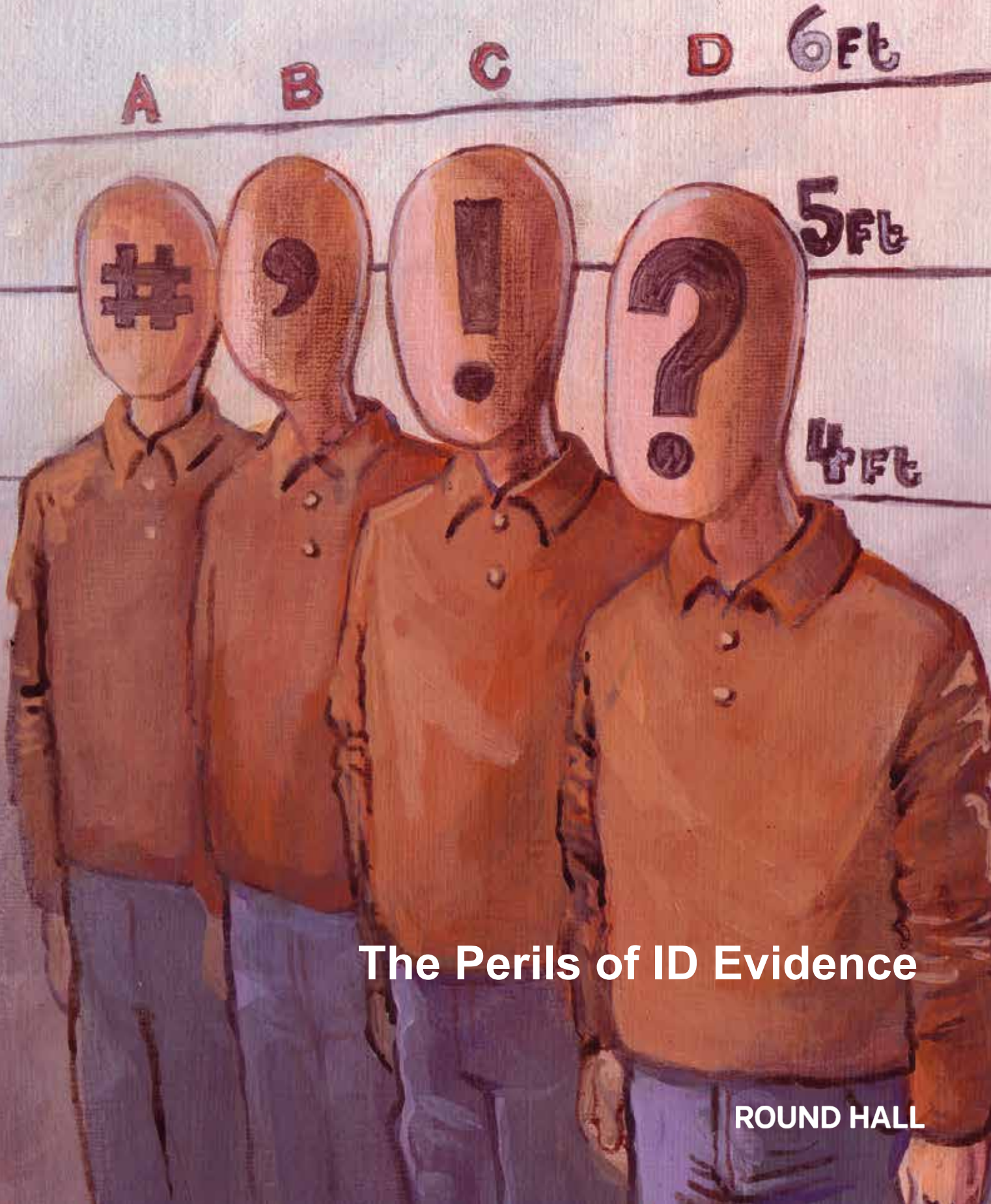


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*Journal of the Bar of Ireland • Volume 19 • Issue 4 • July 2014*



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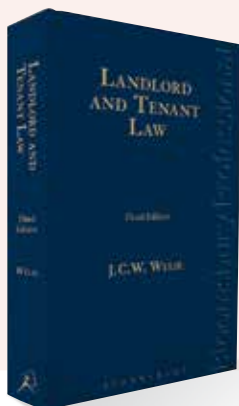
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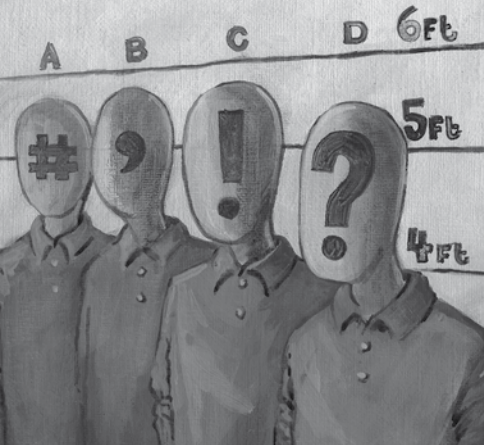
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# The Bar Review

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ROUND HALL



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The Bar Review July 2014

# Killing While Under the Influence

MARTIN DURACK BL

An eminent Jurist<sup>1</sup> recently remarked that the defence of intoxication in murder trials is surprisingly rarely relied upon, “*even though; alcohol indulgence is our national pastime*”. That remark was a catalyst for this consideration of the defence of intoxication. Can the State secure a conviction for murder, in circumstances where the accused was drunk, at the time of the killing? When might an accused person successfully raise the defence? Answers to these questions are very much related to the onus that the State must discharge, in order to secure convictions and that onus is that at the time of death, it was the intention of the accused to kill, or cause serious injury.

In a legal context, the concept of intention has posed great difficulty. The definition as framed in Irish law ascribes to the accused person specific intention, where the death of the deceased was a natural and probable consequence of the accused’s actions. This however may not be reflective of the actuality of the cognitive process involved, especially where alcohol has been consumed, a concern not lost on the Law Reform Commission when as far back as 1995; when they noted the psychological consequences that ;

“Alcohol brings about a diminution of the repressive mechanisms, allowing the instinctual to occur in behaviour. These repressive mechanisms are of emotional, not intellectual, origin. In simple terms, the emotional brakes which act as the restraint on all of us are released, and inhibited or self-controlled desires are converted into actions.”<sup>2</sup>

If for example, current legal limits<sup>3</sup> for driving, are considered as being sufficient to impair one’s judgment, then the effect of having consumed large quantities of alcohol must be rightly a factor, to be considered, and weighted by a jury in establishing whether an individual has formed the specific intention, to commit the crime of murder.

## The Legislature and Intention

The Common Law recognised two manifestations of intention, actual, and oblique. In the former, a train of events are put in place by the accused person, in order to bring about a desired outcome. In the latter; whilst the outcome that was brought about, by the accused’s actions was not the actual desired consequence, it was nonetheless a foreseeable consequence. Both these situations are covered under Irish Criminal Law; <sup>4</sup>

“Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.”

It is to be noted firstly that the definition of murder is couched in the negative. Secondly, that a person commits an unlawful killing in circumstances, where he or she is deemed to have intended the natural and probable consequences of his/her actions, but that presumption can be rebutted.

Thus, even if the intention was only to seriously injure, the required mental element, for intention to be deemed present is nevertheless made out, in the event of the assaulted person dying, whether that deceased person, was the desired victim or not;

As the Law Reform Commission report noted;

“the term ‘serious injury’ is left undefined. It merely has to be shown that the defendant intended to cause some ‘serious injury’; it is not necessary to show that the defendant intended or foresaw a particular or specific consequence, such as a loss of mobility”<sup>5</sup>

## Voluntary Intoxication and Specific Intention

Intention is further categorised as either being Specific, or Basic; a distinction it would seem not based on logic, but on experience<sup>6</sup>. Hardiman J, in *DPP v Alan Murphy*<sup>7</sup> posits that the distinction was made primarily by the English judiciary on the basis that crimes of; “Specific Intent” may have resulted, in the death penalty for the convicted person, and an allowance was made due to the presence of alcohol to negate this requisite culpability element.

The meaning of “Specific Intent” had been clarified by Lord Birkenhead in the 1920 case of *DPP v Beard*<sup>8</sup> when the accused person, whilst intoxicated, suffocated a 13 year old girl, while raping her;

“if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or do grievous bodily harm... he cannot be convicted of murder. But nevertheless, unlawful homicide has been committed by the accused... and that is manslaughter ...”

1 Comment by Tom O’Malley BL to author on rest stop on M6 July 2013

2 Law Reform Commission Paper 1995

3 Driving in a public place where the concentration of alcohol in the blood exceeds 50 milligram’s per 100 millilitres.

4 Section 4 Criminal Justice Act of 1964

5 Consultation Paper on Homicide: the Mental Element in Murder LRC – CP 17 – 2001

6 The famous words of Oliver Wendell Holmes

7 *DPP v Alan Murphy* 87/01, CCA 8 July 2003

8 *DPP v Beard*, 1920

Under this guidance, intoxication is not a relevant factor for juries to consider, except in those cases, where the effects of alcohol, has been so extreme so as to negate the accused's capacity to form the specific intent.

In the *DPP v Majewski*,<sup>9</sup> the accused, having taken drugs and alcohol, assaulted a publican and three policemen. The House of Lords held that, if the offence charged is one, where the culpability element is satisfied by "Basic Intent"<sup>10</sup>, as here, then the accused may be convicted, even though due to his intoxication, he did not have the *mens rea* normally required, and even though he was in a state of automatism.

Lord Elwyn-Jones LC put it thus;

"...the 'fault' element is satisfied by the defendant's recklessness in becoming intoxicated in the first place, this recklessness being sufficient to substitute for the *mens rea* that the prosecution would otherwise have to prove."

## Drunken Intention

Whilst a drunken intention is still of course intention, as per Lord Denning famous dictum in, *AG v Gallagher*;<sup>11</sup>

"If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on his self-induced drunkenness as a defence to a charge of murder, not even as reducing it to manslaughter."

This was again restated in *R v Sheehan and Moore*<sup>12</sup>, that "*a drunken intent is nevertheless intent*". Sheehan, assisted by Moore, had ignited petrol he had thrown over a man, whom they had blamed for a minor theft burning him to death.

Here it was held in allowing the appeal; the question for the jury was not, one of capacity as to whether the Appellants were capable of forming the necessary intention, but whether they had in fact done so, with the onus for proving intent resting on the prosecution.

## Levels of Intoxication?

These developments in England, and in other Common Law jurisdictions<sup>13</sup> has seen "capacity" language as employed in *Beard*, fall out of favour, with intoxication simply being a factor jurors can consider in assessing; whether the accused had the required "specific intention" .

The level of intoxication necessary was considered in *R v Stubbs*<sup>14</sup> where it was stated that it needs to be "*very extreme*". The result then in successfully raising the defence, or more accurately, the partial defence of intoxication is that the offence of murder will not be made out, with the defence

of intoxication reducing the offence to the basic intent crime of manslaughter.

How then should a judge charge a jury on the question of intention, in circumstance where the consumption of alcohol is raised by the defence? Lord Lane in *R v Sheehan*<sup>15</sup> held as follows;

"A drunken intent is nevertheless an intent. Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel satisfied beyond reasonable doubt that at the material time the defendant had the requisite intent."

## Intention and Capacity

In the *DPP v Mark Davis*<sup>16</sup> the Appellant had consumed probably in excess of fourteen pints of beer and some vodka, prior to stabbing Stephen Brady, with a witness stating "*He seemed to be out of his head*".

The conviction was appealed to the Supreme Court. The Appeal was grounded on a procedural unfairness point and one of substantive unfairness. The first ground was that the function of the jury was usurped by the trial judge. Costello J, when giving his direction, said to the foreman; "*you can sign the issue paper now and the Constitution protects that right*".

Senior Counsel for the accused made submissions on the substantive failure of the judge to take cognisance of the level of alcohol consumed, when charging the jury. In a *voir dire* during the trial Costello J, indicated;

"I will have to tell the jury that they are entitled to come to the view that Mr Davis had a lot of drink taken, that they are entitled to come to the view that he might have been drunk in the social sense of the word, but they are not entitled to come to the view that the evidence in the case would justify them holding as a reasonable jury, that he could not have had an intention of causing serious harm in view of the plain fact of his own statements made later as to what his intention was in picking up the knife."

Counsel's submission was that Section 4 of the Criminal Justice Act, 1964, requires "Specific Intent", namely intention to kill, or to cause serious injury to some person. Counsel also cited *R. v Pardage*<sup>17</sup> as authority for the principle that, with drunkenness, it is not a question of the capacity of the accused to form the intention, but rather whether that intent was actually formed. The case of *R. v Garlick*<sup>18</sup> was also cited where the English Court of Appeal held that if the jury concludes that the accused, because of his drunkenness, did not have had the necessary intention, then the offence of murder is not made out;

"Well, was this man in such a state as to be incapable

9 *DPP v Majewski* [1977] AC

10 *Majewski* was followed in Ireland in *DPP v O'Reilly*

11 *A-G for N. Ireland v Gallagher* [1963] AC 349.

12 [1975] 1 WLR 739

13 See 26 below

14 88 Cr App R 53

15 Opp Cit at 8 above

16 *The People v. Mark Davis* [S.C. No. 15 of 1991]

17 *R v Pardage* [1975] Crim LR 575.

18 *R v Garlick* (1980)

of forming the intention? And they would answer that in the way that I have indicated, necessarily of course, he was not, and on that basis may very well have convicted, and it would be on a false basis.

For that reason we have come to the conclusion that this conviction for murder must be quashed and in its place will be substituted a conviction for manslaughter.”

In *Davis*, Costello J had found that there was no evidence of lack of capacity to form the intention, so the defence of intoxication should therefore not go to the jury. Counsel for the defence argued that this is not the correct position at law as voluntary intoxication is a factor that should be considered by the jury, with regard to whether the accused had, or had not formed the requisite specific intention at the time.

Unfortunately, these arguments were not considered by the Supreme Court as the Court found that any comment on this ground may be prejudicial to the retrial, which he had ordered, on foot of the first point.

### Intoxication and Incapacity

The capacity of the accused to form the requisite intention was considered in the older case of *The People v. Manning*<sup>19</sup>. The accused, when charged with the murder of Sister Kathleen Cooper, a 65 year old employee of Barrington’s Hospital, Limerick, said; “I will tell you all, drink was the cause of it.” The trial judge, Murnaghan J had directed the jury as follows;

“A man is presumed in law to intend the consequences of his action. That presumption can be rebutted in the case of a man who is drunk, if it is shown that his mind has been so affected by drink as to be incapable of knowing that what he was doing was likely to cause serious injury... Now the problem... is this as I see it: you have to ask yourselves is your view of the facts, on the evidence, such that the accused was so drunk that he was incapable of knowing that when he put his hand in the victim’s mouth, or stuffed her mouth with grass, that at that stage he was incapable of knowing that what he was doing was likely to cause serious injury?”<sup>20</sup>

The Court of Criminal Appeal, upheld both the content of the charge and the sentence<sup>21</sup> with, Maguire; J. delivering the judgment of the Court;

“It is complained that the trial Judge failed to instruct the jury correctly on the law as to murder and manslaughter on the facts of the case, particularly with regard to the effects of drink and insanity and the defences made on these grounds. In the opinion of this Court the Judge did correctly and sufficiently direct the jury on both these matters. He put the

possible effects of drink fairly before the jury. He explained the law on drunkenness as a defence fully.”

In light of the developments in the English case law subsequently, it is submitted that the question of incapacity should not be put to the jury as being, synonymous with the absence of intention. Rather, the intoxication of the accused should go to the jury as a factor for their consideration, in light of all the evidence, as to whether the accused had formed the specific intention, or not. The Court of Criminal Appeal had a subsequent opportunity of overruling, or indeed distinguishing *Manning* on this point, but did not do so in *DPP v. O’Reilly*<sup>22</sup>. Here the accused, a soldier, was convicted of the manslaughter of a baby, when out of his mind on alcohol at the time of the killing.

This appeal was not taken on the basis that alcohol consumption was a defence to the manslaughter conviction but rather that the effects of the alcohol consumed caused the appellant’s automatism and therefore he should be acquitted of the murder charge.

The learned trial judge’s charge was approved by the Court. The trial judge had left a number of options open to the jury from acquittal of murder and conviction of manslaughter, to a full acquittal and a consideration of the defence of automatism, having to be free standing from the defence of voluntary consumption of alcohol;

“The situation about drink is that intoxication is not a defence in the criminal law. It is incapable of amounting to a defence but it is material to the question of intent. ... Intoxication could prevent the accused person having the intent that is necessary to sustain the crime of murder. If he didn’t have that intent, you would be concerned with the crime of manslaughter”

It is to be noted the approved charge does not contain the language of capacity, which is consistent with the common-law developments since *Beard*.

### Involuntary Intoxication and Intention

The defence of Involuntary Intoxication was raised in the *DPP v. Alan Murphy*<sup>23</sup>. The accused was found to have set fire to a dwelling house, the property of Eileen Coyne, which was occupied by herself, and two of her sisters, causing their deaths.

The Court of Criminal Appeal was asked to consider the involuntary nature of the intoxication, as the accused may have been drugged, at the time having taken medication for pain relief in addition to alcohol. Hardiman J (paraphrasing the charge by the trial judge) said as follows;

“The law on this matter ... seems to be that if one is so intoxicated, involuntarily or innocently, to the extent that one doesn’t know what one is doing and one has not control over one’s actions, that can be used as a defence ... So the test is, does a person

19 *The People v Michael Manning* [1955] 89 I.L.T.R 155

20 Note this definition and Section 4 1960 Criminal Justice Act

21 Michael Manning, a 25-year from Limerick, on the 20<sup>th</sup> of April 1954 was the last person executed in the Republic of Ireland.

22 *DPP v Reilly* 2005 I.R

23 *DPP v Alan Murphy* CCA 8 July 2003

who is innocently intoxicated know what he is doing or have control over his acts? Then he cannot avail of this defence notwithstanding that he is so intoxicated.”

This test clearly uses the language of capacity, this would not seem to be consistent with the approach in cases of voluntary intoxication, being whether the accused had formed the requisite intention, or not. As the accused is innocently intoxicated, one presumes that this test, takes cognisance of the fact that the accused person, may not know the effect that alcohol consumption, or other intoxicant would have on him. Hardiman J. concluded as follows;

“It does not appear to us that the fundamental moral quality of the applicant’s actions is altered by anything less than the establishment of the propositions that the defendant is intoxicated to the degree that he did not know what he was doing or that he had no control over his actions. The jury has firmly rejected the proposition that he was in either of these states as a result of innocence or involuntary intoxication”

### Alcoholism and Diminished Responsibility

A question that can arise in the context of involuntary intoxication is the difficulty intoxication poses for an accused who is addicted to alcohol. One might surmise that the involuntary element would be satisfied, although this is by no means certain, as Hardiman J. equates involuntary intoxication, with innocent intoxication, which would indicate that the accused was unaware of the consequences of the consumption of the intoxicant. The involuntary element may be satisfied, in “*that he had no control over his actions*” but a question may arise as to whether he had control over his actions in arriving at his intoxicated state

Guidance from the English case law in relation to diminished responsibility of the alcoholic may be instructive. Watkins LJ held in *Tandy v R*<sup>24</sup>, where the Appellant had strangled her 11 year old daughter, having consumed nearly a bottle of vodka;

“If the alcoholism has reached the level at which her brain had been injured by the repeated insult from intoxicants so that there was gross impairment of her judgment and emotional responses, then the defence of diminished responsibility was available to her ....”

The English Court of Appeal held that as the Appellant had not resisted the first drink of the day, which she took voluntarily, then each successive drink was deemed voluntary and thus the defence of diminished responsibility was not open to her and the murder conviction was upheld.

In Ireland, under the Criminal Law Insanity Act 2006, the partial defence of diminished responsibility is recognised;

“Where a person is tried for murder ... (a) did the act alleged,

- (b) was at the time suffering from a mental disorder, and
- (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act.”

The fact that the accused is intoxicated at the time is excluded as a mental disorder under Section (1). Thus, it would seem that, even if the accused can show that the alcohol, as consumed by him was an involuntary act, having been taken due to his or her addiction, the defence of diminished responsibility is not available to him in Irish law.

An accused person may well say; “I was so drunk I don’t know what happened, I blacked out”. It is submitted that assertions as to the absence of recollection and of memory of events are not sufficient to negate the presence, or absence of intention, but would be a factor that a jury may consider in considering the overall evidence of intoxication.

### Canadian Approach

It may be useful to consider the approach taken by the Canadian Supreme Court, in *R v Robinson*,<sup>25</sup> where the *Beard* criteria was overruled, as not being compatible with the Canadian Charter of Fundamental Freedoms;<sup>26</sup>

“I am of the view that before a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that its effect *might* have impaired the accused’s foresight of consequences sufficiently to raise a reasonable doubt. Once a judge is satisfied that this threshold is met, he or she must then make it clear to the jury that the issue before them is whether the Crown has satisfied them beyond a reasonable doubt that the accused had the requisite intent. In the case of murder the issue is whether the accused intended to kill or cause bodily harm with the foresight that the likely consequence was death.”

The issue for consideration, is the presence or absence of subjective foresight, as to the consequences of the accused’s actions. The judge, in his charge, if he is satisfied on the evidence, that alcohol consumption, may have impaired that foresight, must then clearly set out to the jury, their role in determining that the prosecution must satisfy them beyond reasonable doubt that the accused had the specific intention.

In relation to the definition of murder as set out in Section 4 of the Irish Criminal Justice Act 1960, it could of course be contended that it is implicit, that it is a sober man that is presumed to have intended the natural and probable consequences of his actions. But the reverse could also be claimed, that a man is presumed to have intended the natural and probable consequences of his actions, and one way to rebut this presumption is evidence of intoxication, from

25 *R v Robinson* at Paragraph 48 Lamer C.J. Canadian Supreme Court 1996-03-21

26 Article 7

24 (1989) CA

which the jury, may infer the absence of intention, as per, the judges charge in *O'Reilly*.

## Conclusion

In Ireland, responsibility for being voluntary intoxicated, is seen to be very much an individual choice. Irish legislation and jurisprudence does not excuse or make allowance for those who consume too much alcohol, in either tolerating the diminishing of their mental capacity, or in negating responsibility for their actions.

An accused person will have a partial defence to murder, if he can satisfy a jury that he did not have the specific intention to kill. The jury can reach this conclusion by inferring from all the evidence, including the consumption of

alcohol that he did not have that specific intention. Once the defence of intoxication is raised, this inference would more likely be drawn in circumstances where the accused lacked capacity, at the time due to his drunkenness. However, the question is strictly; did he have the requisite intention and the absence, or presence of that intention is inferred, by the jury, from a consideration of all the facts including, the evidence of intoxication. If due to the voluntary consumption of alcohol, the jury finds the absence of this specific intention, then the accused can be convicted of manslaughter. If the accused is innocently intoxicated, the jury may therefore find the absence of specific intention and then, he may be acquitted of murder simpliciter. ■

# Mediation Northside marks its Tenth Anniversary



On the 12<sup>th</sup> May, Mediation Northside celebrated its 10<sup>th</sup> Anniversary with guest speaker, Eamon Gilmore.

Mediation Northside was established by the Northside Community Law Centre in 2004 to address the need for a free and accessible conflict resolution service in the community beyond the traditional field of family law. The service offers mediation on community issues such as boundary disputes and antisocial behaviour and has expanded over the years to include other types of mediation such as elder mediation, sibling disputes and workplace disputes, accepting referrals

from various bodies including the Guards, the Courts Service and Local Authorities.

The demand for the service has grown over the years and since 2004, Mediation Northside has handled 1,425 referrals with 78% of those progressing to mediation. Of that number, approximately 77% result in a successfully mediated agreement. This free service is provided by a panel of 150 fully trained Mediators who have contributed over 7,000 hours of their time since the service commenced. ■



*Left to Right: Rose Wall (Director), Eamon Gilmore, Valerie Gaughbran (Manager)*



# Barristers from North and South Attend Historic Meeting

The Bar Councils of Northern Ireland and Ireland met in formal session in Belfast on 20<sup>th</sup> June at the Royal Courts of Justice. This is the first time Belfast has hosted a joint meeting of the two Bars and follows the reinstatement of the forum last year in Dublin after a gap of over 90 years since it ceased in 1921.

President of the Supreme Court of the United Kingdom, Lord Neuberger delivered the keynote lecture to members of

the legal profession in Northern Ireland and abroad. Among those in attendance were Derek Wood QC, Director of Advocacy at Middle Temple, London, Maura McGowan QC former Chair of the Bar England and Wales, Bill Robinson, former President of the American Bar Association and Jeremy Gauntlett SC, former Chair of the Bar in South Africa. ■



*Mark Mulholland QC chairman of the Northern Ireland Bar of Northern Ireland and David Nolan SC, chairman of the Bar of Ireland talking to Lord Neuberger following his address at the historic meeting.*

## SAVE THE DATES

### PLANNING AND ENVIRONMENTAL LAW CONFERENCE 2014

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**Venue:** Royal College of Physician of Ireland, No.6 Kildare Street, Dublin 2

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# Some Reflections on the Legal Profession

## Address to the Bars of Ireland and Northern Ireland in Belfast, June 2014

LORD NEUBERGER\*

### Introduction<sup>1</sup>

This is a time of extraordinary change in the legal world. As the English and Welsh Solicitors Regulation Authority (the SRA) described it in recently,

‘The legal services sector is in a time of unprecedented change with consumer demands, technology and the regulatory system fundamentally changing the ways that legal services are delivered.’<sup>2</sup>

That is clearly as true in Northern Ireland and the Irish Republic as well. Lawyers are advising, advocating, judging, writing, teaching and researching, training and learning against that backdrop, and we must do our best to cope with and anticipate these changes. Our experiences of the law and practice have changed over the past twenty years and are likely to be even more different twenty years from now.

When I started at the Bar, for instance, there was no United Kingdom Supreme Court, and court proceedings could not be photographed never mind televised. All we had was court artists who had to draw outside court based on their notes made in court, as drawing in court was strictly forbidden. Indeed, that rather archaic rule may still be in place, although it makes little sense in an age when people may tweet and text from court. So, unlike judges in the past, judges today are far less likely to enforce such rules. This sensible and pragmatic, if perhaps less principled, attitude is, I believe, characteristic of modern British judges.

Judges today are rather different from our predecessors – or so we like to think. That is perhaps in part because we are more likely to be observed, and commented on. That is how it should be: open justice is vital in a healthy democratic society, and what open justice requires must in part be governed by the practical realities, including the technological capabilities, of the contemporary life. For instance, in the United Kingdom, not only do we have a Supreme Court because of the importance of the perception of separation of powers, but its proceedings can be watched by everyone

on Sky. We read out what we hope is a reasonably accessible summary of our decisions onto you-tube, and we have a hard copy hand-out for journalists and the public explaining our decisions a little more fully. And now you can also watch the Court of Appeal in London on TV.

Televising proceedings, and permitting tweeting in court (not by the judge) is just one of many ways in which the present situation differs from that which existed when I embarked on my legal training nearly forty years ago. In this paper, I will discuss some of the principal features of change in the legal world, and how that world might develop in the future.

### The Rule of Law

It is right to begin by reminding ourselves that legal practice has an important context not shared by other occupations. Lawyers have a special position in society not because they are loved or because they are particularly admirable people, but because they are responsible for the rule of law. That is true whether they administer law as judges, advise on law as legal advisers or act as advocates in courts and tribunals, whether independent, or employed. The rule of law is fundamental to a modern democratic society. The rule of law requires laws which satisfy certain criteria: they must be clear and accessible, they must protect society, and they must recognise the fundamental rights of individuals against each other and against the state. However, such laws are valueless unless they are also a practical reality, and therefore the rule of law also requires that all citizens have access to justice, and by that I mean effective access to competent legal advice and effective access to competent legal representation.

The special function of lawyers carries with it special responsibilities, which we should never forget. A lawyer has a duty to society, most obviously in the form of a duty to the court in connection with litigation, and that duty, whether or not to the court, is of a greater order than the duty owed by other professionals in the commercial or quasi-commercial world. As the great Lord Bingham put it, a lawyer has to be capable of being trusted to the ends of the earth.<sup>3</sup>

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\* President of the Supreme Court of the United Kingdom.

1 I wish to thank John Sorabji and Zahler Bryan for their help in preparing this lecture.

2 SRA, *Training For Tomorrow – Ensuring the lawyers of today have the skills of tomorrow*, (October 2013) at 4.

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3 *Bolton v The Law Society* [1994] 1 WLR 512 at 519.

## Duties

The fact that lawyers have such a duty carries with it privileges and responsibilities. Thus, the fact that citizens have a fundamental right of access to legal advice and to the courts, means that lawyers have a sort of indirect expectation to be paid by the state, and a fundamental right to have their independence respected, but it also means that lawyers have a duty to their clients to be honest and competent, and a duty to the court. It also means, I suggest, that they must ensure that their services are provided as cheaply as is consistent with their other duties – at least when they are acting for ordinary people whether or not they are relying on government funding. It may be different when lawyers are acting for large corporations and very rich individuals, who can look after themselves.

Self-interest cannot be ignored, as it is a fundamental human characteristic, probably an aspect of Darwinian survival. Indeed many people might think that a lawyer who has no feeling of self-interest and does not fight hard for himself may well be a lawyer who does not fight hard for his client. However, for a lawyer, self-interest has to take a very clear second place to professional and public duties.

## The structure of the legal profession

When I started practice in London, lawyers who were not employed lawyers were either solicitors, who worked in partnerships, and had direct access from clients and conducted litigation, or barristers, who worked in chambers, and appeared in court and gave specialised advice to solicitors. Things are rather different now. With the advent of what are known in England and Wales as alternative business structures in 2012, solicitors can enter into partnership with barristers, barristers can enter partnership with other barristers, any lawyer can also enter into partnership with non-lawyers, and non-lawyers can hold shares in legal practices.

In the Republic, there is the Legal Services Regulation Bill (“the LSR Bill”), which has been described as “the biggest set of reforms to the legal services industry in the history of the [Irish] State”<sup>4</sup>. It was broadly aimed at reducing costs in the legal sector. The LSR Bill was, I understand, approved by the cabinet in October 2011 and introduced to the Oireachtas shortly afterward, but then spent over a year at the committee stage, before refined reform proposals were approved in January this year. The Bill proposes a six month consultation on the establishment of multi-disciplinary panels (MDPs), one-stop shops with barristers, solicitors and accountants would be available under one roof, and how they might work in the Irish marketplace. And, although the proposal may now be abandoned, the new Legal Services Regulatory Authority set up by the LSR Bill will make recommendations on the unification of the solicitors’ and barristers’ professions<sup>5</sup>

The aim of such liberalisation of the market is to increase competition and, ultimately to reduce the cost of legal services. It may well have those consequences, and it is to be sincerely hoped that it will help to reduce costs. I certainly

have concerns, not least because of that most reliable of virtual statutes, the law of unintended consequences. The proposals will certainly make lawyers’ work environment rather different from that which lawyers experienced in the past. One possible consequence is greater likelihood of the fusion which is contemplated by the LSR Bill, or at least greater similarity between the two traditional branches of the profession. However, in the four main jurisdictions in the British Isles, we have resisted fusion, and the strict demarcation between barristers and solicitors still applies. However, over the course of the last thirty years, solicitors have gained rights of audience in all courts in England and Wales, and barristers have increasingly been able to carry out aspects of the conduct of litigation, and even to advise members of the public direct. In addition to this, Chartered Legal Executives have also, again over the recent past obtained more and more rights traditionally reserved other legal professionals.

The increased flexibility in the legal profession has been justified as being in the name of consumerism. It is hard to quarrel with the notion that legal advice and legal representation are intended to be as cheap and as accessible as possible to everyone. However, we must be careful of invoking consumerism to justify legal advice and representation, which is not properly independent, or which is second rate – or worse. As I have tried to explain, access to justice cannot be equated to any other consumer commodity. Legal advice and legal representation can only be properly given by those who are qualified to give it, and it is essential that the legislators and policy-makers appreciate this. There will inevitably be some lawyers who are better than others, but there is an irreducible acceptable minimum of competence. And lawyers and judges must always stand up for that. And it is what education and regulation should ensure.

## Regulation

This convergence between the professionals has to a large degree been reflected by regulatory changes in England and Wales. Rights of audience were the preserve of the Bar, and the barristers’ professional body, the Bar Council, was responsible for their regulation and discipline. It did a good job. The conduct of litigation and direct access from the public were the preserve of solicitors, and their professional body, The Law Society, regulated such matters. It did a less good job, but it had a much harder task. The changes in the professions have come at the same time as disapproval of self-regulation, and so the current regulatory environment is very different. Multiple regulators, separate from the professional bodies, all regulate the same activity. Thus, the three professional regulators, the Solicitors Regulatory Authority (SRA), the Bar Standards Board (BSB), and the CILEX Professional Standards (CILEXPS), all regulate advocacy, and they all regulate the conduct of litigation. They are all supposed to do so to the same standard. And this patchwork quilt of regulation is supposed to make it easier for the consumer to complain to the appropriate regulatory authority if they receive sub-standard service.

This regulatory patchwork is rendered more expensive and confused by the existence of an over-arching regulatory body, the Legal Services Board (LSB), which is meant to simplify

4 <http://www.thejournal.ie/legal-services-bill-one-stop-shops-lawyers-1286970-Jan2014/>

5 ‘Courting favour at the Bar’, <http://www.irishtimes.com/news/crime-and-law/courting-favour-at-the-bar-1.1817893>

things, but inevitably makes things more confused and more expensive. If you create a body whose job is to regulate, that body will always seek, perhaps only subconsciously, to turn regulation into an end in itself. That's human nature: the more regulation it does, indeed the more of anything it does, the better it justifies its existence and its significance. And if you have a regulatory supervisor, it will similarly find supervisory actions and other initiatives to justify its existence and increase its powers. So the present convoluted system leads to more expensive regulation and more lawyers' time consumed in regulatory compliance. Both the time and the expense are very significant as the lawyers pay for the cost of regulation, and then, inevitably, have to take into account the expense, as well as the loss of their time, when working out their costs, and, therefore their charges.

In Northern Ireland, the bar has, I understand, managed to retain self-regulation, but there is to be an independent supervisor. Provided the supervisor approaches his or her task in a moderate and balanced manner, in a practical way without grandstanding, and maintains the confidence of the public and of the bar, that seems to me to be, in many ways, a more satisfactory model. It is less revolutionary, less doctrinaire, and less expensive than the change which was made in England and Wales

In the Republic, I understand that a rather different model is proposed. The LSR Bill proposes to set up a new Legal Services Regulatory Authority which would take over the existing legal functions of the Law Society (which regulates the enrolment, conduct and business of solicitors) and the Bar Council, which regulates barristers. This new authority's board will feature a majority of members appointed by the minister. Ken Murphy, Director General of the Irish Law Society has said this: "[t]o be a truly independent regulator, the proposed new authority must be made free of the potential for control by the Government, in addition to being free of the potential for control by the profession"<sup>6</sup>. The Irish Council for Civil Liberties has also expressed alarm about the proposal<sup>7</sup>.

Such observations mirror some of the comments which have been made during the recent dispute in England between the Lord Chancellor and the criminal bar. Considerable scepticism is inevitable when one hears expressions of concern about threats to the rule of law from lawyers when their fees are under attack. Indeed, considerable scepticism is justified: the ability to equate the public interest with one's own self-interest is a striking and constant feature of humanity. However, that does not by any means justify disregarding those expressions of concern, which have to be carefully examined on their merits.

I have neither the knowledge nor the legitimacy to criticise specific proposals in another jurisdiction to regulate the legal profession, and I have no wish to do so. However, I can say this. No sensible person would dispute the proposition that the independence of the judiciary is fundamental to the rule of law in a free society. In general, this is because judges must try cases fairly, so they must be and be seen to

be impartial; in particular, judges have no more important function than to protect citizens against the excesses of the executive, and so they must be, and be seen to be, free of any control by, or influence from, the executive. It does not take much thought to see that, particularly in a modern system with complex substantive and procedural rules of law, it is almost equally necessary to have a legal profession which is similarly free of executive control and influence. Access to justice is effectively as important an ingredient of the rule of law as an independent judiciary. Without a legal profession which is genuinely independent of the executive, there is a real risk of justified concern about proper legal representation of defendants in criminal proceedings and of applicants in claims against the state.

More generally, regulation is necessary and important, but it must be kept to a minimum, it must be targeted, and it must be effective. Regulation in the financial world failed to stop the rather obvious abuses of LIBOR fixing and PPI selling by UK banks, and it failed to catch the rather obvious frauds practised by Enron and Madoff in the US. Where regulation fails, a standard response is that we need more of it, whereas the correct response is that we need different regulation not more regulation.

Further, if it is too intrusive and prescriptive, regulation can be positively self-defeating. If a profession is subjected to detailed rules of behaviour with a box-ticking approach and targets, people in the profession will quickly begin to feel that anything which is not forbidden by the rules is permitted. Any sense of what is right and wrong will start to dissipate, or at least to shrink. We therefore are at risk of losing a culture which enforces general standards of honesty, through understanding legal ethics and observing peer group behaviour. And a clear, correct and generally observed culture is very precious: it can do more for the public good, and costs far less, than almost any set of regulations. But such a culture cannot be enough on its own: one needs regulation. But we should not be obsessed with it. After all it is only a control on the means, not the end. What ultimately matters is the quality of the legal advice and representation, whereas regulation is almost always concerned with controlling who provides the advice or representation and how the advice or representation is provided, rather than whether the advice or representation are any good.

I therefore hope that regulation of the legal professions in England will become more realistic and less expensive. The existence of multiple regulators regulating the same activity seems to me questionable at best and quite possibly unsustainable. A rational approach is called for. One possibility is a single regulatory body for legal services with a number of discrete divisions: litigation, advocacy and advisory. That may well be where the proposed Irish model will end up. At the very least moving to activity-based regulation ought to bring with it efficiencies and easily secure common standards. Given however the liberalisation of legal practice, with various different types of lawyers moving more flexibly than previously between different regulated activities in the course of their practice, a single regulatory approach would perhaps be better. It would, amongst other things, have the virtue of simplicity both for lawyers and for the public.

<sup>6</sup> *Ibid*

<sup>7</sup> The Journal, <http://www.thejournal.ie/readme/column-'this-is-a-blueprint-for-government-control-of-the-legal-profession'-343423-Feb2012/>

## Fusion and specialisation

Having said that, the regulatory system may well provide further impetus towards a *de facto* fusion in the legal profession. If we in England and Wales proceed further along the road of convergence I have described, it will lead to the position where barristers, solicitors and CILEX members all carry out the same regulated activities. Whether this leads, as such replication did in the 19<sup>th</sup> century, to a formal merger of professions is an open question. One thing this will not mean will be the end of independent barristers, or of legal specialisation. In those countries where they have a single profession, some lawyers specialise in advocacy, some even specialise in very specific forms of advocacy such as appellate advocacy, while others specialise in advisory work. Expertise and specialisation will always be needed. I think this point highlights a subtle distinction which the independent bar in jurisdictions such as ours sometimes seems to affect not to appreciate. A fearless, independent, and outspoken group of specialist advocates can exist and thrive perfectly well within a larger, single legal profession: it does not need to be a separate profession. In the USA, the very effective Association of Trial Lawyers of America, although a subgroup of a single lawyers profession, is every bit as effective as the Bar Council in England. But I am not advocating fusion: emotionally as a former barrister, I would regret it. Nor am I speaking against it. There are two important questions which those in, and concerned about, the legal profession have to consider, namely: is fusion the way we are going and is fusion in the public interest.

Just as there is a move towards coalescence of the legal profession, so is there an even more effective tendency towards so-called silos within the profession. This is as a result of increased specialisation. The ever-increasing volume and ever-increasing complexity of the law renders specialisation inevitable. When I started studying law in the early 1970s, professional negligence was dealt with in part of a chapter on negligence in textbooks on tort. By the late 1970s, professional negligence merited a chapter on its own. In the 1980s, there were, for the first time, a couple of text books devoted to the topic of professional negligence. By the late 1990s, one could find textbooks devoted to solicitors' negligence. And now, there is a textbook dealing solely with the issue of solicitors' negligence in relation to trust and wills. There is increasing pressure on practising lawyers, like lawbook writers, to specialise, as we seem to be living in an increasingly specialised world.

Whether the trend of the past half-century towards increased specialisation continues is unclear. Some trends are like a spaceship travelling intergalactically: they continue relentlessly in the same direction, perhaps until they explode on hitting a star. Other trends are more like a pendulum – they reverse direction, and often, having gone too far one way they go too far the other. In many ways, I hope specialisation is a pendulum not a spaceship. In the present era, specialists tend to develop their own areas of law without regard to what is happening in other areas. This has the risk of producing lawyers with a rather narrow focus, and the law becoming incoherent and complicated. And, I may add, it emphasises the need for appellate courts with a non-specialist outlook,

which can take a holistic view of the law and ensure that it develops coherently across all areas.

One reason for the increased specialisation among lawyers is the increasing complexity of the law in almost every field, which has been an ever-growing challenge to those practising law. In a lecture last month, I expressed concern about the ever-increasing quantity and often poor quality of legislation over the past thirty years, which, as I explained, is not conducive to justice and brings Parliament, and even the rule of law, into disrepute.

Some of our legislators appreciate this. Consider the Financial Services (Banking Reform) Bill, which was considered in the House of Lords last month. Lord Higgins, a Conservative, said that “*the way that the Bill is drafted ... makes it extremely difficult for the House to work out what is happening from moment to moment on an unbelievably complex matter*”<sup>8</sup>. Lord Phillips of Sudbury, a Liberal Democrat, described “*the complexity of both the Bill and the amendments*” as “*quite barbaric*”<sup>9</sup>, and Lord Barnett, Labour, agreed with the view of Lord Turnbull, a cross-bencher, “*that he has never seen such a shambles presented to any House*”<sup>10</sup>.

So here we have a Parliamentary debate on a Bill whose importance could scarcely be greater, a debate which is condemned from all sides of the political divide as plainly unsatisfactory. Examples abound. Successive Governments promise a simplified tax regime; with each outgoing Chancellor of the Exchequer since, I believe, Nigel Lawson, the already enormous and convoluted volume of revenue statutes and SIs has increased. The state of criminal statute law is remarkable in its extent and complexity. Ten years ago, the recently retired Law Lord, Lord Steyn, referred to there being “*an orgy of statute-making*”<sup>11</sup>, and it's got worse, not better, since then.

I appreciate that as life gets more complex, a degree of complexity in legislation is inevitable, but that reinforces, rather than undermines, the need for a self-denying ordinance by the law-makers. The same applies to judges, who have the task of interpreting statutes and developing the common law. In the same speech, I referred to the fact that many judgments are much too long, adding this “*Reading some judgments one rather loses the will to live – and I can say from experience that it is particularly disconcerting when it's your own judgment that you are reading.*” We need to make our judgments leaner and clearer – more accessible. If I ever had a mission statement for the Supreme Court, which I certainly will not, it would be to ensure that the law was as simple, as clear and as principled as possible.

So far I have been referring to the laws of this country, but there is another factor which has rendered legal practice more demanding than when I started practising in 1975. It is the international dimension.

## The international dimension

The enormous increase in the international, or even global, nature of legal practice has three aspects, which are connected. The first is the growth of international, cross-border business;

8 Hansard;HL Deb 8 Oct 2013, Column 22

9 *Ibid.*

10 *Ibid.*, column 29

11 First Brice Dickson lecture, published in European human rights law review, vol. 9, no. 3

the second is the increasing internationalisation of solicitors' law firms and barristers' chambers; the third is the growth in international law, both in terms of harmonisation and in terms of international courts. These changes are, I think, largely attributable to the increased ease and speed of communication, of travel, and of movement of goods. They tend to make a lawyer's life more complex, but more exciting.

There is an increasing number of international arrangements - eg cross-border insolvency treaties, double taxation agreements and harmonisation of patent law, to take three commercial examples, as well as international criminal conventions. Multinational and even national companies manifest an increasing desire for advice on issues which straddle more than one country, often more than one continent. These developments are attributable to the increase in the globalisation, coupled with increased market liberalisation, which has already happened, and the desire to reduce barriers to trade which is what most people hope will happen. The international arrangements often involve a further layer of international law on top of the national law, which self-evidently renders the subject more complex for lawyers. Or it involves changing the national law, which means more to learn for lawyers. And the need for advice which involves the law of more than one country also increases the task for lawyers.

It has, of course, been commonplace for the larger City of London law firms to have global practices for quite some time now. A changing market place is however now beginning to see other law firms following suit and expanding into new areas. You may well have read how the Australian law firm, Slater & Gordon, has recently been expanding into the English and Welsh market. Other firms will no doubt do the same, and I equally have no doubt that our firms will do the same in other markets around the world. Not only will such inward expansion go a significant way towards increasing regionalisation of legal practice here, but equally it will lead to its increasing internationalisation. For UK, and particularly central London-based, lawyers, this internationalisation has a special significance, because of the importance of the UK as a global service hub, and, above all for present purposes, an international dispute resolution centre. This represents another, rather different, way in which lawyers contribute to the well-being of the UK over and above to the rule of law.

But the international side of things has two other very important aspects for the UK and Ireland and for lawyers in the four jurisdictions: namely the devolution dimension and the European dimension. Devolution means that there is an increasing amount of Northern Irish, Scottish and Welsh law, and that we are starting to have a little more constitutional law. It is difficult to say where it will lead, not least this side of the September 2014 referendum. Self-centredly, it may well lead to increased pressure for a Welsh Justice, as there is an ever-growing body of Welsh law, and if there is a Northern Irish Justice and two Scottish Justices, why is there no Welsh Justice? Still self-centredly, but perhaps more conceptually, I think that increased devolution will lead to an ever-growing constitutional function for the Supreme Court. The UK famously has no constitution and therefore it can have no constitutional court, but, some might say characteristically, in a rather half-baked and absent-minded way, we seem to be evolving, some might say sleepwalking, to evolving

into a partly constitutional court. We are interested in, and have much to learn from, the Irish experience of having a constitutional judicial role engrafted onto a common law system

Our membership of the EU since 1973, and our signing up to the European Convention on Human Rights in 1953 have added to the interest and the challenge of being a lawyer in the UK. The influence of EU law has increased, perhaps particularly since the Maastricht and Lisbon Treaties in 1992 and 2007, and the influence of Human Rights law on our law has increased dramatically with the passing of the Human Rights Act 1998. Both have had a profound effect, not merely in areas where they directly impinge, but on our way of legal thought.

It is wrong to see this as an inappropriate foreign adulteration of English law. Part of the strength of our law is that it has taken what is good from foreign law. The common law developed out of Norman law; equity developed out of Roman Catholic common law; Lord Mansfield developed our commercial law by following European mercantile law. More recently, our notion of *forum non conveniens* was changed by adopting Scots law<sup>12</sup>, and we have been ready to consider and learn from judicial approaches in other jurisdictions.

## Information Technology

There is no doubt that IT has already had a significant effect on working practices and organisations generally and on legal practice and litigation in particular. Professor Richard Susskind has written extensively, expertly and perceptively on the influence of IT on the law<sup>13</sup>. I know that around six months ago, Professor Susskind gave a lecture at the Bar Council of Northern Ireland conference<sup>14</sup>, when he cited Alan Kay's observation that "*the best way to predict the future is to invent it*", and then reformulated it to: "*It's not what the future looks like, but what future are you going to invent?*" A month before that lecture, the Lord Chief Justice of England and Wales gave a speech<sup>15</sup>, highlighting the way in which technological advances ought to have a significant effect on the way in which legal practices are structured. This is not the occasion to discuss the issue in any detail. It is always difficult to predict the future, but, when it comes to IT, it is particularly difficult, because we have so little experience (less than 25 years) and the changes so far have been difficult to predict, as the largest computer company of the 1980s, IBM, witnesses: they took the view that there would be no significant market for personal computers. But that difficulty should not make us scared of change: consider the experience of Kodak who, despite inventing the first digital camera in 1975, dropped the product because they were worried it would undermine their established, traditional camera business. It wasn't until the 1990s that Kodak began to rectify their mistake, having lost the opportunity to obtain first mover advantage

Having said that, computers have changed things enormously in the law already. When I started practice in

12 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460

13 See eg R Susskind, *The End of Lawyers? Rethinking the nature of Legal Services* (Oxford 2008)

14 *Transforming Legal Practice Through Innovation* (15 November 2013)

15 J. Thomas, *Justice in One Fixed Place or Several?* (Birkenhead Lecture, Gray's Inn) (21 October 2013).

*continued after the Legal Update on p.85*

A directory of legislation, articles and acquisitions received in the Law Library from the  
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Rep 117 and Gulf Canada Resources Ltd v Arochem International Ltd [1992] BCJ 500 followed – UPS AG v HSH Nordbank AG [2009] EWCA Civ 589; Birse Construction Ltd v St David Ltd [1999] BLR 194 and Albon v Naza Motors (No 3) [2007] EWHC 665 (Ch), [2007] 2 Lloyd's Rep 1 distinguished – Joint Stock Company Aeroflot Russian Airlines v Berezovsky [2012] EWHC 1610 (Ch), [2013] 1 Lloyd's Rep 345; Roussel-Uclaf v GD Searle & Co Ltd [1978] 1 Lloyd's Rep 225 and Pacific Erosion Control Systems Ltd v Western Quality Seeds [2003] BCSC 1743 considered – Arbitration Act 2010 (No 1), s 6 – UNCITRAL Model Law, Articles 8, 16 – Relief refused (2012/1887S – Mac Eochaidh J – 28/8/2012) [2012] IEHC 361  
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## BANKRUPTCY

### Practice and procedure

Summons – Application of respondent to dismiss summons – Substantial defect in notice – Real and substantial issues regarding summons – Allegation that excessive sum specified in summons – Allegation that four day demand notice not served – Alleged failure to lodge correct documents – Alleged failure to serve true copy of affidavit on respondent – Certificate – Validity of certificate – Conclusive evidence clause – Allegation that certificate not correctly executed – Certificate undated – Whether summons defective – Whether strict compliance with statute – Whether summons should be dismissed – Whether real and substantial issues raised in respect of validity of summons – Whether real prospect of success – Whether certificate conclusive evidence of debt – Whether certificate valid – Whether certificate correctly executed – Minister for Communications, Energy and Natural Resources and M O’C v MW and RW [2009] IEHC 413, [2010] 3 IR 1; St Kevin’s Company against a Debtor (Unrep, ex tempore, SC, 27/1/1995) and Moohan v S& R Motors [2007] IEHC 435, [2008] 3 IR 650 applied – Bache and Company v Banque Vernes [1973] 2 Lloyds Reps 437 and North Shore Ventures Limited v Anstead Holdings Inc and Others [2011] 3 WLR 628 followed – Maher v AG [1973] IR 140; The State (MacEldowney) v Kelleher [1983] IR 289 distinguished – O’Maoileoin v Official Assignee [1989] IR 647; In Re Sherlock [1995] 2 ILRM 493; Dobbs v National Bank of Australasia Limited [1935] 53 CLR 643; Shomat Pty Ltd v Rubinstein (1995) 124 FLR 284 and Hegarty and Sons v Royal Liver Friendly Society [1985] IR 524 considered – Bankruptcy Act 1988 (No 27) ss 7 and 8 – Rules of the Superior Courts 1986 (SI 15/1986), O 76, r 11 – Summons dismissed (2012/ 5373 – Dunne J – 21/8/2012) [2012] IEHC 360

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Application for order directing appointment of new liquidator – Whether respondent acting properly – Whether respondent acting bona fide as liquidator – Alleged failure to call meeting of creditors – Conversion of winding up into creditors’ voluntary winding up – Whether new liquidator ought to be directed to comply with law – Companies Act 1963 (No33), ss 213, 256, 261, 277 and 280 – New liquidator appointed (2013/97COS – Laffoy J – 23/4/2013) [2013] IEHC 193

*Kirwan v Parker*

### Practice and procedure

Examinership – Statutory interpretation – Scheme of arrangement – Service – Notice – Email – Intention of Oireachtas – Requirement of certainty – Whether statutory provision required actual notice – Whether statutory provision capable of interpretation by reference to rule of court – Whether strict construction required – Whether receipt of notice by email satisfied statutory requirement – Proctor & Gamble Co v Controller of Patents [2003] IESC 35, [2003] 2 IR 580 applied – Byrne v Grey [1988] IR 31 and Murphy v Greene [1990] 2 IR 566 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 75A, r 18 and O 124 – Companies (Amendment) Act 1990 (No 27), ss 23 and 25 – Companies (Amendment) (No 2) Act 1999 (No 30), s 25 – Order made (2013/48COS – Finlay Geoghegan J – 31/5/2013) [2013] IEHC 231

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### Receivership

Real property – Mortgage – Charge – Possession – Banking – Transfer – Whether charge registered in name of transferee of banking business – Whether receiver validly appointed – Whether Central Bank Code of Conduct applicable to non-residential lands – Lease – Consent – Whether lease given by mortgagor without consent of mortgagee – Whether mortgagee bound by lease – Interlocutory injunction – Prohibitory orders – Whether serious issue to be tried – Whether damages adequate remedy – Balance of justice – Campus Oil v Minister for Industry and Energy (No 2) [1983] IR 88 applied – McCann v Morrissey [2013] IEHC 288, (Unrep, Laffoy J, 21/6/2013); ICC Bank plc v Verling [1995] 1 ILRM 123 and Fennell v N17 Electrics Ltd (in liquidation) [2012] IEHC

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### Receivership

Statutory receiver – Powers – Appropriation of receivables – Entitlement to receive rent – Entitlement to receive service charges – Contract – Construction – Whether receiver entitled to direct funds to specific accounts – Whether receiver entitled to receive rent accrued prior to appointment – Whether receiver entitled to receive service charges – Whether possible to determine ownership of service charges – Whether appropriate to ring fence service charges pending inquiry as to ownership – Re William Hall (Contractors) Ltd [1967] 2 All ER 1150; Re Foster, ex p Dickin (1875) LR 20 Eq; Crawford v Annaly (1891) 27 LR Ir 523 and Deeley v Lloyds Bank plc [1912] AC 756 considered – Companies Act 1963 (No 33), s 316 – Companies (Amendment) Act 1990 (No 27), s 148 and sched 1 – National Asset Management Agency Act 2009 (No 34), s 147 – Directions given (2013/121COS – Laffoy J – 15/8/2013) [2013] IEHC 386

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### Security for costs

Plenary proceedings – Applicable test – Prima facie defence – Multiple defendants – Whether court should assess strength or weakness of cases – Whether contractual scheme lawful – Whether special circumstances – Whether inability of plaintiff company to meet costs caused by alleged wrongs – Whether plaintiff required to prove quantum of claim on prima facie basis only – Whether plaintiff entitled to have damages potentially recoverable from one defendant taken into account in determining security for costs applications of other defendants – Whether points of law of public importance – Whether points of such gravity and importance as to transcend interests of parties to proceedings – Whether pre-pack receiverships so novel as to raise point of law of public importance – Conduct of defendants – Discretion of court – Delay – Interests of justice – Connaughton Road Construction Ltd v Laing O’Rourke Ireland Ltd [2009] IEHC 7, (Unrep, Clarke J, 16/1/2009); Tribune Newspapers (in receivership) v Associated Newspapers Ireland (Unrep, ex tempore, Finlay Geoghegan J, 25/3/2011); Lismore Homes Ltd (in receivership) v Bank of Ireland Finance [1999] 1 IR 501; Village Residents Association Ltd v An Bord Pleanála (No 2) [2000] 4 IR 321 and Lismore Homes Ltd (in receivership) v Bank of Ireland Finance Ltd [1992] 2 IR 57 followed – OBG Ltd v Allan [2007] UKHL 21, [2008] 1 AC 1; Framus Ltd v



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## Shareholders

Ownership of shares – Mortgage of shares – Loan agreement – Transfer of shares – Articles of association – Amendment – Injunction – Interlocutory injunction – Test to be applied – Whether fair bona fide question to be tried – Adequacy of damages – Balance of convenience – Whether open to court to have regard to relative strength of cases – Whether undertakings as to damages sufficient – Whether service of notice valid – Power of attorney – Director – Whether power of attorney under mortgage of shares extended to actions of director – Whether shares transferred – Campus Oil v Minister for Industry and Energy (No 2) [1983] IR 88; American Cyanamid v Ethicon [1975] 1 All ER 498; Westman Holdings Ltd v McCormack [1992] 1 IR 151 and McGilligan v O’Grady [1999] 1 IR 346 applied – AIB plc v Diamond [2011] IEHC 505, (Unrep, Clarke J, 14/10/2011) approved – Series 5 Software v Clarke [1996] 1 All ER 853; National Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] 1 WLR 1405; Shelbourne Hotel Ltd v Torriam Hotel Operating Co Ltd [2008] IEHC 376, [2010] 2 IR 52; Mancini v Mancini [1999] 17 ACLC 1570; Cheerine Group (International) Pty Ltd v Yeung [2006] NSWSC 1047; Lee & Company (Dublin) Ltd v Egan (Unrep, Kenny J, 7/4/1978); Walls v PJ Walls Holdings Ltd [2007] IESC 41, [2008] 1 IR 732 and Feighery v Feighery [1999] 1 IR 321 considered – Companies Act 1963 (No 33), ss 142 and 182 – Injunction granted (2012/12487P – Laffoy J – 6/6/2012) [2013] IEHC 265

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Insolvency – Deemed insolvency – Inability of company to pay debts – Petitioner owed money by company – Failure of company to pay debt – Whether company insolvent – Whether company incapable of discharging debts – Whether company should be wound up – Practice and procedure – Whether letter of demand properly served – Re Riviera Leisure Ltd [2009] IEHC 183, (Unrep, Laffoy J, 30/3/2009) distinguished – Re WMG (Toughening) Ltd (No 2) [2003] 1 IR 389 and Re WMG (Toughening) Ltd [2001] 3 IR 113 considered – Companies Act 1963 (No 33), ss 213 and 214 – Petition granted (2012/281COS – Laffoy J – 22/8/2012) [2012] IEHC 362

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### Jurisdiction

Childcare – Transfer of proceedings – Assumption of jurisdiction – Test to be applied – Habitual residence – Particular connection – Court best placed to hear case – Best interests of child – Whether child habitually resident in Ireland – Whether exceptions to habitual residence rule – Whether courts of England and Wales better placed to hear case – Whether particular connection of child to Ireland – Whether parents likely to remain in England and Wales

– Whether transfer resulting in greater chance of child having contact with extended family – Whether best interests of child served by transfer – LM (a child) (transfer of Irish proceedings) [2013] EWHC 646 (Fam) [2013] Fam 308 considered – British Nationality Act 1981 (UK), s 2 – Council Regulation 2201/2003/EC, arts 8 and 15 – Orders made, request to assume jurisdiction directed (2013/3629P – Birmingham J – 29/5/2013) [2013] IEHC 239  
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### Breach

Damages for breach of contract – Partnership agreement – Medical doctors – Dissolution of partnership on death of one of doctors – Plaintiff widow of deceased – Contractual obligation – Failure by defendant to effect life insurance for deceased in accordance with partnership agreement – Interest on share of partnership assets – Whether failure to effect life insurance breach of contractual obligation – Whether plaintiff entitled to damages – Whether plaintiff entitled to post dissolution profits – Whether plaintiff entitled to interest on share of partnership assets – Partnership premium – Partnership premium partly paid by deceased at time of death – Counterclaim for balance of premium – Whether defendant entitled to payment of balance of premium – *MacKay v Dick* (1881) 6 App Cas 251; *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014 and *Kyprianou v Cyprus Textiles Ltd* [1958] 2 Lloyd's Rep 60 considered – Partnership Act 1890, (53 & 54 Vict c 39), ss 33 and 42 – Damages awarded (1997/4705P – Laffoy J – 22/8/2012) [2012] IEHC 373

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### Guarantee

Summary judgment – Personal guarantee – Claim that guarantee given on foot of representation that guarantee would not be enforced – Whether guarantee bound defendant – Rule against self-corroboration – Credibility of witness – Parol evidence rule – Evidence of surrounding circumstances – Collateral contract – Absence of written evidence – *R v Coll* (1889) 24 LR Ir 522; *Flanagan v Fahy* [1918] 2 IR 361; *Macklin v Graecen & Co* [1983] IR 61; *ICDL GCC Foundation FZ-LLC v European Computer Driving Licence Foundation Ltd* [2012] IESC 55, (Unrep, SC, 14/11/2012); *Lac Minerals Ltd v Chevron Mineral Corporation* (Unrep, Kean J, 6/8/1993); *AIB v Galvin Developments Ltd* [2011] IEHC 314, (Unrep, Finlay Geoghegan J, 29/7/2011); *Industrial Steel Plant Ltd* [1980] 1 NZLR 545; *Ulster Bank v Deane* [2012] IEHC 248, (Unrep, McGovern J, 20/6/2011); *City and Westminster Properties Ltd v Mudd* [1958] 2 All ER 733 considered – Judgment granted (2010/5390S – Hogan J – 17/4/2013) [2013] IEHC 197

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### Sale of land

Rescission – Right of way – Sale of lands – Right of way to access lands part and parcel of contract of sale – Subsequent discovery that right of way no longer existed – Attempts to resolve matter through arbitration – Failure by appellant to cooperate with arbitration – Attempt by appellant to rescind contract – Validity of rescission – Behaviour of appellant – Whether appellant acted capriciously or arbitrarily – Whether

appellant acted in reasonable manner – Whether appellant reckless in entering into contract for sale of land – Whether appellant indifferent regarding title of lands and sale to respondents – *Lyons v Thomas* [1986] IR 666 applied – *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 followed – *Williams v Kennedy* (Unrep, SC, 19/7/1993) applied – *Baines v Tweddle* [1959] 1 Ch 679; *Kennedy v Wrenne* [1981] ILRM 81 and *In re Jackson and Haden's Contract* [1906] 1 Ch 412 considered – Vendor and Purchaser Act 1874 – Appeal dismissed (134/2008 – SC – 10/7/2012) [2012] IESC 41

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### Terms

Interpretation – Breach of contract – Exclusive distribution of goods – Judgment for liquidated sums – Calculation of damages – Whether parties acting in breach of agreement – Whether wrongful deprivation of profit – Whether terms of first agreement subsisting following execution of second agreement – Defence and counterclaim – Competition law – Whether agreement contravening European or domestic competition law – Whether activity involving active or passive sales – Material non-disclosure – Whether failure to disclose fact that director of one party to contract also director of other party – Whether fact constituting unusual feature of contract – Whether undisclosed fact rendering contractual relationship materially different in potentially disadvantageous respect – Vagueness – Whether agreements failed to define relevant territories – Whether duty on court to give effect to apparent intention of parties to enter binding contracts – Termination of agreement – Automatic termination – Whether party entitled to benefit from own breach – Duty to mitigate loss – Injunction – Prohibitory order – Equity – Whether plaintiff coming to court with clean hands – Guarantee – Surety – Discharge – Test to be applied – Whether material variation of terms of contract so as to discharge surety – Whether surety assenting in variation of contract – Whether surety on notice of or involved in variation of contract – Whether guarantee remaining in force following execution of second agreement – *Hearn & Matchroom Boxing Ltd v Collins* (Unrep, O'Sullivan J, 3/2/1998); *Pierre Fabre Dermo-Cosmetique SAS v President de l'Authorite de la Concurrence* [2013] All ER (EC) 281; *Royal Bank of Scotland plc v Etridge* (No 2) [2002] 2 AC 773; *Seaton v Heaton* [1899] 1 QB 782; *Hamilton v Watson* (1845) 8 ER 1339; *Moorview Developments Ltd v First Active plc* [2009] IEHC 214, (Unrep, Clarke J, 6/3/2009); *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] Ch 31; *McCabe Builders (Dublin) Ltd v Sagamu Developments Ltd* [2009] IESC 31, [2011] 3 IR 480; *Moody v Cox* [1917] 2 Ch 71; *Polak v Everett* (1876) 1 QBD 669; *Holme v Brunskill* (1878) 3 QBD 495; *Bank of India v Trans Continental Commodity*

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in respect of applicant – *Feeney v District Justice John Clifford* [1989] IR 668; *Brehuta v District Judge John Coughlan* [2012] IEHC 498, (Unrep, Peart J, 29/11/2012); *State (McEvitt) v Delap* [1981] 1 IR 125; *Reade v Judge Michael Reilly* [209] IESC 66, [2010] 1 IR 295 considered – Relief refused (2012/174)JR – Peart J – 16/5/2013) [2013] IEHC 210

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### Proceeds of crime

Application to discharge order prohibiting disposal or diminishing value of property – Monies in bank account – Order made ex parte – Allegation of illegal laundering – Trading without license – Full and frank disclosure – Duty of disclosure of all material matters relevant to exercise of discretion – Objective test – Reasonable belief that property proceeds of crime – Failure to provide court with explanation given by respondent – Whether failure to comply with duty of utmost good faith – Whether material non-disclosure – Whether court deceived or misled – Whether allegation was of money laundering or fuel laundering – Nature of case and allegations made at time of application – Exercise of discretion – *Bambrick v Coblely* [2005] IEHC 43, [2006] 1 ILRM 81; *McK(F) v C(D)* [2006] IEHC 185, (Unrep, Clarke J, 26/5/2006); *Tate Access Floors Inc v Boswell* [1990] 3 All ER 303; *Mercury Tax Group Ltd v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), (Unrep, Underhill J, 13/11/2008); *Serious Fraud Office v A* [2007] EWCA 1927 (Crim), (Unrep, Hughes LJ, 2/8/2007) and *J v Crown and Prosecution Service* [2005] EWCA 746 (Civ), [2005] 4 All ER 391 considered – Proceeds of Crime Act 1996 (No 30), s 2 and 8(1) – Proceeds of Crime (Amendment) Act 2005 (No 1) – Finance Act 1999 (No 2), s 101 – Finance Act 2012 (No 9) – Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (No 6), s 17 – Order discharged (2013/7CAB – Cross J – 3/7/2013) [2013] IEHC 302

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### Road traffic offences

Case stated – Circuit Court – Appeal – Driving without insurance – Appellant driving with consent of owner – Approved policy of insurance in existence but appellant not named driver on policy – Road Traffic Act 1961, s 56 – Statutory interpretation – Claim that where a policy of insurance in force vehicle insurer liable for any damages or judgment arising from negligent use of vehicle – “Vehicle insurer” – Whether strict construction necessary – Whether relevant section ambiguous – Whether insurer liable for damages or judgment arising from negligent use of vehicle – DPP v Moorehouse [2005] IESC 52, [2006] 1 IR 421 and DPP v Murphy [1999] 1 IR 98 considered – Road Traffic Act 1961 (No 24), ss 56(1) and 68(1) – Courts of Justice Act 1947 (No 20), s 16 – Council Directive 72/166EEC,

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### Search warrant

Appeal against conviction – False imprisonment and robbery – Validity of warrant not issued by independent person – Preliminary issue as to whether Damache v DPP applicable – Arrest after unconstitutional search of home – Inviolability of dwelling – Finding of unconstitutionality erga omnes effect – Whether warrants invalid – Whether respondent entitled to rely on finding of unconstitutionality – Whether entitled to raise issue on appeal – Whether case had reached finality – Whether issue raised at trial – Whether respondent acted so as to exclude issue – Whether degree of urgency issuing warrant – *Damache v DPP* [2012] IESC 11, (Unrep, SC, 23/2/2010); *The People (DPP) v Kenny* [1990] 2 IR 110; *The People (DPP) v Laide* [2005] IECCA 24, [2005] 1 IR 209; *The People (DPP) v Cronin (No 2)* [2006] IESC 9, [2006] 4 IR 329; *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88; *The People (DPP) v Cronin (No 2)* [2006] IESC 9, [2006] 4 IR 329; *Corrigan v Irish Land Commission* [1977] IR 317; *State (Byrne) v Frawley* [1978] IR 326; *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88; *The People (Director of Public Prosecutions) v Cunningham* [2012] IECCA 64, (Unrep, CCA, 11/5/2012) and *King v Attorney General* [1981] IR 223 considered – Offences Against the State Act 1939 (No 13), s 29 – Criminal Law Act 1976 (No 32), s 5 – Constitution of Ireland 1937, Arts 34.3.2, 40.3.1 and 40.5 – Appeal allowed; retrial ordered (301/2010, 308/2010, 309/2010 & 6/2010 – CCA – 24/5/2012) [2013] IECCA 65

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Education – School – Principal – Disciplinary procedures – Board of management – Judicial review – Public law – Whether decision of board of management to demote principal subject to judicial review – Whether requisite public law element – Whether employment governed solely by contract – Whether application of rules and procedures having statutory derivation – Whether Department of Education circular on disciplinary procedures provided public law element – Appeal – Disciplinary appeals panel – Whether recommendation of disciplinary appeals panel binding – Whether good reasons required for board of management to depart from recommendation – Extension of time – Good and sufficient reason – Whether applicant permitted to await decision on appeal prior to seeking judicial review – Fair procedures – Proportionality – Rationality – Whether failure by board of management to make fair decision – Geoghegan v Institute of Chartered Accountants [1995] 3 IR 86 applied – Brown v Board of Management of Rathfarnham NS [2006] IEHC 178, [2008] 1 IR 70 followed – Becker v Board of Management of St. Dominick's [2005] IEHC 169, (Unrep, Peart J, 14/4/2005) distinguished – Beirne v Commissioner of An Garda Síochána [1993] ILRM 1; O'Donnell v Tipperary (South Riding) County Council [2005] IESC 18, [2005] 2 ILRM 168; Tobin v Mayfield Community School (Unrep, Kearns J, 21/3/2000); Hand v Ludlow [2009] IEHC 583, (Unrep, O'Keefe J, 18/12/2009) and McSorley v Minister for Education [2012] IEHC 201, [2012] 23 ELR 233 considered

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*Minister for Justice and Equality v Eglitis*

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Surrender – Statutory interpretation – Jurisdiction – Extraterritoriality – Place of commission – Offences committed in whole or in part outside of requesting state – Correspondence – Whether offences committed on indivisible basis – Right to respect for family life – Applicable test – Proportionality – Whether test of

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*Minister for Justice and Equality v M(N)*

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### Powers

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Telescoped judicial review application – Asylum – Review of general finding of lack of credibility – Adequacy of reasons – Fear of persecution – Absence of documentary evidence – Whether credibility findings lawful – Whether failure to determine core claim – Whether reasons related to minor or peripheral matters – Whether credibility findings based on absence of documentary evidence lawful – Whether matter put to applicant at hearing – Whether finding untainted by conjecture – Whether conclusions irrational – R(I) v Minister for Justice [2009] IEHC 353 (Unrep, Cooke J, 24/7/2009) and O(R) v Minister for Justice [2012] IEHC 573 (Unrep, Mac Eochaidh J, 20/12/2012) considered – European Communities (Eligibility for Protection) Regulations (SI 518/2006), art 5(3) – Certiorari granted (2009/872JR – Mac Eochaidh J – 25/6/2013) [2013] IEHC 304  
*E(D) v Refugee Appeals Tribunal*

### Asylum

Refusal – Refugee Appeals Tribunal – Credibility – Internal relocation – Judicial review – Leave – Substantial grounds – Whether valid for tribunal to consider availability of internal relocation in test for asylum – Whether valid for tribunal to make adverse credibility findings – Whether tribunal acted unreasonably – Whether substantial grounds established – BP v Minister for Justice [2003] 4 IR 200; Imoh v Refugee Appeals Tribunal [2005] IEHC 220, (Unrep, Clark J, 24/6/2005); *Januzi v Home Secretary* [2006] 2 AC 426; *LD v Refugee Appeals Tribunal* [2006] IEHC 218, (Unrep, McGovern J, 7/7/2006); *CA v Refugee Applications Commissioner* [2008] IEHC

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*I(M) v Refugee Appeals Tribunal*

### Asylum

Refusal – Refugee Appeals Tribunal – Well founded fear of persecution – Evidence – Relevant considerations – Whether decision of tribunal failed to make reference to documents furnished by applicant – Whether failure to refer to documents rendered decision illegal – Whether tribunal relied on peripheral findings – Whether peripheral findings properly within jurisdiction of tribunal – Whether refusal of asylum lawful – Whether documents manifestly relevant – IR v Minister for Justice [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) distinguished – Refugee Act 1996 (No 17), s 13 – Relief refused (2009/1292JR – Clark J – 23/7/2013) [2013] IEHC 349  
*K(G) v Refugee Appeals Tribunal*

### Asylum

Application – Judicial review – Well founded fear of persecution – Social group – Refugee Applications Commissioner – Refugee Appeals Tribunal – Whether claim for asylum included claim based upon fear of persecution due to perception of applicant being witch – Whether claim included in asylum application – Refugee Act 1996 (No 17), ss 2, 8, 11 and 13 – Relief refused (2009/539JR – Mac Eochaidh J – 20/6/2013) [2013] IEHC 283  
*O(D) v Refugee Appeals Tribunal*

### Asylum

Refugee Appeals Tribunal – Refusal of asylum – Certiorari – Fair procedures – Audi alterem partem – Well founded fear of persecution – County of origin information – Whether tribunal erred in finding documentation submitted by applicant capable of forgery – Whether tribunal relied upon undisclosed country of origin information – Whether breach of fair procedures – ASO v Refugee Appeals Tribunal [2009] IEHC 607, (Unrep, Cooke J, 9/12/2009); *ATT v Minister for Justice* [2009] IEHC 503, (Unrep, Birmingham J, 19/11/2009) and *BIGA v Refugee Appeals Tribunal* (Unrep, ex tempore, Clark J, 24/2/2010) considered – Refugee Act 1996 (No 17), ss 11 and 16 – Decision quashed; proceedings remitted (2009/736JR – McDermott J – 9/5/2013) [2013] IEHC 278  
*O(OC) v Minister for Justice, Equality and Law Reform*

### Asylum

Refugee Appeals Tribunal – Refusal of asylum – Judicial review – Leave – County of origin information – Availability of state protection – Membership of social

group – Whether tribunal decision flawed – Whether tribunal failed to adequately assess country of origin information – Whether unreasonable to expect applicant to have sought state protection – Whether women victims of rape constituting social group – Whether circular reasoning to find persecution defining social group – Whether decision of tribunal ultra vires – *Kvaratskhelia v Refugee Appeals Tribunal* [2006] IEHC 132, [2006] 3 IR 368 and *Lelimo v Minister for Justice* (Unrep, O'Sullivan J, 12/11/2003) followed – *Horvath v Secretary of State for the Home Department* [2000] All ER 577 and *Ward v Attorney General* [1993] 2 SCR 689 approved – R v Immigration Appeals Tribunal (ex p Shah) [1999] 2 AC 629 considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 2 and 5 – Leave refused (2009/641JR – Mac Eochaidh J – 10/5/2013) [2013] IEHC 258  
*O(T) v Refugee Appeals Tribunal*

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Refugee Appeals Tribunal – Refusal of asylum – Credibility – Judicial review – Leave – Whether tribunal erred in making adverse credibility findings – Whether tribunal erred in finding state protection available to applicant – Whether tribunal entitled to have regard to discrepancies in claim – Whether tribunal adequately assessed country of origin information – Whether tribunal erred in considering availability of relocation – Whether substantial grounds established – IR v Minister for Justice [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) followed – SR (Pakistan) v Refugee Appeals Tribunal [2013] IEHC 26, (Unrep, Clark J, 29/1/2013) – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Refugee Act 1996 (No 17), s 11 – Directive 2004/83/EEC, art 4 – Leave refused (2008/1295JR – McDermott J – 9/5/2013) [2013] IEHC 243  
*R(M) v Minister for Justice, Equality and Law Reform*

### Asylum

Application for leave to seek judicial review – Refusal of refugee status – Adverse credibility findings – Fear of persecution – Findings not related to core claim – Duty to give reasons – Whether findings irrational – Whether reasons required for finding – Advancing of additional grounds – Whether attempt to broaden scope of challenge – Vague and inconsistent evidence – Whether misinterpretation of evidence – Whether findings flew in face of fundamental reason and common sense – Whether error of law or fact – Basis on which court could intervene – Whether an appeal point – Whether failure to consider core claim – Whether matters considered minor or peripheral – Whether breach of fair procedures – Whether failure to consider material evidence – Country of origin information – R(I) v Minister for Justice, Equality and Law Reform [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009);



O(R) v Minister for Justice [2012] IEHC 573, (Unrep, Mac Eochaidh J, 20/12/2012); AMK v Refugee Appeals Tribunal [2012] IEHC 479, (Unrep, O’Keeffe J, 20/11/2012); T(F) v Refugee Appeals Tribunal [2013] IEHC 167, (Unrep, Mac Eochaidh J, 18/4/2013); M(S) v Refugee Appeals Tribunal [2005] IESC 27, (Unrep, SC, 3/5/2005); AAS v Refugee Appeals Tribunal [2013] IEHC 44, (Unrep, Mac Eochaidh J, 7/2/2013); BNN v Minister for Justice [2008] IEHC 308, (Unrep, Hedigan J, 9/10/2008) and F(B) v Minister for Justice, Equality and Law Reform [2008] IEHC 126, (Unrep, Peart J, 2/5/2008) considered – Refugee Act 1996 (No 17), ss 11B(b) and 11B(c) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 5(1) and 5(3) – Leave refused (2009/266)JR – Mac Eochaidh J – 27/6/2013 [2013] IEHC 326  
*S(MRC) v Minister for Justice*

## Asylum

Telescoped application for judicial review – Asylum – Decision refusing recommendation that applicant be declared refugee – Negative credibility findings – Fear of persecution – Internal relocation – Inconsistent evidence – Failure to apply for asylum as soon as practicable – Content of notice of appeal – Complaint about credibility findings – Adequacy of reasons – Whether failure to make findings on core claim – Whether failure to consider past persecution – Whether failure to consider country of origin information – Whether matters points of appeal – R(I) v Minister for Justice [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) and O(R) v Minister for Justice [2012] IEHC 573, (Unrep, Mac Eochaidh J, 20/12/2012) considered – Refugee Act 1996 (No 17), s 11B(b) – Leave and orders refused (2009/895)JR – Mac Eochaidh J – 10/7/2013 [2013] IEHC 325  
*Z(S) v Refugee Appeals Tribunal*

## Deportation

Application for leave to seek judicial review – Minister – Powers – Right to family life – Rights of child – Best interests of child – Substantial grounds – Whether adequate consideration given to impact of deportation on best interests of child – Whether adequate consideration given to constitutional rights of child – Whether reasoned decision on best interests of child given – Whether adequate consideration given to family rights – Dos Santos v Minister for Justice [2013] IEHC 237, (Unrep, Mac Eochaidh J, 30/5/2013) followed – AO & DL v Minister for Justice [2003] 1 IR 1; Boultif v Switzerland (App No 54273/00) (Unrep, ECHR, 2/8/2001); Under v The Netherlands (App No 46410/99) (Unrep, ECHR, 18/10/2006); LAT v Minister for Justice [2011] IEHC 404, (Unrep, Cooke J, 2/11/2011) and Sivsivadze v Minister for Justice [2012] IEHC 244, (Unrep, Cooke J, 21/6/2012) considered – Refugee Act 1996 (No 17), s 17 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Constitution of Ireland 1937, art 40(3) – European Convention on

Human Rights and Fundamental Freedoms 1950, art 8 – United Nations Convention on the Rights of the Child 1992 – Leave granted (2012/181)JR – McDermott J – 30/7/2013 [2013] IEHC 381

*A(ASM) v Minister for Justice and Equality*

## Deportation

Interlocutory injunction restraining deportation of father – Child citizen of State – Rights of child to care and company of parents – Integrity of asylum system – Illegal and deceitful conduct by father – Balance of convenience – Campus Oil principles – Consistency of decisions by court on matter – Cross current of judicial opinion on matter – Application of father to be viewed from perspective of child – Whether deportation of father would result in deprivation of constitutional right of child – Whether injunction should be granted – Whether child entitled to care and company of parents – Whether conduct of applicant disentitled him to relief – Whether applicant entitled to rely on decision of Court of Justice in *Zambrano v Office national de l’emploi* – *Campus Oil Ltd v Minister for Industry and Energy* (No 2) [1983] IR 88; *Re JH* (an infant) [1985] IR 375; *S v Minister for Justice Equality and Law Reform* [2011] IEHC 417, (Unrep, Clark J, 13/10/2011) and *Kadri v Governor of Cloverhill Prison* [2012] IESC 27 applied – *Zambrano v Office national de l’emploi* (Case C-34/09) [2012] 2 WLR 886; *AO & DL v Minister for Justice* [2003] 1 IR 1 distinguished – *HU v Minister for Justice and Equality* [2010] IEHC 371, (Unrep, Clark J, 29/9/2010) doubted – *Oboh v Minister for Justice Equality and Law Reform* [2011] IEHC 102, (Unrep, Hogan J, 2/3/2011); *AO v Minister for Justice and Equality* (No 2) [2012] IEHC 79, (Unrep, Hogan J, 17/1/2012); *Dereci v Bundesministerien für Inneres* (Case C-256/11), (Unrep, ECHR, 15/11/2011), *Alli v Minister for Justice Equality and Law Reform* [2009] IEHC 595, [2010] 4 IR 45; *I v Minister for Justice Equality and Law Reform* [2011] IEHC 66, (Unrep, Hogan J, 22/2/2011) and *XA v Minister for Justice Equality and Law Reform* [2011] IEHC 397, (Unrep, Hogan J, 25/10/2011) considered – Constitution of Ireland 1937, Arts 41 and 42 – European Convention on Human Rights, art 8 – Injunction granted (2012/478)JR – Hogan J – 7/9/2012 [2012] IEHC 371

*A(E) (an infant) v Minister for Justice and Equality*

## Deportation

Constitution – International law – Child – Best interests of child principle – Whether international law principle entering into domestic law – Whether international principle applicable to interpretation of domestic law – Whether ratification of international agreement creating legitimate expectation of state agencies respecting terms of agreement – Whether international law principles yielding to express provisions of domestic law – Lifelong ban from

entry – Whether deportation constituting unconstitutional lifelong ban on entry – Minister – Powers – Discretionary power – Duty of enquiry – Whether Minister erred in focussing substantially on immigration status of applicants – Whether Minister failed to separately consider rights and best interests of child – Whether Minister under duty of further enquiry when proposing to deport children – Whether decision to deport made on basis of incorrect information – European Convention on Human Rights – European Union law – Whether European Union or European Convention rights engaged by decision to deport – Judicial review – *Certiorari* – Substantial grounds – Whether substantial grounds for review – Delay – Extension of time – Good and sufficient reason – Whether good and sufficient reason to extend time to seek judicial review – Interlocutory injunction – Restraint of deportation – Whether number and age of children favoured restraint of deportation pending determination of proceedings – *CS v Minister for Justice* [2004] IESC 44, [2005] 1 IR 343 and *Okunade v Minister for Justice* [2012] IESC 49, [2012] 3 IR 152 applied – *Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795 distinguished – *Aslam v Minister for Justice* [2011] IEHC 512, (Unrep, Hogan J, 29/12/2011); *A Bu v J Be* [2010] IESC 38, [2010] 3 IR 737; *Sivsivadze v Minister for Justice* [2012] IEHC 244, (Unrep, Kearns P, 21/6/2012); *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696; *Baker v Canada* (Minister of Citizenship and Immigration) [1999] 2 SCR 817; *Agbonlahor v Minister for Justice* [2007] IEHC 166, [2007] 4 IR 309; *FP v Minister for Justice* [2002] 1 IR 164; *Kouype v Minister for Justice* [2005] IEHC 380, [2011] 2 IR 1; *LAT v Minister for Justice* [2011] IEHC 404, (Unrep, Hogan J, 2/11/2011); *APA v Minister for Justice* [2010] IEHC 297, (Unrep, Cooke J, 20/7/2010); *KIK v Minister for Justice* [2011] IEHC 444, (Unrep, Cooke J, 25/11/2011); *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 3 LRC 1; *In re Ó Laighléis* [1960] IR 93; *FP v Minister for Justice* [2002] IR 164; *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97; *NS v Anderson* [2004] IEHC 440, [2008] 3 IR 417; *RGG v DPP* [2008] IEHC 30, [2008] 3 IR 732; *FLK-M v Minister for Justice* [2009] IEHC 125, (Unrep, Charleton J, 16/3/2009); *R (Razgar) v Home Secretary* [2004] UKHL 27, [2004] 2 AC 368; *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112; *OE v Minister for Justice* [2008] IEHC 68, [2008] 3 IR 760; *O Domhnaill v Merrick* [1984] IR 151; *Horgan v An Taoiseach* [2003] 2 IR 468 and *MFM v MC* (Proceeds of crime) [2001] 2 IR 385 considered – Immigration Act 1999 (No 22), s 3 – Refugee Act 1996 (No 17) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on Human Rights Act 2003 (No 20), s 3 – Immigration Act 2004 (No 1), s 5 – Constitution of Ireland 1937, arts 15, 28, 29, 30, 40, and 42A

– European Convention on Human Rights and Fundamental Freedoms 1950, arts 2 & 8 – Geneva Convention relating to the Status of Refugees 1951, art 31 – United Nations Convention on the Rights of the Child 1989, art 3 – Charter of Fundamental Rights of the European Union 2000, arts 4, 9, 10 and 51 – Leave granted (2012/343JR – Mac Eochaidh J – 30/5/2013) [2013] IEHC 237

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## Deportation

Judicial review – Leave – Substantial grounds – Subsidiary protection – Appeal to Supreme Court – Whether pending appeal to Supreme Court concerning refusal of subsidiary protection constituted substantial ground to challenge deportation order – Interlocutory injunction – Restraint of deportation – Whether fair question to be tried – Whether significant weight attaching to implementation of prima facie valid immigration decisions – Whether public interest factors – Whether countervailing circumstances – Whether credible basis for real risk of harm arising from deportation – Whether balance of justice weighed in favour of restraint of deportation – Okunade v Minister for Justice [2012] IESC 49, [2012] 3 IR 152 and Smith v Minister for Justice [2013] IESC 4, (Unrep, SC, 1/2/2013) applied – Refugee Act 1996 (No 17), ss 11, 11B and 13 – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Directive 2005/85/EEC – Charter of Fundamental Rights of the European Union 2000, arts 2, 47 and 51 – European Convention on Human Rights and Fundamental Freedoms 1950, art 6 – Leave refused; injunction refused (2012/931JR – McDermott J – 16/5/2013) [2013] IEHC 240

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## Deportation

Application for injunction to restrain deportation – Change in circumstances – Marriage of applicant – Applicable principles on application for injunctive relief in judicial review context – Default positions that deportations not to be restrained pending outcome of hearing – Exception to default position – Whether disruption to family life – Application for stay – Okunade v Minister for Justice [2012] IEHC 49, (Unrep, Cross J, 30/3/2012); Campus Oil v Minister for Energy (No 2) [1983] 1 IR 88 and Danske Bank v Niall McFadden [2010] IEHC 119, (Unrep, Clarke J, 27/4/2010) considered – Injunction refused (2013/286JR – Mac Eochaidh J – 23/04/2013) [2013] IEHC 186  
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## Deportation

New information – Notification – Duty of enquiry – Judicial review – Leave – Substantial grounds – Delay – Extension of time – Whether deportation order made in absence of relevant information – Whether relevant information communicated to Minister before making of decision to

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## Deportation

Revocation – Minister – Right to family life – Test to be applied – Significant new materials or circumstances – Material change in law – Relevant considerations – Judicial review – Leave – Ex parte application – Whether obligation on applicant to make family rights arguments during first application to revoke deportation – Whether applicant failed to challenge deportation order or first refusal to revoke – Whether grant of permission to reside to son of applicant constituted new fact, material or circumstance – Whether circumstances changed in significant way – Whether European court decision materially altered legal framework so as to require Minister to reconsider decision – Certiorari – Discretion – Whether exercise of discretion to refuse certiorari based on range of factors to be properly taken into account – Whether grant of certiorari would result in different outcome – Whether applicant entitled to rely upon family rights having previously acted in disregard of family life – CRA v Minister for Justice [2007] IEHC 19, [2007] 3 IR 603; Irfan v Minister for Justice [2010] IEHC, (Unrep, Cooke J, 23/11/2010) and G v DPP [1994] 1 IR 374 applied

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*Smith v Minister for Justice and Equality*

## Family reunification

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## Family reunification

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Interlocutory mandatory injunction sought compelling return of passport – Passport retained by Gardaí after arrest – Charge – Not subject to bail or restrictions on travel or liberty – Offer of employment abroad – Constitutional right to travel – Whether any lawful basis for holding passport – Whether any potentially sustainable defence – Constitutional rights to persons and property – *The State (M) v Attorney General* [1979] IR 73; *O'Neill v O'Keeffe* [2002] 2 IR 1; *Murphy v Greene* [1990] 2 IR 566; *Attorney General v Lee* [2000] 4 IR 68; *Albion Properties Ltd v Moonblast Ltd* [2011]

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### Security

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## LOCAL GOVERNMENT

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## MARRIAGE

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## MEDICAL LAW

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## MEDICAL NEGLIGENCE

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### Medical negligence

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## PENSIONS

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### Civil Service

Application for judicial review – Decision refusing award of added professional years under pension regulations – Public service – Lecturer in law – Education sector superannuation scheme – Post-qualification experience required for appointed position – Conditions of scheme in circular letters – Alternative remedy – De novo appeal – Whether alternative remedy available – Whether judicial review most appropriate remedy – Whether reasons irrational – Whether post-qualification experience meant experience practising as lawyer – Whether minimum requirements of circulars met – P&F Sharpe Ltd v Dublin City and County Manager [1989] 1 IR 701; AMT v Refugee Appeals Tribunal [2004] 2 IR 607; Tesco Stores v Secretary of State for the Environment [1995] 1 WLR 759; State (Keegan) v The Stardust Victims Compensation Tribunal [1986] IR 642; O’Keeffe v An Bord Pleanala [1993] 1 IR 39; Tomlinson v Criminal Injuries Compensation Tribunal [2005] IESC 1, [2006] 4 IR 321 and Stefan v Minister for Justice [2001] 4 IR 203 considered – Local Government (Superannuation) (Consolidation) Scheme 1998 (SI 455/1998), art 66(8) – Vocational Education Superannuation Schemes (Transfer of Departmental Administration and Ministerial Functions) Order 1998 (SI 362/1998) – Education Sector Superannuation Scheme (Transfer of Departmental Administration and Ministerial Functions) Order 2001 (SI 14/2001) – Pensions Act 1990 (No 25), s 131 – Orders refused (2012/956)JR – Hedigan J – 10/7/2013) [2013] IEHC 313  
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### Ombudsman

Pension scheme – Reduction by statute – Emergency financial measures – Whether public body – Whether pension of notice party constituted public service pension scheme – Whether notice party entitled to benefit of statutory exception – Whether pension scheme created by act of statutory body – Whether decision of appellant failed to reflect intention of Oireachtas – Whether decision fair and valid – Statutory appeal – Applicable test – Whether principal of deference to expert administrative body applicable where question of pure law – Whether Pensions Ombudsman had significant discretion to achieve fair outcome – Whether error of fact – Whether court entitled to consider evidence not placed before Pensions Ombudsman – Ulster Bank Investment Funds Ltd v Financial Services Ombudsman [2006] IEHC 323, (Unrep, Finnegan J, 1/11/2006); Hayes v Financial Services Ombudsman (Unrep, ex tempore, MacMenamin J, 3/11/2008) approved – Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare [1998] 1 IR 34 and Unite The Union v Minister for Finance [2010]

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### Statutory Instruments

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Application for leave to appeal judicial review – Planning – Reliefs refused in relation to decision to grant approval for dual carriageway – Costs – Whether point made at first instance – Whether legal findings based on established legal principles – Whether point of law determined in judgment – Whether point of law of exceptional public importance – Whether desirable in public interest that appeal taken – *Glancré Teoranta v An Bord Pleanála* [2006] IEHC 250 (Unrep, MacMenamin J, 13/7/2006); *Harding v Cork County Council* [2006] IEHC 80, [2006] 1 IR 294; *Commission v Ireland (Case C-50/09)* [2011] ECR I-873 and R (Edwards) v Environment Agency (No 2) (Case C-260/11) [2013] 1 WLR 2914 considered – European Union (Environmental Impact Assessment) (Planning and Development Act 2000) Regulations 2012 (SI 419/2012) – Planning and Development Act, 2000 (No 30), ss 50(7), 50B, 117A and 172 – Planning and Development (Strategic Infrastructure) Act 2006 (No 27), s13 – Constitution of Ireland 1937, Arts 34.1 and 40.3.1 – Environmental Impact Assessment Directive 85/337/EEC, arts 3 and 10a – Council Directive 11/92/EU, art 11 – Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25/6/1998 – Leave to appeal refused (2013/431JR – O'Malley J – 19/7/2013) [2013] IEHC 348 *Shanahan v Ireland*

### Development

Judicial review – Exemptions for agricultural purposes – Whether erection of tractor shed constituted exempted development – Scope of planning exemption – Whether carrying out of development endangered public safety by reason of traffic hazard – Report of inspector – Failure to demonstrate connection

between carrying out of development and traffic hazard – Statutory definition of ‘development’ – Departure from literal interpretation – Deference to expertise of Board – *BUPA Ireland Ltd v Health Insurance Authority* [2008] IESC 42, [2009] 1 ILRM 81; *Nestor v Murphy* [1979] IR 326; *O’Keeffe v An Bord Pleanála* [1993] 1 IR 39; *The State (Holland) v Kennedy* [1977] IR 193 and *Killeen v Director of Public Prosecutions* [1997] 3 IR 218 considered – Planning and Development Act 2000 (No 3), s 4 – Planning and Development Regulations 2001 (SI 600/2001), arts 6 and 9 – Interpretation Act 2005 (No 23), s 5 – Matter remitted to An Bord Pleanála for further consideration (2012/48JR – Hogan J – 15/5/2013) [2013] IEHC 234

*Cunningham v An Bord Pleanála*

## PRACTICE AND PROCEDURE

### Costs

Application for costs – Costs of trial of preliminary issues – Discretion of court – Primary rule that costs follow event – Whether rule that costs follow event ought to be displaced – Whether exceptional circumstances warranting departure from primary rule – Onus on party resisting application of primary rule – Justice between the parties – Commercial litigation – *Grimes v Punchestown Developments Co Ltd* [2002] 4 IR 515; *Fyffes plc v DCC plc* [2006] IEHC 32; [2009] 2 IR 417; *Cork County Council v Shackleton* [2007] IEHC 241; [2007] IEHC 334; [2011] 1 IR 443; *John Ronan and Sons v Cleanbuild Ltd* [2011] IEHC 499, (Unrep, Clarke J, 21/12/2011); *ACC Bank plc v Johnston* [2011] IEHC 500, (Unrep, Clarke J, 24/10/2011); *McEvoy v Meath County Council* [2003] 1 IR 208 and *Dunne v Minister for Environment* [2007] IESC 60; [2008] 2 IR 775 considered – Rules of the Superior Courts 1986 (SI 15/1986), O99, r 1 – Costs in favour of respondents limited to 75% (2005/532JR – Cooke J – 30/4/2013) [2013] IEHC 177 *Bupa Ireland Ltd v Health Insurance Authority*

### Costs

Security for costs in respect of appeal – Applicable principles – Multiple appeals against procedural orders of High Court – Lay litigant – Calculation of security for costs – ‘One third rule’ – Departure from ‘one third rule’ – Factors to be considered – Application for stay on appeals pending order for security for costs – Whether appropriate to order security for costs – Whether conduct of litigation by appellant vexatious – Whether conduct of litigation by appellant oppressive – Whether right of access to courts affected – Whether reasonable efforts made to conduct litigation in accordance with directions of court – Whether conduct of appellant added inappropriately to length or costs of proceedings – Whether behaviour of appellant improper – Whether special circumstances – Whether point of law of

public importance – Whether sufficient countervailing factor – Whether ‘one third rule’ appropriate – *Midland Bank Ltd v Crossley-Cooke* [1969] IR 56; *Dowling & Ors v Minister For Finance* [2012] IESC 32, (Unrep, SC, 24/5/2012) and *Domican v Axa Insurance Ltd* [2007] IEHC 14, [2007] 2 IR 682 applied – *Macauley v Minister for Posts & Telegraphs* [1966] IR 345; *Slattery v An Taoiseach* [1993] 1 IR 286; *Barry v Buckley* [1981] IR 306; *Lismore Homes Ltd v Bank of Ireland Finance Ltd* [1999] 1 IR 501; *Proetta v Neil* [1996] 1 IR 100; *Pitt v Bolger* [1996] 1 IR 108; *Salthill Properties Ltd v Royal Bank Of Scotland Plc* [2010] IEHC 31, [2011] 2 IR 441; *Malone v Brown Thomas & Co Ltd* [1995] 1 ILRM 369; *Hidden Ireland Heritage Holidays Ltd v Indigo Services Ltd* [2005] IESC 38, [2005] 2 IR 115; *Bula Ltd v Tara Mines Ltd* (Unrep, SC, 26/3/1998); *Din v Banco Ambrosiano Spa* [1991] 1 IR 569; *Thalle v Soares & Ors* [1957] IR 182; *Fallon v An Bord Pleanála* [1992] 2 IR 380 and *Harlequin Property & Ors v Halloran* [2012] IEHC 13, (Unrep, Clarke J, 19/1/2012) considered – Constitution of Ireland 1937 – Companies Act 1963 (No 33), s 390 – Security for costs ordered (432,437,438, 439 & 440/2010 and 47,121,381,382,383/2011 – SC – 10/7/2012) [2012] IESC 42

*Farrell v Bank of Ireland*

### Costs

Aarhus Convention – Intended challenge to decision of respondent – Application for order for costs on ex ante and ex parte basis – Applicant company not represented by solicitor or counsel – Applicant seeking order that costs for intended action “not be prohibitively expensive” – Fair procedures – Audi alterem partem – Jurisdiction of court – Whether Aarhus Convention applied – Whether decision of respondent within scope of legislation – Whether costs order could be made on ex ante and ex parte basis – Whether breach of fair procedures to make costs order on ex ante and ex parte basis – Whether court had jurisdiction to make order sought – *Battle v Irish Art Promotions Ltd* [1968] IR 252 applied – *Commission v Ireland (Case C-427/)* [2009] ECR I-6277 considered – R (Edwards) v Environment Agency [2011] OJ C226/16 followed – Constitution of Ireland 1937, arts 29 and 34 – Aarhus Convention, articles 6, 9 and 20 – Council Directive 2003/35/EC, recitals 5 to 10 – Council Directive 2011/92/EU, recitals 18 to 22 and art 11 – Council Directive 2008/1/EC, recital 26 and art 16 – Environmental Protection Agency Act 1992 (No 7), s 87 – Relief refused (2012/205MCA – Hogan J – 28/8/2012) [2012] IEHC 369 *NO2GM Ltd v Environmental Protection Agency*

### Costs

Aarhus Convention – Intended challenge to decision of respondent – Application for order for costs on ex ante and ex parte basis – Applicant seeking order that costs for intended action “not be prohibitively

expensive” – Fair procedures – Audi alterem partem – Jurisdiction of court – Whether Aarhus Convention applied – Whether decision of respondent within scope of legislation – Whether costs order could be made on ex ante and ex parte basis – Whether breach of fair procedures to make costs order on ex ante and ex parte basis – Whether court had jurisdiction to make order sought – *Commission v Ireland* (Case C-427/07) [2009] ECR I-6277 considered – R (Edwards) v Environmental Agency [2011] OJ C226/16 followed – Constitution of Ireland 1937, Arts 29 and 34 – Aarhus Convention, arts 6, 9 and 20 – Council Directive 2003/35/EC, recitals 5 to 10 -Council Directive 2011/92/EU, recitals 18 to 22 and art 11 – Council Directive 2008/1/EC, recital 26 and art 16 – Environmental Protection Agency Act 1992 (No 7), s 87 – Relief refused (2012/295MCA – Hogan J – 28/8/2012) [2012] IEHC 370 *O’Connor v Environmental Protection Agency*

### Costs

Ancillary orders relating to interest and costs – Whether default interest clause in guarantee properly executed – Whether defendant entitled to claim interest given delay in seeking to recover on foot of guarantee – Plaintiff succeeded on discrete issue – Normal rule that costs follow event – Discretion to depart from normal rule – Assessment of amount of hearing attributable to discrete issue – Application for stay – *Dawson v Raynes* [1826] 2 Russ 466 ; *Veolia Water UK plc v Fingal County Council* (No 2) [2006] IEHC 240; [2007] 2 IR 81; *ACC v Johnston* [2011] IEHC 500, (Unrep, Clarke J, 24/10/2011); *McAleenan v AIG (Europe) Ltd* [2010] IEHC 279, (Unrep, Finlay Geoghegan J, 16/7/2010) and *National Irish Bank v McFadden* [2010] IEHC 119, (Unrep, Clarke J, 27/4/2010) considered – Interest granted excluding default rate interest; defendant entitled to 70% of costs (2012/2092P – McGovern J – 14/05/2013) [2013] IEHC 213

*Slattery v Friends First Life Assurance Company Limited*

### Costs

Clinical negligence – Failure to establish negligence in all but one aspect of claim – Liability denied – Costs follow the event – Discretion of court – Costs significant – Discovery documentation – Expert witnesses – Percentage reduction – Extent of procedural protections available to defendant – Costs penalty – Duration of proceedings – Whether proceedings complex – Whether case should be subjected to greater scrutiny when considering costs – Whether plaintiff overall winner – *Veolia Water UK Plc v Fingal County Council* (No 2) [2006] IEHC 240, [2007] 2 IR 81 and *Fairfield Sentry Ltd v Citco Bank Nedeerland NV* [2012] IEHC 462 (Unrep, Finlay Geoghegan J, 25/6/2012) considered – Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998 (SI 391/1998) – Plaintiff awarded 65% of her

costs (2007/9362P – Irvine J – 19/7/2013) [2013] IEHC 363

*Wright v Health Service Executive*

### Delay

Dismissal of proceedings – Applicable test – Onus of proof – Whether delay inordinate – Whether delay inexcusable – Whether balance of justice favoured dismissal – Whether actual prejudice – Whether delay attributable to both parties – Whether trial judge took extraneous considerations into account – Whether consideration of adduction of evidence at trial constituted material consideration in balance of justice – Whether payment of security for costs by plaintiffs afforded sufficient weight by trial judge – Whether delay attributable to interlocutory applications and appeals – Whether plaintiffs culpable – Whether delays by defendants in filing defences – *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459; *Comcast International Holdings Inc v Minister for Public Enterprise* [2012] IESC 50, (Unrep, SC, 17/10/2012); *Desmond v MGN Ltd* [2008] IESC 56, [2009] 1 IR 737 and *Anglo Irish Beef Processors v Montgomery* [2002] 3 IR 510 approved – *Lismore Homes Ltd* (in receivership) v *Bank of Ireland Finance Ltd* [1999] 1 IR 501 considered – Appeal allowed; proceedings dismissed with stay subject to directions (363/2006 & 364/2006 – SC – 8/2/2012) [2012] IESC 6

*Lismore Builders Ltd (in receivership) v Bank of Ireland Finance Ltd*

### Discovery

Privilege – Inspection of documents – An Garda Síochána – Applicable – Public interest – Public policy – Whether public interest regarding crime outweighed interest in disclosure – Whether inspection undermined Witness Protection Programme – Whether documents sought confidential, sensitive and relating to Garda practices in the prevention and detection of crime – Whether inspection likely to put lives at risk – *Ambriorix Ltd v Minister for the Environment* (No 1) [1992] 1 IR 277 and *Murphy v Dublin Corporation* [1972] IR 215 applied – *Breathnach v Ireland* (No 3) [1993] 2 IR 458; *Keating v RTE* [2013] IESC 22, (Unrep, SC, 9/5/2013); *Foley v Bowden* [2003] 2 IR 607 and *Nic Gibb v Minister for Justice* [2013] IEHC 238, (Unrep, O’Malley J, 16/5/2013) considered – Rules of the Superior Courts 1986 (SI 15/1986), O31, r18 – Inspection refused (2003/11249 – Kearns P – 29/7/2013) [2013] IEHC 393 *Keating v Radió Telifís Éireann*

### Discovery

Privilege – Inspection of documents – Public interest privilege – An Garda Síochána – Detection and prevention of serious crime – Confidentiality – Whether public interest privilege in maintaining confidentiality of operational plan and duty roster of Garda operation – Whether disclosure demonstrated Garda methodologies – Whether age of events rendered public interest claim null – Whether

discernible risk of information assisting criminals – Whether redaction of identities of Garda officers appropriate – Whether public interest in retaining confidentiality of intelligence communications – Whether inspection should be ordered – *Ambriorix Ltd v Minister for Environment* (No 1) [1992] 1 IR 277 and *Murphy v Dublin Corporation* [1972] 1 IR 215 applied – *Breathnach v Ireland* (No 3) [1993] 2 IR 458; *Keating v Radió Telifís Éireann* [2013] IESC 22, (Unrep, SC, 9/5/2013); *In re Kevin O’Kelly* [1974] 108 ILTR 97; *Burke v Central Independent Television plc* [1994] 2 IR 261 and *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guana Co* (1882) 11 QBD 55 considered – Inspection ordered (1999/7414P – O’Malley J – 16/5/2013) [2013] IEHC 238

*Nic Gibb v Minister for Justice, Equality and Law Reform*

### Discovery

Succession – Documents sought by daughter of testator relating to means and assets of widow and children of second marriage – Undertaking given to swear affidavit of means – Jurisdiction of court – Whether testator failed in moral duty to make proper provision for child – Whether relevant to any matter in question in proceedings – Whether necessary for disposing fairly of cause or matter or for saving costs – Whether in possession or procurement – Whether proportionate – In the Goods of JH (Deceased) [1984] IR 599; (C)K v F(C) [2003] IEHC 109, (Unrep, Carroll J, 16/12/2003) and *XC v RT* (Succession: Proper provision) [2003] 2 IR 250 considered – Succession Act 1965 (No 27), s 117 and 121 – Application partially dismissed in respect of documents relating to children, adjourned in relation to documents relating to widow (2012/256SP – Laffoy J – 15/7/2013) [2013] IEHC 333

*P(G) v R(G)*

### Dismissal of proceedings

Failure to disclose cause of action – Frivolous or vexatious claim – Whether proceedings bound to fail – Banking – Loan – Mortgage – Receiver – Sale of property – Securitisation – Central Bank Codes of Practice – Whether securitisation of loans altered obligations under mortgage – Whether alleged breaches of codes of practice gave rise to cause of action – Whether claims relating to securitisation and codes of practice inextricably intertwined – Company law – Cross-border merger – Solvency – Whether solvency requirement in relation to cross-border mergers – Whether cross-border merger constituted fraudulent misrepresentation – Statute – Repeal – Whether receiver appointed under repealed statutory provision – Whether power to appoint receiver under mortgage deed affected by repeal of statutory provision – Whether loan agreement constituting creation of currency – Whether basis for allegations of offence of fraud – Whether basis for allegations of defamation –

Whether proceedings constituted organised pseudolegal commercial arguments – Aer Rianta *cpt v Ryanair* [2004] IESC 23, [2004] 1 IR 506 and *Barry v Buckley* [1981] IR 306 applied; *Wellstead v White* [2011] IEHC 438, (Unrep, Laffoy J, 25/11/2011) and *Kavanagh v Lynch* [2011] IEHC 348; (Unrep, Laffoy J, 31/8/2011) approved – *Irish Life and Permanent plc v Duff* [2013] IEHC 43, (Unrep, Hogan J, 31/1/2013); *Friends First Finance Ltd v Cronin* [2013] IEHC 59, (Unrep, Herbert J, 15/2/2013); *Zurich Bank plc v McConnon* [2011] IEHC 75, (Unrep, Birmingham J, 4/3/2011); *Stepstone Mortgage Funding Ltd v Fitzell* [2012] IEHC 142, [2012] 2 IR 318; *Re C L Nye* [1971] Ch 442 and *Start Mortgages Ltd v Gunn* [2011] IEHC 275, (Unrep, Dunne J, 25/7/2011) considered – Rules of the Superior Courts 1986 (SI 15/1986), O19, r 28 – European Communities (Cross-Border Mergers) Regulations 2008 (SI 157/2008) – Registration of Title Act 1964 (No 16), s 62(7) – Land and Conveyancing Law Reform Act 2009 (No 27), s 8 – Central Bank Act 1989 (No 16), s 117 – Directive 2005/56/EC, arts 4 and 17 – Proceedings dismissed in part (2012/8705P – Gilligan J – 31/5/2013) [2013] IEHC 371

*Freeman v Bank of Scotland (Ireland) Ltd*

### Dismissal of proceedings

Motion to dismiss – Inherent jurisdiction of court to dismiss claim bound to fail – Frivolous and vexatious – Abuse of court process – Previous litigation – Claim for defamation – Actions of garda – Claims not actionable – Whether no chance of success – Whether claim already disposed of – Whether dismissal gave rise to bar to fresh proceedings – Whether statute barred – Whether statement privileged – Witness immunity – Whether defence should be filed – *Barry v Buckley* [1981] IR 306; *Sun Fat Chan v Osseous* [1992] 1 IR 425; *O'Neill v Ryan* [1992] 1 IR 166; *Moffitt v ACC* [2007] IEHC 245, [2008] 1 ILRM 416; *Looney v Bank of Ireland* [1996] 1 IR 157 and *Fagan v Burgess* [1999] 3 IR 306 considered – Defamation Act 2009 (No 31), ss 17 and 38 – Statute of Limitations Act 1957 (No 6), s 11 – Claim dismissed (2012/10367P – O'Malley J – 27/6/2013) [2013] IEHC 303

*Murray v Sheridan*

### Parties

Joinder of defendant – Statute of limitations – Building contract – Defects – Discoverability test – Whether claim clearly and manifestly statute barred – Whether date of discovery of defects availing plaintiff – Whether circumstances in which defendant would be debarred from relying upon statute of limitations – *Hynes v Western Health Board* [2006] IEHC 55, (Unrep, Clarke J, 8/3/2006); *O'Connell v Building and Allied Trades Union* [2012] IESC 36, [2012] 2 IR 371; *Murphy v McInerney Construction Ltd* [2008] IEHC 323, (Unrep, Dunne J, 22/10/2008); *Irish Equine Foundation Ltd v Robinson* [1999] 2

IR 442 and *Hegarty v O'Loughran* [1990] 1 IR 148 applied – *O'Donnell v Kilsaran Concrete Ltd* [2001] 4 IR 183 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 15, r 14, O 19, r 28 and O63, r 9 – Building Regulations 1997 (SI 497/1997) – Application granted (2011/2114P – Birmingham J – 31/5/2013) [2013] IEHC 263

*Hegarty v D & S Flanagan Brothers Ballymore Ltd*

### Settlement

Contract – Settlement between plaintiff and third party – Concurrent wrongdoers – 'Release or accord' – Statutory interpretation – Whether arbitral process constituted release or accord – Whether action disclosed bona fide or reasonable continuing cause of action – Whether claim should be struck out – Whether compromise of part of arbitral proceedings and subsequent determination of arbitral process constituted release and or accord – Whether settlement unenforceable for want of consideration – Whether valid consideration – Construction of contract – Meaning of dispute or difference – Whether existence of actual or potential dispute prerequisite to compromise – Whether dispute existed – Whether failure to accept position of other party constituted dispute – Whether argument of plaintiff abandoned when claim conceded – Whether rule in *Henderson v Henderson* applicable – Whether rule in *Henderson v Henderson* applied where parties settled dispute – Whether plaintiff precluded from revisiting matters subject of settlement – Whether exception to rule in *Henderson v Henderson* – *Analog Devices BV v Zurich Insurance Company* [2005] IESC 12, [2005] 1 IR 274; *AA v The Medical Council* [2003] 4 IR 302; *Lynch v Beale* (Unrep, Hamilton J, 23/11/1974) applied – *Henderson v Henderson* [1843] 3 Hare 100; *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] 1 WLR 2339; *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA* ("The Leonidas D") [1985] 1 WLR 925; *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 and *El-Mir v Risk* [2005] NSWCA 215 followed – Civil Liability Act 1961 (No 41), ss 11, 17 and 35 – Relief granted (2006/1833P – Hedigan J – 4/9/2012) [2012] IEHC 368

*Arnold v Duffy Mitchell O'Donoghue (a firm)*

### Summary judgment

Multiple proceedings – Defences in nature of counterclaims – Whether equitable set-off to be permitted – Discretion of court – Applicable principles – Commencement of proceedings by summary summons – Breach of agreement causing disruption to business and financial affairs – Transfer of loans to NAMA – Alleged mismanagement of accounts by plaintiff – Whether claims advanced promptly and with precision – Defence raised that bank aware wife could not afford to repay loan in own right – Signing of loan agreement and legal retainer by wife – *Danske Bank v Durcan*

*New Homes* [2010] IESC 22, (Unrep, SC, 22/4/2010); *Prendergast v Biddle* (Unrep, SC, 31/7/1957); *Moohan v S & R Motors (Donegal) Ltd* [2007] IEHC 435, [2008] 3 IR 650 and *Dellway Investments Ltd v National Asset Management Agency* [2011] IESC 13, [2011] 4 IR 1 considered – Judgment granted in part with leave to defend granted in part (2011/2790S, 2011/2791S & 2011/2792S – Hogan J – 12/3/2013) [2013] IEHC 227  
*Allied Irish Bank Plc v Tracey*

### Summary judgment

Leave to defend – Arrears of rent – Whether entitlement to summary judgment – Whether matter should go to plenary hearing – Economic collapse as basis for defence – Doctrine of mistake – Mutual mistake – Whether mistake as to facts which existed at time contract entered into – Whether arguable defence – *Aer Rianta CPT v Ryanair Limited* [2001] 4 IR 607; *Solle v Butcher* [1950] 1 KB 671 – *O'Neill v Regan* [1992] 1 IR 166; *Irish Pensions Trust v Central Remedial Clinic* [2005] IEHC 87, [2006] 2 IR 126; *Amalgamated Investments v John Walker* [1976] 3 All ER 509 and *Fitzsimons v O'Hanlon* [1999] 2 ILRM 551 considered – Judgment granted (2010/3749S – Birmingham J – 6/6/2012) [2012] IEHC 607

*Behan v Behan's Land Restoration Ltd*

### Summons

Plenary summons – Renewal of summons – Delay – Interests of justice – Hardship on defendant if summons renewed – Deprivation of defence under statute of limitations – Whether summons should be renewed – Whether balance of justice in favour of plaintiff – Whether other good reason – Whether defendants prejudiced in defending claim – Whether defendants aware of intention of plaintiff to sue – Whether defendants deprived of defence – *Baulk v Irish National Insurance Co Ltd* [1969] IR 66 applied – *Firman v Ellis* [1978] 3 WLR 1 followed – *Chambers v Kenefick* [2005] IEHC 402, [2007] 3 IR 526; *McCooey v. Minister for Finance* [1971] I.R. 159; *O'Brien v. Fahy* (Unrep, SC, 21/3/1997); *Roche v. Clayton* [1998] 1 IR 596; *Martin v Moy Contractors Ltd* (Unrep, SC, 11/2/1999) and *Moloney v Lacey Building and Civil Engineering Ltd* [2010] IEHC 8, [2010] 4 IR 417 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 8, r 1 – Summons renewed (2001/12398P – Herbert J – 10/8/2012) [2012] IEHC 351

*Aberne v MIBI*

### Strike out

Application for order striking out proceedings – Application to amend pleadings – Allegations of professional negligence and breach of contract against solicitor in preparation for and conduct of criminal trial – Claim that proceedings constituted impermissible collateral challenge to decision of Court of Criminal Appeal – Claim that personal

injuries claim statute barred – Amendment of pleadings to limit claim to alleged upset caused pre-trial – Independent expert opinion on professional negligence – Amendment to determine real issues in controversy – Inherent power to strike out proceedings – Whether claim bound to fail – *Hamilton-Jones v David & Snape (a firm)* [2004] 1 WLR 924; *Farley v Skinner* [2002] 2 AC 732; *Heywood v Wellers* [1976] QB 446; *Jarvis v Swan Tours Ltd* [1973] 1 QB 233; *Hussey v Dillon* [1995] 1 IR 111 and *McDonnell v Ireland* [1998] 1 IR 134 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 28 – Statute of Limitation (Amendment) Act 1991 (No 18), s 3 – Parts of claim struck out with limited amendment of summons permitted (2005/420P – Clark J – 23/11/2010) [2010] IEHC 542  
*Murray v Budds*

### Third party procedure

Medical negligence – Alleged failure to diagnose abscess – Application to set aside joinder of defendant – Delay – Whether claim statute barred – Whether clear cut that claim statute barred – Whether delay prejudiced right to fair hearing – Jurisdiction to strike out for delay irrespective of fault – Passage of time – Whether fair trial possible – *O’Connell v Building and Allied Trade Union* [2012] IESC 36, [2012] 2 IR 371; *I(T) v J(J)* [2012] IEHC 327, (Unrep, Hogan J, 5/7/2012); *McBrearty v North Western Health Board* [2010] IESC 27, (Unrep, SC, 10/5/2010); *Manning v Benson & Hedges Ltd* [2004] 3 IR 556 considered – Order joining defendant set aside (2003/8027P – Hogan J – 19/4/2013) [2013] IEHC 191

*Adamson v North Eastern Health Board*

### Third party procedure

Application to set aside leave to issue and serve third party notice – Unreasonable delay – Claim delay caused by professional advisors – Burden of proof- Actual prejudice to proposed third party – Whether delay – Whether leave should be set aside – Whether delay unreasonable – Whether actual prejudice caused to proposed third party by delay – *Murnaghan v Marklands Holdings Ltd* [2007] IEHC 255, (Unrep, Laffoy J, 10/8/2007); *Greene v Triangle Developments Ltd* [2008] IEHC 52, (Unrep, Clarke J, 4/3/2008) and *Robins v Coleman* [2009] IEHC 486, [2010] 2 IR 180 applied – *Gilmore v Windle* [1967] IR 323; *Board of Governors of St Laurence’s Hospital v Staunton* [1990] 2 IR 31; *Molloy v Dublin Corporation* [2001] 4 IR 52; *McElwaine v Hughes* (Unrep, Barron J, 30/4/1997) and *Greer v John Sisk & Sons Ltd* (Unrep, SC, 20/3/2002) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 16 and O 125- Civil Liability Act 1961 (No 41), s 27 – Application dismissed (2007/5569P – Herbert J – 12/6/2012) [2012] IEHC 380

*Basinview Management Ltd v Borg Developments and Waterdrop*

### Third party procedure

Plenary summons – Dispute regarding ownership of public house and dwelling house – Third party notice alleging negligence and breach of duty by legal advisers – Application to set aside third party procedure – Alleged failure to comply with statutory requirements – Alleged delay – Whether third party notice served as soon as reasonably possible – Prejudice – Passage of time – Deaths of witnesses – Whether delay in making claim for damages inordinate and inexcusable – Whether third party issue inappropriate – Inherent jurisdiction of court to set aside third party proceedings – *Quirke (a minor) v O’Shea* [1992] ILRM 286 and *Wicklow County Council v Fenton* [2002] 2 IR 583 considered – Civil Liability Act 1961 (No 41), s 27 – Rules of the Superior Courts 1986 (SI 15/1986), O16 – Relief refused (2001/16429P – Laffoy J – 24/4/2013) [2013] IEHC 232

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## PROFESSIONS

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### Solicitors

Appeal against finding that no case of misconduct – Delay – Affidavits filed with errors – Misled – Denied opinion of senior counsel – Delayed hearing – Absence of estimate of costs – Alleged coercion to accept settlement – Alleged ignoring of instructions – Whether attempt to delay proceedings – Whether no case of misconduct – Whether allegations adequately rebutted – Whether Tribunal erred in its findings – Appeal dismissed (2013/61SA – Kearns P – 15/7/2013) [2013] IEHC 329

*Cawley v Solicitors Disciplinary Tribunal*

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## REAL PROPERTY

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### Mortgage

Ejection proceedings – Application for possession – Whether vested right to possession prior to repeal of Registration of Title Act 1964 – Whether right to possession pursuant to contractual agreement independent of statute – Whether case to be stated to Supreme Court – Jurisdiction to state case – Whether proper to state case – Whether case stated on application of party – Whether appeals where no oral evidence heard in Circuit Court excluded – *Irish Life and Permanent Plc v Duff* [2013] IEHC 43, (Unrep, Hogan J, 31/1/3013; *Northern Bank Ltd v Devlin* [1924] 1 IR 90; *Bank of Ireland v Smyth* [1993] 2 IR 102; *Kavanagh v Lynch* [2011] IEHC 348, (Unrep, Laffoy J, 31/8/2011); *McEneary v Sheahan* [2012] IEHC 331, (Unrep, Feeney J, 31/7/2012); *Meagher v Luke J Healy Pharmacy Ltd* [2010] IESC 40, [2010] 3 IR 743; *Wigoder Ltd v Moran* [1977] IR 112 considered – Courts of Justice Act 1936 (No 48), ss 37 and 38 – Registration of Title Act 1964 (No 16), s 62 – Interpretation Act 2005 (No 23), s 27 –

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*Irish Life and Permanent Plc v Dunphy*

### Mortgage

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C-124/99) [2000] ECR I-07293; *Nemec v Caisse régionale d'assurance maladie du Nord-Est* (Case C-205/05) [2006] ECR I-10745; *Da Silva Martins v Bank Betriebskrankenkasse – Pflegekasse* (Case C-388/09) [2011] ECR I-05737; *Trojani v Centre public d'aide sociale de Bruxelles* (Case C-456/02) [2004] ECR I-07573; *Goncescu v Minister for Justice* [2003] IESC 49, (Unrep, SC, 30/7/2003) considered – European Communities (Free Movement of Persons)(No 2) Regulations 2006 (SI 656/2006), regs 6 and 12 – Social Welfare Consolidation Act 2005 (No 26), ss 141, 240 and 246 – Directive 38/2004/EC, arts 4 and 24 – Regulation 883/2004/EC, arts, 3, 11, 70 and annex – Treaty on the Functioning of the European Union, arts 21, 48,49 and 50 – Relief refused (2013/88JR & 2013/140 JR – Hedigan J – 12/7/2013) [2013] IEHC 340  
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## SOLICITORS

### Solicitors

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### Damages

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### Damages

Appeal against liability and quantum – Professional negligence – Doctor and hospital – Standard of care – Symphysiotomy procedure – Procedure carried out after completion of caesarean section and safe delivery of baby – Applicable standard – Whether symphysiotomy justified in the circumstances – Whether procedure warranted – Whether general and approved practice of the time – Whether ethically justifiable – Whether general acceptance that procedure justifiable – Whether medical practitioner of like specialisation and skill would have carried out procedure in circumstances – Quantum – Cap on general damages – Principles to be applied – Mitigating factors in damages issue – Whether award of damages should be reduced – *Dunne v National Maternity Hospital* [1989] IR 91 applied – *MN v SN* [2005] IESC 17 & [2005] IESC 30, [2005] 4 IR 461 applied – *Yang Yun v MIB* [2009] IEHC 318, (Unrep, Quirke J, 17/7/2009)

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### Personal injuries

Damages – Road traffic accident – Psychiatric injury – Personality disorder – Whether personality disorder existed prior to accident – Future treatment to include medical inflation – Loss of earnings – Assessment of damages – *McEaney v Monaghan County Council* (Unrep, O'Sullivan J, 26/7/2001); *Yang Yun v MIB* [2009] IEHC 318, (Unrep, Quirke J, 17/7/2009) and *Reddy v Bates* [1983] IR 141 considered – Damages awarded (2006/2595P – Cross J – 31/7/2012) [2012] IEHC 377  
*Fagan v Griffin*

### Personal injuries

Minor struck by bus while crossing road – Claim that driver failed to see children on side of road in time and failed to take proper evasive action to warn plaintiff of presence – Liability of drivers in presence of children – Whether driver insufficiently alert – Whether driver would have reacted earlier had driver been alert – CCTV footage – Contributory negligence – Apportionment of damages – *McDonald v Córás Iompair Éireann* (1971) 104 ILTR 13; *Mulcahy v Lynch* (Unrep, SC, 25/3/1993); *O'Sullivan v Dwyer* [1971] IR 275 and *Carroll v Clare County Council* [1975] IR 221 considered – Civil Liability Act 1961 (No 41), s 34 – Rules of the Superior Courts 1986 (SI 15/1986), O16 – Negligence established with 30% reduction in damages for contributory negligence (2010/11561P – Cross J – 24/4/2013) [2013] IEHC 184  
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### Medical negligence

Professional negligence – Infant plaintiff – Liability – Alleged failure of defendant to diagnose and treat condition of plaintiff – Lumbar puncture procedure – No general approved practice established by expert witnesses – Causation – Path of causation charted by expert witness – Whether defendant liable – Whether failure to conduct lumbar puncture procedure on plaintiff negligent – Whether general and approved practice established – Whether path of causation identified by expert witness founded in fact or medical science – *Dunne v National Maternity Hospital* [1989] 1 IR 91 applied – Case dismissed (2010/937P – Ryan J – 14/8/2012) [2012] IEHC 354  
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## WATER

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### Statutory Instruments

Water Services Act (No. 2) 2013 (transfer of other liabilities) order (no. 2) 2014  
SI 188/2014

Water Services (No. 2) Act 2013 (commencement) order 2014  
SI 76/2014

Water Services (No. 2) Act 2013 (transfer of other liabilities) order 2014  
SI 96/2014

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## BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 15<sup>TH</sup> MAY 2014 TO THE 18<sup>TH</sup> JUNE 2014

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

National Treasury Management Agency (Amendment) Bill 2014  
Bill 44/2014 [Dáil Éireann]

Radiological Protection (Miscellaneous Provisions) Bill 2014  
Bill 52/2014 [Dáil Éireann]

Social Welfare & Pensions Bill 2014  
Bill 47/2014

Domestic Violence (Amendment) Bill 2014  
Bill 43/2014 [Dáil Éireann]

[pmb] Deputy Gerry Adams and Deputy Dessie Ellis and Deputy Pádraig Mac Lochlainn and Deputy Mary Lou McDonald.

Freedom of Movement (Common Travel Area) (Travel Documentation) Bill 2014  
Bill 50/2014

[pmb] Deputy Terence Flanagan

Garda Síochána (Amendment) (no.2) Bill 2014

Bill 45/2014 [Dáil Éireann]

[pmb] Deputy Mick Wallace

Public Sector Management (Appointment of Senior Members of the Garda Síochána) Bill 2014  
Bill 55/2014

[pmb] Deputy Shane Ross

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## BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 15<sup>TH</sup> MAY 2014 TO THE 18<sup>TH</sup> JUNE 2014

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Johnstown Castle Agricultural College (Amendment) Bill 2014  
Bill 46/2014

Public Health (Standardized packaging of Tobacco) Bill 2014  
Bill 54/2014 [Seanad Éireann]

Ministers and Secretaries (Amendment) Bill 2014

Bill 53/2014 [Seanad Éireann]

[pmb] Senator Fidelma Healy Eames, Senator Sean D. Barrett and Senator Feargal Quinn

Criminal Law (Sexual Offences) (Amendment) Bill 2014

Bill 41/2014 [Seanad Éireann]

[pmb] Senator Katherine Zappone

Parliamentary Scrutiny of Appointments (European Commission) Bill 2014  
Bill 49/2014

[pmb] Senator Paul Bradford, Senator James Heffernan, Senator Sean D. Barrett

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## PROGRESS OF BILLS AND BILLS AMENDED DURING THE PERIOD 15<sup>TH</sup> MAY 2014 TO THE 18<sup>TH</sup> JUNE 2014

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Competition and consumer protection bill 2014  
Bill 21/2014

1<sup>st</sup> Stage Dáil

Committee Stage – Dáil

Companies Bill 2012

Bill 116/2012

1<sup>st</sup> Stage Dáil

Passed Dail

Criminal Law (Sexual Offences) (Amendment) Bill 2014

Bill 41/2014

1<sup>st</sup> Stage – Seanad [pmb] Senator Katherine Zappone

Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013

Bill 93/2013

1<sup>st</sup> Stage – Dáil

Bill 93b/2013 Committee Stage – (Seanad)

Housing (Miscellaneous Provisions) Bill 2014

Bill 39/2014

Committee Amendments

Bill 39a/2014 Select sub-Committee

Bill 39a/2014 Report Amendments

Industrial Development (Forfás Dissolution) Bill 2013

Bill 138/2013

1<sup>st</sup> Stage – Dáil

Bill 138a/2013 Committee Amendments – [Seanad Éireann]

Irish Human Rights & Equality Commission Bill 2014

Bill 20/2014

Report Amendments

Bill 20a/2014 Passed by Dail Éireann

Merchant Shipping (Registration of Ships) Bill 2013

Bill 139/2013

1<sup>st</sup> Stage – Seanad

Committee Stage

Passed by Seanad Éireann [pmb] Senators Sean D. Barrett and Feargal Quinn and John Crown

Protected Disclosures Bill 2013

Bill 76/2013

Committee Stage

Select sub-committee

Bill 76b/2013 Report Amendments – [Dáil Éireann]

Public Health (Sunbeds) Bill 2013

Bill 140/2013

1<sup>st</sup> Stage – Dáil

Bill 140b Committee [Seanad Éireann]

Social Welfare & Pensions Bill 2014

Bill 47/2014

1<sup>st</sup> Stage Dáil

Committee Amendments – [Dáil Éireann]

Bill 47a Select Sub-Committee – [Dáil Éireann]

State Airports (Shannon Group) Bill 2014

Bill 35/2014

Committee Stage – [Seanad Éireann]

Bill 35a/2014 Report Amendments – [Seanad Éireann]

**For up to date information please check the following websites:**

**Bills & Legislation**

<http://www.oireachtas.ie/parliament/>

**Government Legislation Programme updated 15th January 2013**

[http://www.taoiseach.gov.ie/eng/Taoiseach\\_and\\_Government/Government\\_Legislation\\_Programme/](http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/)

1975, the idea of every significant decision of the High Court, Court of Appeal or Supreme Court being instantly and freely accessible was unthinkable. As were ideas such as a paperless office, IT-led disclosure, video-linked evidence, instant sending of documents, and filming of court proceedings, to choose a few innovations almost at random. The prospects for legal outsourcing, near-shoring, off-shoring and all manner of new business arrangements are all likely to have a radical effect. We are just at the beginning, or in some ways at an intermediate stage, when it comes to IT. Thus, in the Supreme Court, we require all the papers in an appeal to be sent electronically on a memory stick, but we also require hard copies of all the papers.

All of us will have to be quick on our feet to adapt to electronic and other innovations which may very quickly alter our methods of working and many business models generally. And, of course, as Professor Susskind emphasises, IT is not an end in itself and it is by no means the sole driver for change. He may well be right in saying that the two most powerful forces are “*a market pull towards commoditisation and [a] pervasive development and uptake of information technology*”<sup>16</sup>, and, while you should be thinking about those eventualities, you should also be planning for the unknown unknowns, or at least maximising flexibility to allow for them.

In his lecture, Richard Susskind suggested that disputes can be broken down into nine constituent parts (document review, legal research, project management, litigation support, electronic disclosure, strategy, tactics, negotiation and advocacy), and the demand for reduced costs will ensure the emergence of specialist providers in each of those parts. It seems unlikely that document review, for example, will still be located in countries where legal costs are so high. Which brings me to legal costs.

## Legal costs

Legal advice and representation cost significantly more in the UK than in almost any country in Europe. Four caveats should be made at once. First, this is a very broad generalisation indeed, and there are no doubt many exceptions, qualifications and explanations which could and should be made to this statement. Secondly, it is dangerous, and can be unfair, simply to compare the costs of lawyers between different countries. To take an obvious point, in the UK, a judge is largely an impartial umpire, whereas in much of Europe, the judge plays a much more proactive role, and therefore the judicial system in such countries is significantly more expensive than here. Thirdly, there is much to be said for the point that you pay for what you get: UK lawyers have a particularly fine reputation, as their presence and influence internationally demonstrates. Fourthly, any reform should be carried out bearing in mind the importance of retaining a high quality legal profession, and its importance to the rule of law and to the economy.

Having said that, there is a long-standing and justified concern about the level of cost of litigation: it will simply be out of all proportion to the amount involved in a small case, which means that fighting a small case (in a recent lecture I gave the example of a plumber suing a householder for

£5000 for work done and the householder counterclaiming for £10,000 for alleged flooding caused by the plumber's negligence) is either not worth it or is prohibitively expensive. This is a denial of access to justice and is therefore an offence against access to justice and therefore to the rule of law. I have referred on more than one occasion to the need for “quick and dirty” justice; it is not perfect, but it is better than no justice.

I hope we can do something about this. If we do, it is true that lawyers will make less per case, but there will be many more cases, as people will be prepared to fight. One solution may be the German system of fixed costs. Meanwhile in the Republic, one of the purposes of the LSR Bill is to reduce costs, but, again, I refer to the law of unintended consequences.

## Diversity and a nascent career judiciary

In the UK jurisdictions, we now have a competitive, open process, albeit one which is more expensive, more time-consuming, more bureaucratic than its predecessor, and, to some, rather more demeaning. Thus, the new process, as was widely reported earlier this year, saw appointment to the office of Lord Chief Justice depend on, amongst other things, the candidates writing an essay with their applications. I am far from criticising this - I was a member of the panel. If we are to have a judiciary that is accountable and able to secure public confidence, indispensable if we are to maintain the rule of law, appointment by an independent Commission through a fair and open competition would be seen by many as an essential aspect of our constitutional settlement.

The creation of the JAC did more than place judicial appointments on a proper footing; it also created a basis upon which a judicial career could begin to develop. Under the old system, other than moving up from the High Court to the Court of Appeal and to the Law Lords, very few judges were promoted. And to be one of the few who were promoted, it was also by invitation. The JAC's creation has changed all that. First, judges no longer need wait to be called. They can apply, and take part in an open competition. A fair number of District Judges have been promoted to Circuit Judges, and a fair number of Circuit Judges have been promoted from the Circuit Bench to the High Court. Further, the possibility of part-time judges is now in statutory place for all courts – including the Supreme Court.

These developments, an open appointment process, the prospect that it provides for judicial promotion, and greater flexibility in judicial sitting arrangements seem to me to suggest that we are beginning to move towards a judicial career. We may not have adopted the position that is in place in other jurisdictions where law graduates have to decide whether they want a career as a lawyer or as a judge and, having made that choice, are effectively stuck with it. But we can see a degree of convergence between our system and those that have long-established career judiciaries. A nascent judicial career is developing here, or at the very least the conditions now exist for its development to take place.

Provided that we do not move to a preponderantly career judiciary, which I would emphatically not favour, this development is a positive one, both for individuals and for the judicial system as a whole. Perhaps its most important

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16 R Susskind *op cit* page 1

positive aspect is that it should provide a real boost for the development of a more diverse judiciary. As I have said previously, greater judicial diversity is important for three reasons. First, it is unjust if people have fewer opportunities because of, for instance, their gender, sexuality, ethnicity, socio-economic background or disability – especially in a job committed to justice. Secondly, if judicial positions are not in practice open to all members of society, it is statistically inevitable that we will not be appointing the best and the brightest, which is against our national interest. Thirdly, public confidence in the judiciary risks being undermined if judges collectively appear to represent only a section of society.

We have been making progress in this regard. In England and Wales, in 1998, of 3174 judges, 10.3% were women and 1.6% were BAME (Black and Minority Ethnic), and in 2013 of 3621 judges 24% were women and 6.8% BAME<sup>17</sup>. The Court of Appeal now has seven women – the highest number it ever had – and recent High Court appointments saw an appointment rate of about 30% for women. In Scotland, as at March this year, just over 25% of the Senators of the College of Justice and 21% of sheriffs were women; in the Inner House, 4 of the 11 judges are women. The Supreme Court however still only has one female member. A lot more work needs to be done in other respects: the BAME representation among the senior judiciary is very low, and the socio-economic background of the senior judiciary is almost monolithic. In this regard it is not enough to say time will tell and will bring improvements. While you have to be patient, patience alone is not going to answer the problem.

Changes in the structure and nature of the legal profession have an enormous part to play in improving diversity among the judiciary, but it is also very much a desirable end in itself – for precisely the same reasons as why it is so important for the judiciary. So far as the Bar of England and Wales is concerned, in 2006, 33.4% of barristers were women, and 9.6% were BAME, in 2012, 34.7% were women and 11.0% were BAME, so they are slowly going in the right direction. As to Ireland, it has one of the highest populations of barristers per capita in the world<sup>18</sup> - there are 317 senior counsel and 1,956 junior counsel. According to a recent article on the Irish Bar, the “average profile of an Irish barrister is now female, under 40 and struggling to make ends meet after years of study”<sup>19</sup>, and the current male to female ratio is approximately 60%

17 <http://www.judiciary.gov.uk/publications/diversity-statistics-and-general-overview-2013/>

18 David Nolan, ‘Bar Council favours reform – but let’s have a proper debate’, <http://www.independent.ie/opinion/analysis/bar-council-favours-reform-but-lets-have-a-proper-debate-30316152.html>

19 *Ibid*

to 40%, and women have accounted for more than 50% of entrants over the past five years<sup>20</sup>. The Bar Council of Ireland states on its website that a “number of different nationalities and religious beliefs are represented”<sup>21</sup>, but they don’t have any diversity statistics available. As for Northern Ireland, enquiries made by my judicial assistant in the Supreme Court reveal that the Northern Irish Bar Council has no diversity statistics – other than telling her that there were around 125 women out of a total of around 700 independent barristers.

## Education and Training

Having touched on various features of the present, and contrasting it with my past and your future, I turn finally to education and training.

It is essential that legal education takes into account, first the centrality of the rule of law; secondly the need for a very high standard of professional ethics (duties to society, the courts and clients); thirdly the need for lawyers to understand legal principles; fourthly the need to deal with practicalities of professional life; fifthly the need to allow for recent changes; sixthly, as far as possible, to cater for future. As for training, it is not only important that these factors are taken into account, but, particularly at a time of such fast change as the present, training after qualification, continuing professional development, is very important too.

## Supreme Court Advocacy

I end with a few words on Supreme Court advocacy, suggested by Lord Kerr. In a nutshell, we would benefit from two things. The first is shorter written cases. There’s no point in setting out the detailed facts: they are in the Statement of Facts and Issues, and most of the details don’t matter. Similarly, quoting large chunks of judgments is unnecessary and unattractive. Repetition is also to be avoided. The rapier is a better weapon in the Supreme Court than a bludgeon.

The second point is that your oral submissions should focus on the development of the argument in the written case, rather than a rehearsal of the written case – or at least a fresh approach from the written case. With a written case and an oral argument, you have the opportunity to make two sets of submissions: take advantage of it. ■

David Neuberger, 20 June 2014

20 [http://www.lawlibrary.ie/docs/A\\_Brief\\_History\\_of\\_the\\_Irish\\_Bar\\_\\_Contents/56.htm](http://www.lawlibrary.ie/docs/A_Brief_History_of_the_Irish_Bar__Contents/56.htm)

21 <http://www.lawlibrary.ie/viewdoc.asp?fn=/documents/aboutus/irishbar.asp&CatID=1&m=2>

# O'Flynn – The Need for Tax Certainty\*

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## Introduction

Government, State agencies and many of the State's leading accountancy and law firms recognise the importance of tax certainty in attracting foreign investment and the steps taken to promote Ireland as “*the best little country to do business in*”<sup>1</sup>. However since *O'Flynn Construction Ltd v. The Revenue Commissioners*<sup>2</sup>, the interpretation of tax statutes has become uncertain.

## Interpretation before O'Flynn

It was generally accepted that prior to *O'Flynn* a strict or literalist approach was taken in the interpretation of a tax statute. *LC Autolink Ltd and another v Feehily and others*<sup>3</sup> and *Mc Garry v The Revenue Commissioners*<sup>4</sup> were the most recent endorsements for a literal interpretation. In the latter, O'Neill J. referred to:

“the well known authorities on the construction of taxing statutes, namely *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at p 71; *Revenue Commissioners v Doorley* [1933] 1 IR 750 at p 765; *McGrath v McDermott* [1988] I.R. 258; *Texaco (Ireland) Limited v Murphy* [1989] I.R. 496 and *Inspector of Taxes v Kiernan* [1981] IR 117 at p 121. These cases establish that in construing a taxing statute the Court must adopt a literal interpretation, giving to the words used their natural and ordinary meaning. There is no place for the purposive approach. Both the liability to the tax and any exemption from it must be created by clear words. Lack of clarity or ambiguity must be resolved *contra preferentum* regardless of the awkwardness of the outcome, either for the taxpayer or the respondents.”<sup>5</sup>

## Interpretation after O'Flynn

However O'Donnell J. speaking on behalf of the majority in *O'Flynn*<sup>6</sup> revised the previous interpretation of the judgment of Finlay, CJ in *McGrath*<sup>7</sup>, holding that Finlay CJ had:

“restated the orthodox approach to statutory interpretation at the time when he adverted to

the obligation of the courts in cases of doubt or ambiguity to resort to a “consideration of the purpose and intention of the legislature” at p. 276. Indeed, if *McGrath* stands for any principle of statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters.”<sup>8</sup>

As such, the Supreme Court determined in *O'Flynn* that the decision in *McGrath*, a tax avoidance case, contemplated an approach to the interpretation of legislation “*that has always been understood as purposive.*” Furthermore, the same principles of statutory interpretation applied to tax statutes as to other legislation and:

“this was something that was acknowledged at least implicitly in *McGrath*, and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes”<sup>9</sup>.

## Interpretation Act 2005

The Interpretation Act 2005 is one of the bases relied on by the majority in *O'Flynn*. Section 5 of that Act provides, *inter alia*:

“In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

- (i) that is obscure or ambiguous, or
- (ii) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
  - (i) in the case of an Act to which paragraph (a) of the definition of “Act” in section 2(1) relates, the Oireachtas, or
  - (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.”

Section 5 applies to Statutory Instruments *mutatis mutandi*.

## The O'Flynn Decision

Section 811 of the Taxes Consolidation Act 1997 is a

\* This article, with slight variation, was published in the Irish Tax Review.

1 See, Fine Gael pre-election ‘5 point plan for recovery’ <<http://electioncamp.eu/sites/default/files/5%20Point%20Plan%20A4%20Brochure%20WEB.pdf>> accessed 12 March 2014

2 *O'Flynn Construction Ltd v The Revenue Commissioners* [2011] IESC 47

3 *LC Autolink Ltd and another v Feehily and others* [2008] IEHC 397

4 *Mc Garry v The Revenue Commissioners* [2009] ITR 131

5 *Ibid* at 65

6 Fennelly and Finnegan JJ. concurring, McKechnie J. (Macken J. concurring) dissenting

7 *McGrath v McDermott* [1988] I.R. 258

8 *O'Flynn*, [69]

9 *ibid* [70]

general anti-avoidance measure designed to defeat tax driven transactions where the primary intention is to avoid or reduce a tax charge or to artificially create a tax deduction or tax refund. The provision permits the Revenue Commissioners to form an opinion that a transaction is a tax avoidance transaction and give notice of that opinion to the person effected. The notice contains the necessary particulars and outlines the methods by which Revenue propose to defeat the transaction. There is also a statutory right of appeal.

*Revenue Commissioners v O'Flynn Construction Co. Ltd.*, is the first tax avoidance case to be heard before the Superior Courts. In that case, the Revenue Commissioners issued a section 811 notice to challenge a transaction involving the sale of export sales relieved profits by a member of the Dairygold Group to an unconnected construction company, O'Flynn Construction Co. Ltd. Dividends from those profits were paid by that company to its shareholders, John O'Flynn and Michael O'Flynn, and were relieved from income tax pursuant to a statutory exemption.

The Revenue Commissioners determined that the steps undertaken by O'Flynn Construction Limited and its shareholders, John O'Flynn and Michael O'Flynn, constituted tax avoidance transactions pursuant to section 811 and issued Notices of Opinion purporting to withdraw the exemption from tax. That determination was appealed and the matter proceeded before the Appeal Commissioners.

The Appeal Commissioners considered that the transaction was a tax avoidance transaction the results of which were to deplete the assets of O'Flynn Construction Limited and to enrich its shareholders without either the company or the shareholders incurring any tax. However they determined that to conclude that there had been a misuse of the export sales relief provisions would be to:

“ignore the statement of the law laid down *McGrath v McDermott*. While it is necessary to look at the purpose for which Section 86 was enacted, in our opinion Section 86, in itself cannot be used to abandon the clear principles of statutory construction laid out in that case. These principles of statutory interpretations set out in *McGrath v McDermott* prohibit us from adopting such a purposive approach”<sup>10</sup>.

On appeal, the High Court found that the Appeal Commissioners were correct in holding that the transaction was a tax avoidance transaction but incorrect in determining that there was no misuse or abuse of a relief and reasoned as follows:

“the transaction the subject of these proceedings—whereby export sales relieved reserves in the Dairygold Group were transferred to a company that was not engaged in the manufacture of goods for export to enable fully tax relieved dividends to be paid to the shareholders of a construction company, is completely at odds with the purpose for which the export sales relief was provided.”<sup>11</sup>

<sup>10</sup> *ibid* [42]

<sup>11</sup> *ibid*, [45].

The taxpayer appealed that determination to the Supreme Court. In affirming the decision of the High Court, the Court held that the transaction was highly artificial and contrived and did not involve the realisation of profits in the ordinary course of business activities. It was a transaction arranged primarily to give rise to a tax advantage. In dismissing the appeal, the Court determined that the substance of the transaction:

“was to use the funds of a domestic property company to pay dividends to its shareholders relieved of tax, and that such an outcome is the antithesis of the statutory scheme.”<sup>12</sup>

## Purposive Interpretation

Unlike the dissenting judgment of McKechnie J., in reviewing the jurisprudence in *O'Flynn*, O'Donnell J. made no reference to two of the seminal judgments on the construction of taxing statutes, namely *Inspector of Taxes v Kiernan*<sup>13</sup>, and *Texaco (Ireland) Limited v Murphy*<sup>14</sup>. While both cases were heard prior to the Interpretation Act 2005, *Texaco* was three years after *McGrath*. As such, it is necessary to consider the observation of O'Donnell J. when determining that:

“the decision in *McGrath* itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive.”<sup>15</sup>

In *Kiernan*, Henchy J at page 121 said that

“A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein.”

The Law Reform Commission consultation paper on “*Statutory Drafting and Interpretation – Plain Language and the Law*”<sup>16</sup> under the heading “*Presumption that Penal and Revenue Statutes be Construed Strictly*” noted that:

“The application of the presumption beyond criminal statutes was emphasised by O'Higgins J in *Mullins v Hartnett* when he said: ‘*Penal statutes are not only criminal statutes, but any statutes that impose a detriment.*’ The application of strict construction to taxation statutes was confirmed in *Inspector of Taxes v Kiernan*. Henchy J stated: ‘*when a word or expression is used in a statute creating a penal or taxation liability, then if there is looseness or ambiguity attaching to it, it should be construed strictly so as*

<sup>12</sup> *ibid*, [82]

<sup>13</sup> *Inspector of Taxes v Kiernan* [1981] IR 117

<sup>14</sup> *Texaco (Ireland) Limited v Murphy* [1991] I.R. 449

<sup>15</sup> *O'Flynn*, [69]

<sup>16</sup> ‘Statutory Drafting and Interpretation – Plain Language and the Law’ (LRC – CP14 –1999) s 1.095, 25 <[http://www.lawreform.ie/\\_fileupload/consultation%20papers/cpPlainLanguage.htm](http://www.lawreform.ie/_fileupload/consultation%20papers/cpPlainLanguage.htm)> accessed 13 March 2014 [CIT. omitted]

*to prevent the fresh imposition of liability from being created unfairly by the use of oblique or slack language.’*<sup>17</sup>

This paper predated the adoption of the Interpretation Act 2005.

In *Texaco*, reference was made to *Doorley, Kiernan and McGrath*. While there is no express reference to a purposive interpretation, McCarthy J observed, at page 456, that:

“Whilst the Court must, if necessary, seek to identify the intent of the Legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning.”

This view is echoed by O’Donnell J when stating that:

“The legal intent of the Oireachtas is to be derived from the words used in their context, deploying all the aids to construction which are available, in an attempt to understand what the Oireachtas intended. But in very many cases, the Oireachtas will not have contemplated at all, the elaborate schemes subsequently constructed, which will take as their starting point a faithful compliance with the words of the statute. In some cases it may be that there is a gap that the Oireachtas neglected, or an intended scheme which was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme.”<sup>18</sup>

The majority’s findings in *O’Flynn* include:

1. the decision in *McGrath* itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive;<sup>19</sup>
2. the provisions of the Interpretation Act 2005 embrace a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes<sup>20</sup>, and
3. where there is a gap in the legislation, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme.<sup>21</sup>

Contrary to prior understanding and practice, *O’Flynn* infers that tax provisions do not relate to the imposition of a penal or other sanction. The extent to which a provision is obscure, ambiguous, or absurd, will vary from provision to provision and is inherently contestable. Consequently, there is an argument to be had, before one moves to a purposive

interpretation, to a consideration on whether the literal meaning is obscure, ambiguous, or absurd.

## McKechnie Judgment

As noted in the judgement McKechnie J., the task of discerning the intention of the Oireachtas is fraught with difficulty requiring the judiciary to avoid the infusion of subjective opinions while at the same time preserving some level of certainty and respecting the remit of parliament. Cognisant of the judicial function, McKechnie J. said:

“Any suggestion that the courts could, having identified the legislative policy by whatever means, apply that policy to influence, modify or alter the wording of a taxation provision, would be tantamount to judicial intrusion into this key legislative sphere, and would be a usurpation of such legislative power. Neither the formation of taxation policy or the creation of a taxation charge are matters for the judiciary.”<sup>22</sup>

McKechnie J. points to the requirement that the policy “*must be anchored in the language used, recourse being had, where appropriate, to its context as disclosed by the statute (or relevant part thereof) as a whole.*”<sup>23</sup>

McKechnie J. ultimately held in favour of the taxpayer noting “*that it would seem impossible to hold that the purpose of the relief could be said to have been either abused or misused in this case.*”<sup>24</sup>

## Rule of Law

In an article that heralded the introduction of general anti-avoidance tax provision in the United Kingdom, Mr Patrick Way QC, published an article entitled “*The Rule of Law, Tax Avoidance and the GAAR*”<sup>25</sup>.

The Rule of Law is a fundamental component in civilised society in which the judiciary are regarded as the guardians and called upon to enforce, when invoked by citizens to protect themselves from breaches by the executive.

Mr Way commences his deliberations by defining the Rule of Law and its application to tax statutes that obliges a government to:

“exercise its powers, including its powers to collect tax, by reference exclusively to its rules, regulations and legal practices as laid down in statute and built up through case law. The law is sacrosanct, and an individual is entitled to govern his or her affairs exclusively by reference to the law in force, particularly so far as is concerned the citizen’s obligation to pay tax.”

Mr Way highlights incidences where the Rule of Law produces both benefits and disadvantages for taxpayers. In *HMRC v. D’Ary*<sup>26</sup>, a challenge was made to an accrued

17 [cit.omitted]

18 O’Flynn, [74]

19 *ibid*, [69]

20 *ibid*, [70]

21 *ibid*, [74]

22 O’Flynn, Minority decision, [83]

23 *ibid*, [84]

24 *ibid*, [97]

25 Patrick Way QC ‘The Rule of Law, Tax Avoidance and the GAAR’ [2013] XII (1) Gray’s Inn Tax Chambers Review 79.

26 [2007] EWHC 163 (Ch), [2008] STC 1329.

income scheme involving the sale and repurchase of gilts resulting in a significant tax advantage to the taxpayer with no corresponding economic expense. While the matter was decided in favour of the taxpayer, Mr Way paraphrased the judgement of Henderson J. to mean “*The rule of law holds sway in this case whether I like it or not (and I probably don’t like it)*”.

*Mayes v. Revenue & Customs Commissioners*<sup>27</sup> concerned a tax avoidance scheme involving the surrender of insurance policies producing a loss by reference to a prescriptive interpretation of the statute in circumstances whereby the taxpayer suffered no similar economic loss. The Court, in observing the Rule of Law, determined that the taxpayer’s avoidance scheme was successful since it fell fairly and squarely within the legislation in which a significant tax benefit accrued.

Mr Way thereafter highlights circumstances where a literal interpretation can have profound and inequitable effects. *Joost Lobler v. HMRC*<sup>28</sup> is a case in which the taxpayer engaged in a partial surrender of life policies. In determining the matter in favour of the Crown, Judge Charles Hellier noted, with some remorse and frustration, that the application of prescriptive legislation together with Mr. Lobler’s ill-advised actions produced a remarkably unfair result.

Mr Way’s conclusion is that while the Rule of Law is not perfect, there is certainty “*particularly if the courts apply a literal and prescriptive meaning to it, adopting the rule set out by Rowlatt J in the Cape Brandy case.*”

In this jurisdiction, while the application of a strict literal interpretation has favoured the taxpayer in *Kiernan, McGrath and Texaco*, it has produced harsh consequences in *Saatchi and Saatchi Advertising Limited v Kevin McGarry (Inspector of Taxes)*.<sup>29</sup>

A purposive interpretation of a contested provision may have knock on effects whereby the interpretation of the remaining part could be compromised to the extent that it may not be possible to comply with the requirements of the Interpretation Act in interpreting a provision that is clear and unambiguous.

The remoteness of law to subject may exist where the literal meaning pertains. Where the meaning of technical provisions is purposively interpreted, the remoteness is much magnified because of the interposition of layers of professionals between the legislature and the citizen, interpreting the law according to practice, experience and contestable purposive interpretations.

## Tax as an economic instrument

According to the OECD<sup>30</sup>, “*growth-oriented tax systems seek not only to minimise the distortions of market signals by the tax system, but also to create as few obstacles as possible to investment, innovation, entrepreneurship and other drivers of economic growth*”.

The significance of tax policy as an economic instrument to influence behaviour and encourage investment was recognised in this jurisdiction by TK Whitaker, an official in the Department of Finance. In 1958 his department

published an economic development plan which is widely accepted to have been a watershed in Irish economic history.<sup>31</sup> That plan drafted a framework for Irish industrial policy that would:

1. emphasise free trade rather than protectionism;
2. encourage foreign investment;
3. concentrate expenditure on productive investment and
4. set specific growth targets.

The inability of the indigenous sector to stimulate growth and exports prompted efforts to attract foreign direct investment. The suggested framework involved a strong focus on export led growth by attracting multinationals by offering generous state grants and tax incentives. Tax statutes were amended that offered export profit tax relief which later became the 10% manufacturing relief tax.

## Tax Certainty

Tax certainty is a fundamental component in attracting inward investment. As such, the need for tax certainty has been recognised by Government. In 2008, the Commission on Taxation issued invitations to interested parties to make submissions on the structure, efficiency and appropriateness of the Irish taxation system for the purposes of establishing the framework within which tax policy would be set for the next decade. In response to that invitation, many parties made submissions including the Department of Finance. In commenting on the importance of tax certainty, the Department stated that:

“Experience has shown that in matters of tax, particularly as they relate to the corporate sector, certainty is invaluable. Providing the maximum degree of certainty and predictability in the application of corporate and other business taxes may in itself lead to higher levels of investment and economic growth. The Commission should factor this into its deliberations.”<sup>32</sup>

In an interview with the Irish Times,<sup>33</sup> the Minister for Enterprise, Jobs and Innovation Richard Bruton TD, pointed out “*The consistent approach of successive governments here has been to keep our tax regime the same*” noting in particular that “*Tax certainty is extremely important*” for the purposes of encouraging and maintaining foreign direct investment.

## Tax Certainty in the UK

In March 2013, the UK Government published a document

27 [2011] STC 1269

28 [2013] UKFTT 141 (TC)

29 [1998] 2 IR 562

30 See, ‘Tax Policy Reform and Economic Growth’ (2010) OECD Tax Policy Studies, No. 20 < <http://www.oecd.org/ctp/tax-policy/46605695.pdf>>

31 Department of Finance, “*First Programme for Economic Expansion*” (November 1958)

32 Submission by the Department of Finance to the Commission on Taxation, July 2008, [61] <<http://www.commissionontaxation.ie/submissions/Government%20Depts%20-%20Political%20Parties/F08%20-%20Dept.%20of%20Finance.doc>> accessed 13 March 2014

33 Frank Dillon, ‘Removing the Barriers to Closer Co-operation’ Irish Times (4 July 2013) <<https://www.amcham.ie/download/American%20Business%202013.pdf>> accessed 13 March 2014.



“*Business is Great, Britain - A guide to UK taxation*”. The focus of the brochure is to promote the UK as a place to locate international business and to help attract multinational companies and investment. The importance of tax certainty to attract inward investment is mentioned on no less than 8 occasions in that 28 page document.<sup>34</sup>

The foreword is a joint statement by Lord Green, Minister of State for Trade and Investment and Mr George Osborne MP Chancellor of the Exchequer where the principles that underpin a modern, transparent, efficient tax system are set out and a commitment given that the UK will provide “*the certainty needed for long-term financial planning and investment.*”

The document also highlights that “*High-quality policy-making is vital for business. Lack of clear direction, frequent changes to the tax system and lack of attention paid to the real impact on business can all act to create uncertainty and deter investment.*”

### Restoration of literal interpretation

The purposive approach to the interpretation of a tax statute came as a surprise to many in the tax profession. That approach was encapsulated in the Appeal Commissioner’s decision which the High Court, affirmed by the Supreme Court, overturned in *O’Flynn*. Assumptions had been made that *Kiernan*, *McGrath* and *Texaco* advocated a strict literal interpretation. Even reference to penal statutes in section 5 of the Interpretation Act 2005 was understood to mean tax legislation. However the majority in *O’Flynn* have relied, for the reversal of the previously accepted interpretive approach, on among other bases the Interpretation Act. This means that a purposive approach be taken to a tax provision that is obscure, absurd, or fails to reflect the intention of the Oireachtas.

In making specific reference to the general anti-avoidance provision, O’Donnell J. observed that it was “*of almost mind-numbing complexity*”. This observation could equally apply to many other provisions in the Tax Acts. However one cannot question his observation that certainty “*in tax matters it is difficult to achieve and the desire to provide certainty to those who wish to avoid a taxation regime which applies to others similarly situated to them, is something which ranks low in the objectives which statutory interpretation seeks to achieve*”.<sup>35</sup>

McKechnie J, remarked that tax “*policy is usually formulated at political level and reflects much diversity so much so that, unless at*

*the core of the process, it can be almost impossible to decipher. Yet the judiciary is frequently called upon to search for, find, describe and define what the policy is of some piece of legislation or other.*” Thereafter he rhetorically asks how can this process be achieved without avoiding the infusion of subjective views while at the same time respecting the remit of the Oireachtas.<sup>36</sup> The observation of McKechnie J. therefore recognises the lack of discernible purpose in tax statutes that reflects the stated policy objective.

The best course is to simplify and consolidate the tax legislation. This course is much the same for many areas of the law. However there is an additional problem in tax. Its technicality and complexity are predominately navigated by experts, but these experts can only navigate where a literal interpretation is observed. When a purposive approach is intended, the ability to advise with confidence diminishes. As such, the lack of certainty in tax statutes acts as an impediment to investment.

Similar to the UK Government, the Irish Government in promoting foreign direct investment recognises the importance for tax certainty. However the *O’Flynn* approach to interpretation of a tax statute makes tax law more uncertain. It makes the application of the law dependent on practice, not on the law. It makes the understanding of the law more dependent on intermediaries and on fees.

In raising such issues, one must be cognisant that *O’Flynn* is a single case with the facts favouring the Revenue Commissioners.<sup>37</sup> There are issues raised in the reasoning of the decisions that require examination in greater detail. However there are two careful judgments from a Supreme Court of strong intellect. As matters stand, the majority decision is likely to be taken as laying down a rule of general application affecting tax statutes and is in consequence a court decision of major impact affecting economic decisions.

### Conclusion

These authors are of the view that tax certainty promotes the Rule of Law, the aspirations of government, the undertakings of ministers, the freedom of the citizenry and investment. These authors further believe that a strict literal approach should be taken to tax statutes. Consequently section 5 of the Interpretation Act 2005 should be amended to exclude a purposive interpretative approach to such statutes. ■

34 “*Business is Great Britain - A guide to UK taxation*” (2013) 1, 8, 17, 17, 20, 22, 23, 23 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/183408/A\\_guide\\_to\\_UK\\_taxation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183408/A_guide_to_UK_taxation.pdf)> accessed 25 February 2014

35 *O’Flynn* [74]

36 *O’Flynn*, Minority decision, [82]

37 Emer Hunt and Turlough Galvin, ‘*Impact of the Supreme Court in O’Flynn Construction on Statutory Interpretation*’, (2012) Issue 1 Irish Tax Review 60.

# The Perils of ID Parades

JOHN BERRY BL

## Introduction

In 1896, 10 witnesses positively identified Adolf Beck as a fraudster, who, posing as a Lord Willoughby, had managed to obtain items of jewellery and cash from ladies by enchanting them with tales of fabulous wealth and yachting trips to the Riviera. Having served a 7 year sentence despite protesting his innocence, Beck was again convicted for similar crimes in 1904 having been identified by a further five witnesses. While in custody awaiting sentence, Beck's fortune changed; "Lord Willoughby" struck again and was arrested, the witnesses recanted their identification of Beck and the real fraudster, a Wilhelm Meyer, admitted guilt for the crimes. Beck's case led to a parliamentary inquiry and indirectly to the foundation of the Court of Appeal.

Given the inherent unreliability of identification evidence and the possibility of honest, non-malicious mistake, safeguards have built up over time in order to ensure that the quality of the identification evidence is sufficient to defeat the well grounded concerns over its reliability. The starting point in Irish law is Kingsmill-Moore J's seminal judgment in *People (AG) v. Casey (No. 2)*<sup>1</sup> which mandates jury warnings in all trials involving identification evidence.

## Formal ID Parades

While recognising that there is no right to a formal identification parade, the Superior Courts have time and time again stressed that formal identification parades are the preferred method for securing identification evidence. The fashion in which a formal identification parade is expected to be conducted is set out in detail in the *Crime Investigation Techniques Manual*<sup>2</sup> of An Garda Síochána and is more generally described in O'Flaherty J's judgement in *People (DPP) v. O'Reilly*<sup>3</sup>:

"It involves that there are assembled eight or nine people of similar age, height, appearance, dress and walk in life to the suspect; that the parade will be supervised by an independent garda (that is, one not concerned with the actual investigation); that full details will be kept of the description of the various people making up the parade and that the witness should not have any opportunity of seeing the suspect in advance of the holding of the parade. This is not intended to be an exhaustive list for such parades..."

If a form of identification is relied upon other than a formal

parade, the prosecution bears the onus of proving that the recourse to informal identification was justified. In order to show the relatively high threshold that must be crossed before an informal identification is allowed, it is instructive to look at the cases in which the Court of Criminal Appeal have refused to allow the fruits of informal identifications.

In *People (DPP) v. Duff*<sup>4</sup>, there was a suggestion that the witness to a bank robbery, a teller who observed a limited part of one of the robbers' face for 30 seconds, was in fear. This was used to attempt to excuse an informal identification which took place outside a courthouse in Smithfield. Finlay CJ, allowing the appeal, held that this evidence "*might well have been sufficient to be properly left to a jury had it been followed by a formal identification parade*" and the fact that the teller may have been in fear "*does not alter the unsatisfactory nature of the evidence emanating from the informal identification*".

In *People (DPP) v. Carroll*<sup>5</sup>, a street robbery occurred in Cork which lasted for a period of up to 15 minutes. There was no question in the mind of the Court of Criminal Appeal that the opportunity for observation was adequate. The appellant was subsequently identified in the Grand Parade area of Cork, the victim having been brought there by An Garda Síochána. When asked why no formal parade was conducted, the excuse offered was that it would have been difficult to arrange a parade of men between the ages of 40-50 of scruffy appearance in dishevelled clothes. However, the Court held that no effort had been made to assemble a parade of this nature and that "*given the absence of any satisfactory explanation for not holding a formal identification parade, the court is satisfied that that of itself, would render the trial unsafe and unsatisfactory...*".

Further examples are found in the case of *People (AG) v. Fagan*<sup>6</sup> where the excuse for holding an informal identification was that the accused "*was not always that readily available*" was held to be "*less than satisfactory*". In *People (DPP) v. O'Reilly*<sup>7</sup>, the excuse that the Garda felt the informal process was "*more beneficial*" to the accused was similarly not acceptable.

While the Superior Courts have regularly scrutinised informal identification procedures, there has been little scrutiny of formal identification procedures. The only warning in relation to that identification procedure will be the *Casey* warning. However, *Casey* was decided in 1962 and the state of knowledge in relation to memory, how it is formed and retained and the capacity of eye witnesses to make accurate identifications has dramatically increased. This increase in scientific knowledge, coupled with the increase in proven DNA based exonerations<sup>8</sup> led the Supreme Court of New Jersey to consider their approach to warnings that

1 1963 [IR] 33

2 Published by An Garda Síochána, a summary dealing with identification parades is included in Orange, *Police Powers in Ireland*, Bloomsbury, 2014

3 [1990] 2 IR 415 at p.420

4 [1995] 3 IR 296

5 (Unreported, Court of Criminal Appeal).

6 (1974) Frewen 1 375

7 [1990] 2 IR 415

8 In a review of 250 DNA based exonerations, the innocence project found that 75% of the cases involved eyewitness misidentification

should be given to juries in eyewitness identification cases. They were given the opportunity to do this in the case of *State of New Jersey v. Henderson*<sup>9</sup>.

### **Henderson – A Scientific Approach to ID Evidence**

*Henderson* is a murder case in which the evidence against the defendant is based on an eyewitness identification. A preliminary issue on the tests to be applied to eyewitness identification made its way to the New Jersey Supreme Court. The starting point of the resulting judgement is:

“In the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence, which New Jersey adopted soon after, a vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory. It also calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications.”<sup>10</sup>

Recognising that the adversarial system is not necessarily the best forum in which to consider wide ranging scientific evidence, the Supreme Court ordered that a remand hearing be held and “appointed a *Special Master to evaluate scientific and other evidence about eyewitness identifications*”. In his report, the Special Master, retired Judge Gaulkin, describes the conduct of the remand hearing before him:

“Given the nature of the inquiry, the proceedings were conducted more as a seminar than an adversarial litigation. At an initial conference, it was agreed that all participants would submit and exchange whatever published scientific materials they chose and would also disclose the names and areas of proposed testimony of all expert witnesses. More than 200 published scientific studies, articles and books were ultimately made part of the record.”<sup>11</sup>

The compelling element in the *Henderson* case is not that it relies on rules of evidence or particular jurisdictional quirks; it speaks to the science of eyewitness identification. Mr. Justice Clarke spoke recently about the need to guard against the proliferation of cases of foreign origin being opened as persuasive in an Irish context when they considered entirely alien statutory provisions<sup>12</sup>; *Henderson* does not fall foul of those concerns – its findings on the science of identification are universal. Those findings are deeply disturbing:

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and that in 50% of those, the eyewitness testimony was not corroborated by confessions, forensic science or informants.

9 *State of New Jersey v. Henderson* (Supreme Court of New Jersey, Rabner CJ, Long, LaVecchia, Albin, Rivera-Soto, Hoens JJ., 24<sup>th</sup> August 2011)

10 *State v. Henderson* (Supreme Court of New Jersey, Rabner CJ, 24<sup>th</sup> August 2011), p.3

11 *State v. Henderson*, Report of the Special Master, p. 3. The author wishes to acknowledge the assistance of Mr. Mike Mathis of the New Jersey Administrative Office of the Courts who provided copies of the transcripts and certain exhibits.

12 The Irish Times, 5<sup>th</sup> May 2014, *Judge concerned about foreign jurisprudence*

“We find that the scientific evidence considered at the remand hearing is reliable. That evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised. Study after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country. We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications.”<sup>13</sup>

The “array of variables” referred to above have been divided into two categories by social scientists; system variables and estimator variables. System variables are those which are in the control of the investigation and prosecuting authorities and include, *inter alia*, such matters as line up construction, instructions given to eyewitnesses attempting to make an identification and feedback given to such witnesses. Estimator variables are not in the control of the investigators and relate to characteristics of the witness and perpetrator (such as age and race) or the event itself (such as lighting, time for observation, the presence of a weapon and stress levels). All of them can significantly affect the result of an identification. However, as only system variables are within the control of the prosecuting authorities, this article will focus on how they can significantly affect an identification made in the course of a formal identification parade, the gold standard of identification in Irish jurisprudence.

### **System Variables**

#### ***Lineup Administration***

One of the key system variables is whether the person conducting the identification parade knows the identity of the suspect or whether the parade is being run in a “blind” fashion. This means that the Garda running a formal identification should not know whether any particular member of the lineup is the suspect or an innocent foil making up the numbers. This was described by Dr. Gary Wells during the hearing before the Special Master as “the single most important characteristic that should apply to eyewitness identification”<sup>14</sup>. The terminology of blind administration is familiar from that of pharmacology, where volunteers testing new drugs are not told whether they are part of the control group and receiving a placebo or whether they are part of the experimental group and receiving the test medication. It has been found that if the person administering the test knows whether the volunteer is in the control group or the experimental group, that this information can be transmitted in any number of fashions and will affect the outcome of the test. For this reason, drugs must now be tested in a double

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13 *State v. Henderson*, p.4

14 *State v. Henderson*, transcript of the remand hearing, 29<sup>th</sup> September 2009, afternoon session, p.74

blind fashion, where neither the person dispensing the drug nor the volunteer knows whether they are receiving a placebo or the live drug. Police lineups are no different. The Special Master accepted a finding that blind lineups are twice as likely to result in accurate identification. In his judgement in *Henderson*, Rabner CJ held that:

“The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect.”<sup>15</sup>

### Witness Instructions

A simple instruction to the witness prior to the lineup can dramatically reduce the possibility of error. Every eyewitness should be instructed that “*the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification*”<sup>16</sup>. This has been shown to reduce the number of foil identifications by as much as 45%. In the remand hearing conducted by the Special Master, Dr. Roy Malpass, an expert called by the State, gave details of an experiment he conducted in which foil identification was reduced from 78% to 33% in target absent arrays by the issuing of appropriate witness instructions.<sup>17</sup> If the parade is being run in a blind fashion, a further instruction should be given to the witness that the Garda administering the parade does not know who the suspect is. The need for witness instructions of this nature was accepted by the Supreme Court who declared that “*there is a broad consensus for that conclusion*”.

### Lineup Construction

The composition of the lineup is clearly something that is well within the control of An Garda Síochána. Clearly, the suspect will be in the lineup. The question is, who else will be? The general consensus appeared to be that at a minimum, there should be five foils in the lineup. It was noted that multiple suspects should not be displayed to witnesses in the same lineup as it increases the possibility of a “lucky guess”. Thirdly, and most importantly, the foils must, insofar as is possible, resemble the description of the perpetrator given by the witness and not obviously stand out from the suspect. If this is not the case, there is a real risk that the eyewitness may not rely on their memory of the incident but instead rely on relative judgement.

Relative judgement is concept which simply put means that people may not be selecting the perpetrator but instead selecting the person who most closely resembles their memory of the perpetrator. In order to test this phenomenon, Dr. Gary Wells showed 200 people a video of a simulated robbery<sup>18</sup>. Then 100 people were asked to pick the perpetrator from an array of six photos. The other 100 witnesses were

asked to identify someone from an array of five photos, from which the perpetrator had been removed. Both sets of witnesses were warned that the perpetrator may not be present. The results are in Table 1. In the first run of the experiment, when the target was present, 54% of witnesses correctly identified him, 21% made no pick and the other 25% of witnesses distributed their choices on the other members of the lineup, favouring number 2 with 13% of their choices. However, when the experiment was run without the target being present, rather than the 54% moving to the “No pick” category, only 11% did. Lineup member number 2’s rate of selection jumped to 38%.

**Table 1 - Wells’ experiments on relative judgement**

	Lineup Member						
	1	2	3	4	5	6	No pick
Target Present	3%	13%	54%	3%	3%	3%	21%
Target Absent	6%	38%	-	12%	7%	5%	32%

### Feedback and confidence

Jurors tend to assess a witness’ confidence in their testimony. This creates a number of problems for lawyers defending cases based predominantly on identification testimony. Eyewitnesses tend, when they give evidence in court, to be unshakeable in their evidence. This is due to the fact that they can honestly believe that they are telling the truth, even when they are mistaken. Moreover, cross-examination, which has been described by Wigmore as “*greatest legal engine ever invented for the discovery of truth*”, is of limited assistance in testing eye witness identification. In the course of his testimony to the remand hearing, Professor Jules Epstein gave evidence that in experimental mock trials designed to test the effectiveness of cross-examination, it made little difference to the mock jury whether the cross examination of an eye witness was conducted by an experienced trial lawyer or by a neophyte.<sup>19</sup>

A difficulty is that an eyewitness’ confidence in their identification can be affected by events entirely separate to their capacity to observe the event. This can happen both before and after the identification is made. An example of pre identification feedback would be commenting that the lighting in the area was good so that an identification would be easy – this might improve a witness’ confidence in their identification. It can of course be even more subtle. Dr. Elisabeth Loftus was one of the first scientists to systematically study memory. In a famous experiment, referred to in the Special Master’s report, she showed witnesses a video of a staged car accident and asked for speed estimates. However, the questions varied, different people were asked what was the speed when the cars “contacted”, “bumped”, “hit”, “collided” or “smashed”. Higher speed estimates were given by those who were asked the question containing “smashed”.<sup>20</sup> In order to minimise pre identification feedback or contamination, the Special

15 *State v. Henderson*, p.52

16 *State v. Henderson*, p.53

17 *State v. Henderson*, transcript of the remand hearing, 13<sup>th</sup> October 2009, afternoon session, p.44

18 The experiment is detailed in a paper “*What do we know about eyewitness identification*” which is included in the record of the remand hearing. *State v. Henderson*, transcript of the remand hearing, 24<sup>th</sup> September 2009, afternoon session, p. 16

19 *State v. Henderson*, transcript of the remand hearing, 9<sup>th</sup> October 2009, morning session, p.28

20 *State v. Henderson*, Report of the Special Master, p.31. For a brief and entertaining overview of some of Loftus’ experiments, read *Opening Skinner’s Box, Great Psychological Experiments of the 20<sup>th</sup> Century*, Lauren Slater, Bloomsbury, 2004. While you’re there, have a look at chapter on Rat Land.

Master recommended that witnesses be interviewed in a particular way:

“...tell the witness the type and detail of information necessary for the investigation, ask no leading or suggestive questions, volunteer no information, ask open-ended questions, instruct the witness not to guess and to report any doubt or uncertainty, avoid interrupting the witness, reinstate the context of the witnessed event, develop rapport with the witness, have the witness recall in both forward and backward directions, and the like.”<sup>21</sup>

Post identification feedback can also dramatically affect the confidence a person has in their identification. In an experiment conducted by Dr. Gary Wells, a crime was staged and recorded on video. The video, which was then shown to witnesses, was designed so that it was impossible to get a good look at the perpetrator. The witnesses were shown an array of photographs which did not include the perpetrator. By definition, any identification that was made was wrong. Half the group were given no feedback following the experiment. The other half, regardless of which photo they picked, were told “that’s him, you got the man” or words to that effect. They were then asked to rate their confidence in their identification. The results are set out in Table 2. Thus, having picked a suspect from a photo array in which the perpetrator was absent, having watched a video designed to offer no basis for making an identification, 43% of people who made an identification on being told they had the right guy expressed high confidence in their ID.

**Table 2 – Wells and Bradfield experiment on feedback**

Question	Positive feedback	No feedback
High Confidence in ID	43%	15%
Clear view	25%	4%
Facial details recognisable	20%	3%
Easy ID to make	35%	4%
Strong basis for making ID	33%	5%

As mentioned at the start of this section, confidence in an identification is strongly relied upon by jurors in assessing the credit to be given to a witness. While there is a low correlation between eyewitness confidence and identification accuracy, it is recommended that an immediate record be made of the witness’ confidence, be it written or oral, in their identification. This is particularly important as witnesses now have access to investigative tools outside of the control of the prosecution authorities. Facebook and similar websites make searching for photographs of known individuals very easy<sup>22</sup>. Thus, having identified someone in a controlled environment in a police station, it is possible for a witness to seek further information about that person once their name is known. If they then view photos of that person stored on a social

media website, their confidence in the identification might increase. The problem is that their memory of the person who committed the crime may very well be overlaid by their memory of the person they identified in the police station. An immediate record of confidence and perhaps reasons for that confidence could be used in the event that there is a change in the confidence level come the trial.

## Garda Procedures

Garda procedures are wanting when viewed in light of the findings in *Henderson*. Parades are not run in a blind fashion. While the Garda administering the parade is, ideally, to be independent of the investigation, he is also required to know the identity of the suspect. Given the aspiration towards independent administration, it is no great leap to ask that the independent administrator be “blind” as to the identity of the foils and the suspect.

There are no mandatory requirements to instruct the witness that the perpetrator may not be present in the lineup. In fact, the direction to be given to witnesses is set out in bold and enclosed in quotation marks in the *Crime Investigation Techniques Manual*:

“This is an identification parade. I want you to look very carefully at this line of persons and see if you can recognise the person you have come to identify (or the person who assaulted you, or the person you saw at \_\_\_\_\_(place) at \_\_\_\_\_(time) on \_\_\_\_\_(date), etc.) Do not say anything until I ask you a question”<sup>23</sup>

It is submitted that this direction should be changed substantially. It should include a warning that the perpetrator may not be present and that the witness should feel under no pressure to pick a suspect. It should include a direction that the witness should rely on her memory of the incident and not pick the person who most closely resembles the perpetrator. It should not have suggestive language such as inquiring whether the witness “*can recognise the person you have come to identify*” which clearly gives an impression that the perpetrator is in the room. Finally, the instruction “*do not say anything until I ask you a question*” should be removed. Identification has been described as being “*an automatic, rapid process*” and an identification made within 10-12 seconds is more likely to be accurate<sup>24</sup>. The natural consequence of that final instruction is that the piece of empirical evidence which can be used to bolster or indeed challenge the eyewitness’ confidence in their identification is denied to all parties.

The procedure further mandates that if the witness identifies the suspect, the suspect is to be cautioned and their reply, if any, noted. If this is done immediately, in the room with the witness still present, the potential for feedback contamination is vast, destroying any possibility of taking a genuine record of the eye witness’ confidence levels. Such a record is not required by the procedure, but it too should

21 *State v. Henderson*, Report of the Special Master, p.32

22 The South Australian case *Strauss v Police* [2013] SASC 3 offers a comprehensive review of the difficulties posed by identifications prompted by social media

23 *Crime Investigation Techniques Manual*, para. 6.19.3. A copy of the page containing this paragraph was made available in the course of disclosure and discussed in evidence during a case in which a formal ID parade was conducted.

24 *State v. Henderson*, Report of the Special Master, p.35

be included in the procedure in order to preserve valuable evidence which can be used to assess the reliability of the identification.

The changes recommended are not onerous to implement and could vastly improve the quality of eye witness identifications. As Hewart LCJ remarked in *R v. Dwyer*<sup>25</sup>, a

case involving the showing of photographs to witnesses prior to them being asked to make identifications, “*it is the duty of the police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has an interest only in securing the conviction of the right person.*” ■

<sup>25</sup> [1925] 2 KB 799, also quoted with approval in *People (DPP) v. Rapple* [1999] 1 ILRM 113 and *People (DPP) v. Mekonnen* [2012] 1 IR 210

## Bar of Ireland Conference in Westport



*Pictured at the recent Bar of Ireland Conference in Westport are (L-R) Michael Ring TD, Minister of State for Tourism and Sport; Councillor Myles Staunton (Westport Leas Cathaoirleach); Frances Fitzgerald TD, Minister for Justice & Equality; David Nolan SC, Chairman, Bar of Ireland; Jerry Carroll, Director, Bar of Ireland.*

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*L-R: William Binchy BL (McMahon & Binchy, Law of Torts – Bloomsbury); Karen McDonnell; Minister for Justice Frances Fitzgerald, TD; Karl Dowling BL (Dowling & McDonnell, Civil Procedure in the Circuit Court – Round Hall/Thomson Reuters); and Bill Holohan, Solicitor (Holohan/O’Mahoney/Harding, Buying and Selling Insolvent Companies in Ireland – Bloomsbury) and (Holohan & Farry, Consolidated Bankruptcy and Personal Insolvency Legislation – Round Hall/Thomson Reuters).*



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