquiries to David Curran (01-874 4840).

This architectural series is shaping up and as predicted each print is 'wearing' well. There are still some copies of print no 2 (The Library, IR£95) and print no 3 (The Round Hall, IR£95) available at their original prices and we urge you to buy them now as we will be increasing the price of these two prints to IR£150 later this year.



MOOTING DEBATING

The annual moot between King's Inns and Queen's University Belfast took place in November. This year King's Inns again came away with flying colours having won the competition for the second year running. Marion Berry represent the Inns.

Four teams representing King's Inns went to Glasgow for the World Debating Championships in late December. All teams were well ranked; one of the teams, comprising Caoilfhionn Gallagher and Ian Walsh, came third in the overall result.

Congratulations to all who were involved.

The mooters are now preparing for their annual visit to the Vienna Moot and are being coached by Ercus Stewart SC.

DEGREE AND DIPLOMA COURSES AT KING'S INNS

We are presently receiving applications for places on the King's Inns courses. Applications should be lodged by 31 March. With effect from 2002 entry to the degree course will only be by competitive examination to be held annually in the month of August. Application forms are available from King's Inns (01 874 4840)

LSDSI INAUGURAL

The inaugural meeting of the 171st session of the Law Students Debating Society of Ireland will take place on Thursday 8 February at 7.30p.m. at the King's Inns preceded by a reception at 6.45p.m. The topic for discussion will be 'Treatment of Offenders - Reality and Responsibility'. The evening will be chaired by the Chief Justice and the guest speakers will be Mr John Lonergan, Governor of Mountjoy Prison, Chief Supt. Tom Monaghan; and Mr Tom O'Malley, lecturer in law at NUI Galway. All are welcome.

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