The Bar Review

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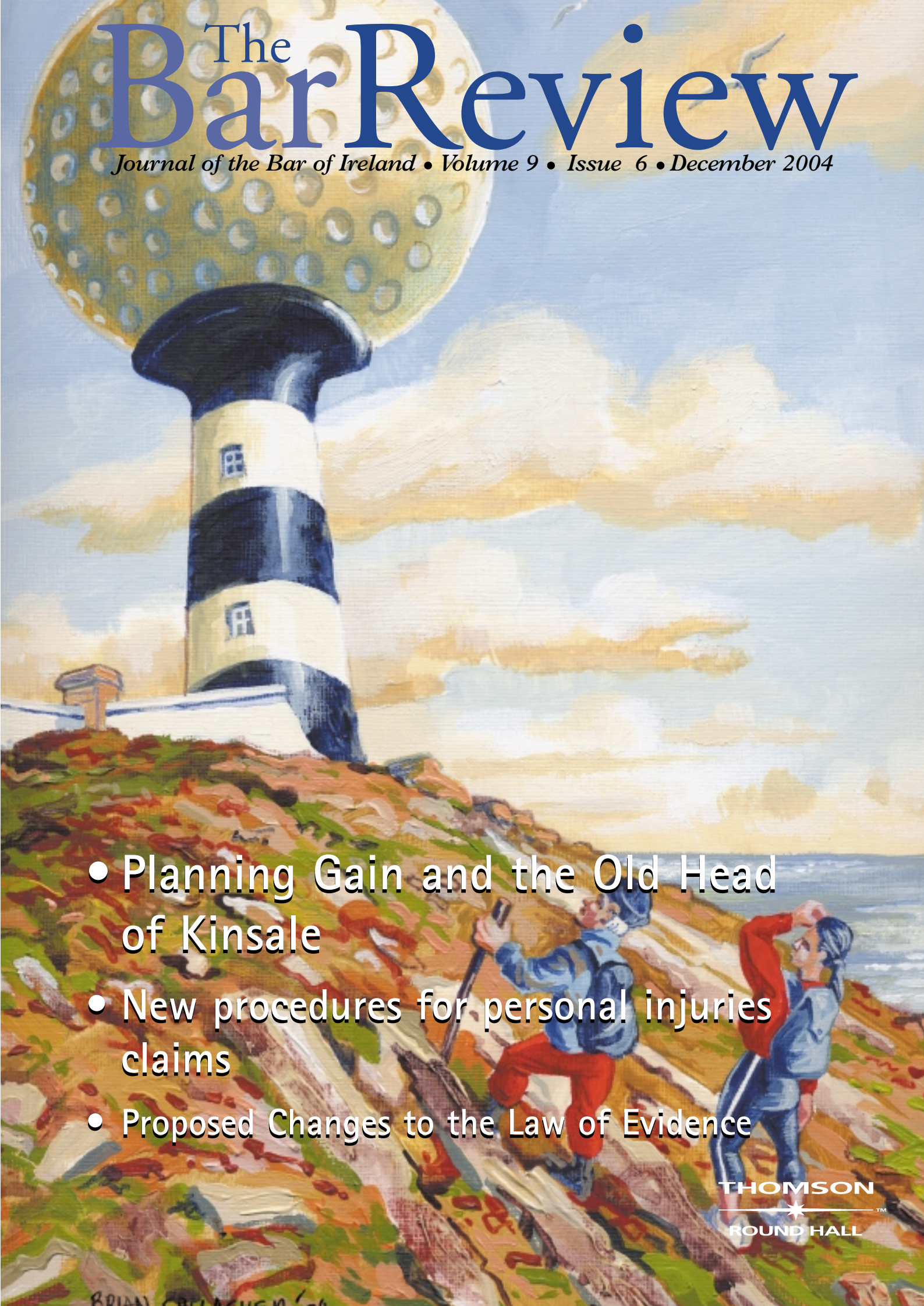

- Planning Gain and the Old Head of Kinsale
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- Proposed Changes to the Law of Evidence

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Launch of Evidence Book

Pictured at the launch of the newly published "Irish Commercial Precedents Service" hosted by BCM Hanby Wallace are: L-R: Elanor McGarry, General Manager Thomson Round Hall; Gary Byrne, Managing Partner BCM Hanby Wallace;

The Hon. Mr Justice Peter Kelly, Head of The Commercial Court; Sean Wallace, co-author/BCM Hanby Wallace; Alex Nesbitt, co-author/BCM Hanby Wallace; and Iain Cox of SpeedAuthor who provided the software for the CD Rom version of the product. This new title published by Thomson Round Hall in association with BCM Hanby Wallace is available in both Looseleaf and CD Rom formats.

The specially designed software by SpeedAuthor allows you to produce, manipulate and edit documents. The software works alongside Microsoft Word allowing you to view the document in Microsoft Word whilst building and editing.

Annual Conference on European Tort Law

From 31 March 2005 to 2 April 2005, the 4th Annual Conference on European Tort Law (ACET) will take place in Vienna. The conference will provide both practitioners and academics with the opportunity to learn of the most significant developments in tort law within Europe in 2004.

For information, please contact, Lisa Zeiler, European Centre of Tort and Insurance Law (ECTIL), Landesgerichtsstrasse 11,
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Criminal Law Conference

Pictured at the Thomson Round Hall Criminal Law Conference are the speakers (L-R): Tom O'Malley BL; Niall Neligan BL; Alisdair Gillespie, University of Teesside; The Hon. Mr Justice Adrian Hardiman of The Supreme Court who chaired the conference; Professor Finbar McAuley, UCD; and Professor Dermot Walsh, UL. The conference was held in The Law Library Distillery Building and dealt with the following topics: the proposed codification of the body of criminal law, the proposed new garda complaints procedure, recent developments in sentencing, the Criminal Justice(Terrorist Offences) Bill 2002, and UK Legislative Solutions to On-Line Child Abuse via the internet. The papers from this conference can be purchased from Thomson Round Hall.

Book for Bar Benevolent

"Life and Death and In Between", a book of short stories by Conor Bowman BL, is now on sale in the Legal and General shop and the Tea Rooms (both in the Four Courts). This book would make a great Christmas present and all proceeds go to the Bar Benevolent fund.

Launch of "Irish Laws of Evidence"

Pictured at the launch of "Irish Laws of Evidence" by John Healy BL which was recently published by Thomson Round Hall are: L-R: The Hon. Mr Justice Adrian Hardiman of The Supreme Court who launched the book; John Healy, the author; and Elanor McGarry, General Manager of Thomson Round Hall.

Proposed Reform of Evidence Law in Ireland and England: Times they are a 'Changin'?

John Healy BL

Introduction

Reform of the rules governing criminal procedure and evidence has become *de rigeur* in Ireland and England over the past decade. This article explores some of the key changes being proposed - in Ireland, the admissibility of repudiated witness statements in lieu of *viva voce* testimony; in England, provision for the admissibility of criminal record and bad character evidence in trials for sexual offences and theft. This author argues that currently in both jurisdictions, long-standing principles central to our notion of criminal justice are being sacrificed for political expediency.[1]

Proposed Admissibility of Witness Statements in Ireland

In swift response to media and public indignation at the dramatic collapse of the *Keane* criminal trial toward the end of 2003,[2] the Minister for Justice announced plans to enact a provision that would enable juries for the first time in Ireland to receive a witness' pre-trial statement as probative evidence in circumstances where the witness turns 'hostile' in court and repudiates the statement.[3] Immediate reference was made to a new set of rules adopted by the Canadian Supreme Court, sanctioning admissibility of pre-trial statements where the trial judge is satisfied they constitute a reliable account of the relevant events.[4] The case that caused this precipitous *volte face* in Ireland was one where it was suspected that intimidation had produced 'collective amnesia' in the State's witnesses, as memorably decried by Carney J. from the bench.

In order to understand the perceived need to reform the law on admissibility of statements by witnesses who later repudiate the statements in court and fall to be treated as 'hostile witnesses', it is necessary to set out the common law position on witnesses who spontaneously in the context of a live trial refuse 'to swear up' or to give an account consistent with statements they made prior to the trial. By traditional common law rule, a witness who is deemed 'hostile' may be cross-examined by calling counsel in an attempt to bring the witness "back to proof" or, where this option is strategically out of reach, to discredit that witness by underscoring his inconsistency. Inconsistent pre-trial accounts may, by common law principle, be received by the court for the limited purpose of bearing upon the witness' (lack of) credibility, but, owing to the rule against hearsay (which applies in the absence of statutory exception), they may not be received to establish the truth of any facts asserted therein.[5] Accordingly, the prosecution may not properly invite the jury to consider the witness' pre-trial account as evidence supplementing or replacing his sworn oral evidence in the trial. Where the hostile witness repudiates aspects of his prior statement, and is adamant about the truth of his revised account given from the witness box, the revised account constitutes the witness' testimony and in principle the jury is free to act upon that, although invariably it will be argued that the witness is now unworthy of belief, and the trial judge may be obliged to indicate to the jury at the close of the case that the witness' evidence has been shown to be inconsistent and therefore may be unreliable.[6] Thus in most events, the witness' account given testimonially in the trial constitutes that witness' evidence, whether or not probative of the guilt of the accused. Moreover, it is consistently recognised that where a pre-trial statement is admitted in evidence to assist the jury with respect to a specific issue, the trial judge is obliged to warn the jury that the statement is not evidence tending to prove any of the facts at issue in the trial, and that when considering the guilt of the accused as charged, they must disregard the statement. The failure adequately to direct the jury on this point has led to the quashing of conviction on numerous occasions.[7]

Part 3 of the Criminal Justice Bill 2004 sets out the proposed reform pledged by the Minister for Justice in the wake of the aborted Keane trial. Section 15 provides for the admissibility of pre-trial statements by witnesses who during the trial either refuse to give evidence, deny

1 A version of this article originally appeared in the Independent Law Journal.
2 *People (DPP) v Keane* (Central Criminal Court, October 30, 2003).
3 *Irish Times*, November 5, 2003.
4 See *R v B (KG)* [1993] 1 S.C.R. 740 (SC).
5 The rule that pre-trial inconsistent statements go only to the credibility of the witness was acknowledged again recently in *People (DPP) v McArdle* [2003] 4 I.R. 186 (CCA).
6 See *R v Goodway* [1993] 4 All E.R. 894 (CA).
7 E.g., *People (Attorney-General) v Cradden* [1955] I.R. 130 (CCA); *People (Attorney-General) v Taylor* [1974] I.R. 97 (CCA); *R v Golder, Jones, & Porritt* [1960] 1 W.L.R. 1169 (CA).

having made the statement, or give evidence materially inconsistent with the account provided in their pre-trial statement - subject to an exclusionary discretion in the trial judge to reject the statement where its admission would be 'unfair to the accused' or contrary to 'the interests of justice'. The conditions to be satisfied for admissibility are as follows: (1) it must be proved that the witness made the statement; (2) the facts alleged in the statement must, if otherwise directly testified to, be admissible in evidence (i.e., the assertions must not infringe other rules of evidence such as the rules against opinion evidence, multiple hearsay, and bad character evidence); (3) the statement must have been made voluntarily; and (4) the statement must be 'reliable'. Additionally, the trial judge must satisfy himself either that the statement was given under oath or affirmation or by statutory declaration (for which provision is made under s. 16) or that when the statement was made, the witness understood the requirement to tell the truth. When assessing whether the statement is reliable, the trial judge will 'have regard' to whether it was video-recorded, although this is not necessary where "there is other sufficient evidence in support of its reliability". Additionally, the trial judge will have regard to any explanation by the witness for refusing to give evidence at the trial or for giving evidence inconsistent with his pre-trial statement, or, where the witness denies having made the statement, any evidence given in relation to the denial.

A point worth noting is that legislative provision had been put in place not long before the *Keane* trial that specifically anticipated the predicament of the intimidated witness. Section 9 of the Criminal Justice Act 1999 amended s.4 of the Criminal Procedure Act 1967 to enable witnesses to give their evidence by deposition or via television link, in the District Court in advance of the trial, so long as the accused is present and is given an opportunity to cross-examine the witness. That evidence may later be tendered in the trial as fully probative evidence in lieu of *viva voce* evidence where it is shown that the witness was intimidated or is in fear of the accused. The 1999 Act also created a separate criminal offence of interference with, or intimidation of, a witness.[8] The critical difference between the provisions introduced by the 1999 Act and the currently proposed measures under the Bill of 2004 is that the former preserves the opportunity to cross-examine the witness, one of the fundamental pre-requisites for the admissibility of testimonial evidence in common law trials. Although the 1999 Act provisions are certainly not capable of removing the prospect of intimidation, they are likely to reduce that prospect by enabling evidence to be taken shortly after charges are brought, and by the threat of separate prosecution for the crime of intimidating a witness.

The possibility of the type of reform currently proposed by the 2004 Bill had been considered but rejected by the Law Reform Commission in its working paper on *The Rule Against Hearsay*[9] two decades prior to enactment of the Criminal Justice Act 1999. The Commission for good reason rejected the alternative option of receiving un-sworn pre-trial statements, which would "[open] the door to the manufacture of evidence or to the perpetuation of previously told lies or inaccuracies".[10] It took the view that a provision of this nature would depart perilously from the best evidence principle, and in all likelihood would act counter-productively to deter witnesses from giving testimony, less from their fear of reprisal than their fear of exposing a false or inaccurate account of events. The Commission concluded that such a direction was fraught with risks of prejudice and unfairness for the trial, given that pre-trial statements are un-sworn and made in the absence of the accused. As such, admissibility of pre-trial statements would certainly precipitate questions of constitutionality (and, now, of compliance with the European Convention on Human Rights). Furthermore, the principle of admissibility, subject to explanatory direction by the trial judge implicitly assumes that judicial warnings on the limited probative use of statements will surmount the prejudice caused by their admissibility. As Mark Twain remarked, if one tells a child to stand in the corner of a room and not to think about white elephants, the very thing he will think about when he faces the wall is, of course, white elephants.

The biggest threat to the rule of law posed by the admissibility of pre-trial statements is less the fear that the statement was not given in the form or words of the statement, or the fact that it was not given under oath, than the concern that the statement was made in the absence of the accused and in a context where cross-examination of the declarant did not occur. This has been one of the abiding concerns of the rule against hearsay, which precludes pre-trial statements not only by absent third party declarants but also by declarants who are present in court to testify. Witnesses are generally required to testify de novo in the trial as to the relevant facts, and their uncross-examined statements are not permitted to plug any gaps in the accounts they give testimonially under oath before the jury.[11] That is to say that the justification for the strictness of the hearsay rule has, in more recent years, been the opponent's lack of opportunity to cross-examine the declarant upon the accuracy or reliability of the information narrated or implied in the statement. Wigmore famously described cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience".[12] Lord Ackner expressed the view in *R. v Kearly*[13] that the hearsay rule "is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can be properly given to a statement by a person whom the jury has not seen or heard and which has not been subject to any test of reliability by cross-examination".

Central to the concept of natural justice developed by the Irish courts is the necessity to be presented with direct oral evidence in circumstances where a person has a right to an oral hearing, not only in criminal proceedings, but potentially in any proceedings where adverse findings may be drawn against the person and serious consequences may ensue. This principle has been applied regularly by the Irish courts in recent years to tribunals exercising quasi-judicial functions even though it has been claimed that the rules of evidence are more flexible in this context. In *Kiely v Minister for Social Welfare*,[14] the appeals enquiry had wrongly permitted a written statement by a

8 Criminal Justice Act 1999, s. 41.
9 *The Rule Against Hearsay,* Working Paper 9-1980.
10 Words used by the Criminal Bar Association: ibid. at p.34.
11 See *People (DPP) v McDonagh* (CCA, May 29, 2003).
12 Wigmore, Evidence in Trials at Common Law (Chadbourn rev., Little Brown & Co., Boston, 1981) at para.1367, p.29.
13 [1992] 2 W.L.R. 656 at 679 (HL).
14 [1977] I.R. 267 (SC). See also *Borges v Medical Council* (HC, March 5, 2003; SC, January 30, 2004).

doctor, engaged by the Department of Social Welfare, to prevail over evidence given testimonially by two doctors called as witnesses for the applicant. Henchy J. observed:
"Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. *Audi alteram partem* means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination".[15]

The loss of so fundamental a protection for the accused in criminal proceedings is a matter of grave concern to all. A witness' version of events given to a garda prior to the trial is, of course, one-sided. It has not been challenged or tested by an opponent in sight of the jury. If, as contemplated by the proposed reform, a statement given before the trial, but later repudiated by the witness during the trial, is allowed to function as admissible probative evidence in lieu of the witness' *viva voce* testimony, selective truth-telling and falsehoods will inevitably be permitted to attain a stability and status that is unwarranted and most dangerous. This Humpty Dumpty reform will eviscerate the long-maintained distinction between hearsay evidence (in this context, statements made by a witness prior to the trial) and viva voce testimonial evidence, as well as flouting one of the abiding concerns of the laws of evidence, namely the avoidance of unreliable evidence and undue prejudice in the trial - matters, surely, of more acute concern given the recent incorporation of the European Convention on Human Rights in Ireland.

Proposed Admissibility of Criminal Record Evidence in England

David Blunkett, the U.K. Home Secretary, is currently spearheading fundamental legislative reform in England designed to remove the age-old prohibition against reference to the criminal record and bad character of an accused in criminal trials. Of most concern, in England and here, is the reform that would render criminal record evidence generally admissible in child sex abuse and theft cases. The coupling of these qualitatively different offences has been justified by the Home Secretary on the basis that there is a high level of "public concern about paedophilia and theft". In other words, the reform is clearly calculated to curry favour with the public and the fact that an election year in England is imminent can hardly be far from the Home Secretary's mind. Ireland is by no means immune from this type of abuse of law reform, and, though the attempted reforms in England thankfully appear unthinkable at present to the legal community in Ireland, the prospect of a similar attempt here can of course never be ruled out. (The prospect of admissibility of uncross-examined witness statements was, I believe, not anticipated or sought by the legal community in Ireland prior to the Minister for Justice's sudden endorsement of it last year.) To understand the effect of this reform, it is necessary to reflect on the reasons why criminal record evidence has been staunchly prohibited by the common law judges, and then to consider the current status of this body of law, often referred to as 'similar fact evidence'.

The prohibition against reference to the accused's criminal or deviant past was famously articulated in *Makin v Attorney-General for New South Wales*, where the Privy Council described what has since become known as 'the forbidden reasoning':

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."[16]

Given the obvious risks of prejudice and unfairness in criminal trial, the rules and principles developed by the courts over the years to justify exceptions to the prohibition against bad character evidence have always tended to court controversy. In 1893, Makin had somewhat obliquely sanctioned admissibility where the bad character evidence was independently relevant (for instance to rebut a particular defence, such as accident, which did not depend upon an appeal to 'the forbidden reasoning'). By 1974, *Boardman v DPP*[17] had proposed a test based on the 'striking similarity' of the prior crimes to the offence being tried, thereby engendering the term 'similar fact evidence', which is now used generally to describe bad character evidence admissible by way of exception to the general prohibition. By 1991, in *DPP v P*,[18] the House of Lords decided that 'striking similarity' was too restrictive a test, and that trial judges should instead evaluate whether the evidence was sufficiently probative in light of the resultant prejudicial effect for the defence. Each of these landmark decisions have routinely been approved in the Irish courts, the most recent of these, *DPP v P*, by the High Court in *B v DPP*[19] and by the Court of Criminal Appeal in People *(DPP) v BK*.[20] Each development has emphasised the exceptional nature of admissibility, however, and the prohibition has been defended by the common law judges in England, Ireland, and elsewhere in the common law. Why, then, this prohibition?

The prohibition reflects the fear, which also exists with respect to other exclusionary rules of evidence, that the particular evidence might "have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value".[21] The objection to bad character evidence is not based on the irrelevance of such evidence.[22] Rather, it is based on the devastating prejudice the evidence inevitably wreaks for the defence - where 'prejudicial' means "the capacity [of the evidence] to unfairly predispose the triers of fact toward a particular outcome."[23] Bad character evidence is notoriously prejudicial. Once introduced into court, it "irreversibly changes the chemistry of the trial" so that "it becomes almost impossible for the accused to be tried dispassionately on the facts of the case."[24] It encourages the jury to indulge in the "forbidden reasoning", potentially to infer present guilt from past misdeed. It is feared that proof of the accused's criminal past

15 *Ibid.* at 281, per Henchy J.
16 [1894] A.C. 57 at 65, per Lord Herschell CJ (PC).
17 [1974] 3 All E.R. 887 (HL).
18 [1991] 2 A.C. 447 (HL).
19 [1997] 3 I.R. 140 (HC).
20 [2000] 2 I.R. 199 (CCA).
21 *R v Christie* [1914] A.C. 545 at 559, per Lord Moulton (HL).
22 *DPP v Boardman* [1974] 3 All E.R. 887 at 908, per Lord Cross (HL); *DPP v Kilbourne* [1973] A.C. 729 at 756, per Lord Simon (HL).
23 Damaska, Evidence Law Adrift (Yale University Press, 1997) at p. 15.
24 Murphy, "Character Evidence: the Search for Logic and Policy Continues" [1998] 2 E. & P. 71 at 73.

may prompt the view that it is unlikely he reformed himself and more likely that he repeat-offended. Even if not fully convinced of the guilt of the accused beyond a reasonable doubt, the jury may consider that he should be punished for his past behaviour. In such a trial, the presumption of innocence can have little real effect. The tendency of jurors to label the accused has been highlighted by Ellsworth, who found that jurors "do not seem to spend a great deal of time trying to define the legal categories, evaluating the admissibility of evidence they are using, or testing their final conclusion against a standard of proof. In fact, many jurors simply appear to select a sketchy stereotyped theme to summarise what happened (eg. 'cold-hearted killer plots revenge', 'nice guy panics and overreacts') and then choose a verdict on the basis of the severity of the crime as they perceive it".[25]

There is a very close nexus between the prohibition on bad character evidence and the presumption of innocence, essentially since the prohibition aims to ensure that the accused is not pre-judged by evidence of his past behaviour or disposition. In A*ttorney-General v O'Leary*,[26] the presumption of innocence was acknowledged by Costello J. to have protected constitutional status under Art.38(1), despite the absence of express reference to it in the Constitution: "It seems to me that it has been for so long a fundamental postulate of every criminal trial in this country that the accused was presumed to be innocent of the offence with which he was charged that a criminal trial held otherwise than in accordance with this presumption would, prima facie, be one which was not held in due course of law under Article 38." The presumption of innocence has likewise been construed to constitute a fundamental human right embedded in Art. 6(2) of the European Convention of Human Rights. In *Barbera, Messegue and Jabardo v Spain*,[27] the European Court of Human Rights reasoned that the presumption of innocence entails the non-admission of prejudicial evidence (such as evidence of past crimes), adherence to the principle that the prosecution bears the burden of proving guilt beyond reasonable doubt and adequate pre-trial disclosure by the prosecution.

Liberal admissibility of bad character evidence would be a most retrograde step, particularly in the realm of sexual offences, in light of what is generally known or assumed about the propensity of sex abusers to repeat-offend. The reform would undoubtedly encourage the 'forbidden reasoning' - the inference of present guilt from past misdeed - and would culminate in a shift in many such cases from a presumption of innocence to a presumption of guilt, especially where the charge is of sexual offence. A recent test of jury deliberations by the Law Commission in England found that where it was made known to the jury that the accused had been previously convicted for child sexual abuse, the jury was instantly negative towards him, and significantly more willing to disbelieve and convict him of any crime: by contrast, disclosure of other convictions, even of dishonesty, had negligible effect unless conviction was for a recent similar offence.[28]

It is inherently difficult to prove sexual offences, given that they tend to take place in private and to suffer a deficit of independent proof. There is no quick-fix solution to this predicament that does not entail the abandonment of core values and principles developed by the common law judges after centuries of applied reason. The law has already made a number of advances toward improving the course and conduct of such trials for complainants and child witnesses - including the introduction of television link testimony for child witnesses under Part III of the Criminal Evidence Act 1992, the abolition of restrictive corroboration requirements for child witnesses, flexibility with respect to the oath and the taking of un-sworn evidence by children, and relaxation of the hearsay rule as it applies to recorded interviews with child complainants under 14 years. As a solution putatively in the name of the victims of child abuse and theft, however, the Home Secretary's intended reform has the potential to create new classes of victims through miscarriage of justice and to corrupt the criminal process generally through the erosion of one of its most fundamental protections. It would, moreover, engender a two-tiered system of justice in criminal proceedings. Trials for sexual offence and theft would experience significantly more prejudice through evidence of predisposition, and indirectly a lower standard of proof, when contrasted with trials for other offences that observe the rule of law and the requirement of a fair trial.

The common law - which Ireland inherited from England - operates a jury trial for criminal offences. The rules of evidence we operate are largely an attempt to filter the evidence a jury may hear. Because members of a jury have only occasional familiarity with the trial, and because the trial is a once-off event, there is a great need to regulate the evidence that is presented to them and to ensure that adjudication is dispassionate and logical. The technicality of evidence laws derives necessarily in part from the temporally concentrated nature of the common law trial; further from the absence of a pre-trial stage dedicated to the examination and testing of contemplated evidence; and yet further from the "inscrutability of the jury verdict, and the minimal possibility of reconsidering factual issues on appeal".[29] One of the core concerns of the laws of evidence - aside from the fear of unreliable evidence - is the avoidance of undue prejudice to the defence. Dillon L.J. once observed: "Where there is a jury, the court must be more careful about admitting evidence which is in truth merely prejudicial, than is necessary where there is a trial by a judge alone, who is trained to distinguish between what is probative and what is not".[30]

Manifestly, there are pressures on politicians to respond to the perception that our laws are soft on crime. The bad character evidence reform anticipated in England, and the admissibility of repudiated witness statements currently proposed in Ireland, appear politically motivated. These measures will curry favour with the general public whose direct experience of trial by jury is minimal and whose anxiety to protect the vulnerable from grotesque crimes, stoked by sensationalist media headlines, is ever at risk of prevailing over reason. This risk is currently more acute in a climate of fear wherein civil liberties and reason are usually the first casualty. Irish criminal justice emphasises fair process for criminal trials somewhat more than other jurisdictions. For this, it has been praised abroad by criminal lawyers. It would be a great shame to abandon any of the core values that distinguishes this system as fair.●

John Healy BL is the author of Irish Laws of Evidence (Thomson Round Hall, 2004)

25 Ellsworth, "Some Steps between Attitudes and Verdicts" in Hastie (ed.), Inside the Juror: The Psychology of Juror Decision Making (Cambridge, 1993) at pp.47-8.
26 [1991] I.L.R.M. 454 at 459 (HC).
27 (1988) 11 E.H.R.R. 360 at para.77.
28 Criminal Law Revision Committee, Eleventh Report: Evidence, 1972, Cmnd. 4991, at para.89.
29 Damaska, op. cit. n.22 at p.65.
30 *Thorpe v Chief Constable of Greater Manchester Police* [1989] 2 All E.R. 827 at 831 (CA).

New procedures for personal injuries claims

Colm O'Dwyer BL

The practice and procedure for making a claim for damages for personal injuries has been fundamentally changed by the introduction of the Personal Injuries Assessment Board (PIAB) and by the provisions of the Civil Liability and Courts Act, 2004, which were brought into effect on the 20th of September, 2004.[1]

It is proposed in this article to provide a step by step guide to making a claim to PIAB and to highlight some of the more important procedural changes in personal injuries litigation.

1. The Letter of Claim

Section 8 of the Civil Liability and Courts Act, 2004,[2] provides that a claimant/plaintiff who intends to take an action for damages for personal injuries must now serve a letter of claim upon the alleged wrongdoer(s) within 2 months of the date of the cause of action, or as soon as is practicable thereafter.

The term 'date of the cause of action' is defined in the Act to mean either the date of accrual of the action or the date of knowledge (if later).[3] The term 'date of knowledge' has the same meaning attributed to it in the Statute of Limitations (Amendment) Act, 1991,[4] that is the date on which the claimant/plaintiff had knowledge of the following facts:

a) that he or she has been injured,
b) that the injury was significant,
c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance of breach of duty,
d) the identity of the defendant, and
e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of the action against the defendant.[5]

'Knowledge' of these facts in this context does not refer simply to the facts actually established in the claimant's mind but includes knowledge which he or she might reasonably have been expected to acquire:

a) from facts observable of ascertainable by him or her, or
b) from facts ascertainable by him or her with the help of medical or other expert advice, which it is reasonable for him or her to seek.[6]

It is important to serve the letter of claim within the two month period or as soon as practicable thereafter, as the court may draw negative inferences from the failure to do so and, where the interests of justice so require, may even make no order as to the payment of the successful plaintiff's costs or deduct an amount from the plaintiff's costs as appropriate.[7]

Section 4 of the Act deals with service of the letter of claim. The letter can be served by delivering it to the proposed respondent(s)/ defendant(s) in person, by leaving it at the address at which the respondent ordinarily resides, or at an address furnished by him, or by sending it by prepaid registered post to the address where the respondent ordinarily resides, or to an address furnished by the respondent/defendant.[8] A limited company is deemed to be ordinarily resident at its registered office. Every other body corporate or unincorporated body is deemed to be ordinarily resident at its principal office or place of business.

The Act is silent on the format or content of the letter of claim except to indicate in section 8 (1) that it should make reference to the 'nature of the wrong' alleged to have been committed by the recipient(s).

The types of actions covered by the requirement for a letter of claim are:

a) actions for damages for personal injuries,
b) actions for damages for both personal injuries and damage to property (but only if both have been caused by the same wrong), or
c) actions for damages for fatal injury under section 48 of the Civil Liability Act, 1961.[9]

Claims for compensation under the Garda Siochana Compensation Acts or any actions where the damages sought include damages for false imprisonment or trespass to the person are specifically excluded.

1 Civil Liability and Courts Act, 2004 (Commencement) Order, S.I. 544/04
2 Brought into effect on the 20th of September, 2004 by SI 544/04
3 Section 8 (2) Civil Liability and Courts Act, 2004.
4 Section 2 Civil Liability and Courts Act, 2004.
5 Section 2 (1) Statute of Limitations (Amendment) Act, 1991.
6 Section 2 (2) Statute of Limitations (Amendment) Act, 1991.
7 Section 8 (1) (a) Civil Liability and Courts Act, 2004.
8 Section 4 (1) (a) (b) (c) Civil Liability and Courts Act, 2004.
9 Section 2 of the Civil Liability and Courts Act, 2004.

The letter of claim is still necessary where an application for an assessment will be made to PIAB, as there is no way of knowing in advance whether the Board will issue an authorisation for court proceedings.

2. The O'Byrne letter

In circumstances where there are potentially several respondents/defendants to a claim for damages for personal injuries, the 'O'Byrne' letter regarding liability as between the respondents/defendants is now more important than ever and must cover a variety of new issues. I would suggest that it should be served before any contact is made with PIAB. This could help the claimant to avoid including unnecessary respondents in his or her application to PIAB and/or could lead to a immediate settlement of the claim where the wrongdoer wants to avoid paying the PIAB fee (€850 to be paid by the defendant) and the damages in the PIAB Book of Quantum. Where possible, it might be worthwhile to issue the O'Byrne letters as letters of claim as soon as possible after an accident.

The new O'Byrne letter should:

a) provide the name and address of the claimant/plaintiff,
b) provide details of the accident,
c) claim that the accident was caused by the wrongdoing of one or other potential respondents/defendants but that the claimant/plaintiff is unable to say which one is responsible,
d) call upon the recipient to admit liability within a certain specified period,
e) call upon the recipient to make proposals to compensate the claimant,
f) warn the recipient that if there is no admission of liability and/or proposals to compensate the claimant, an application will be made to PIAB for an assessment of damages against all the named potential respondents,
g) warn the recipient that if it becomes necessary to issue court proceedings against all of the respondents/defendants (where, for example, none of the respondents/defendants consents to a PIAB assessment), the O' Byrne letter will be used to fix the unsuccessful defendant with the costs payable to the defendant(s) who are found to have no liability,
h) request an indemnity from the recipient in relation to the costs of unnecessary or aborted court proceedings against any of the potential respondents/defendants who will not participate in the PIAB assessment (non-participating respondents) or do not accept the amount assessed (non-accepting respondents),
i) warn the recipient that in absence of the indemnity outlined above, the claimant will seek to recoup these costs in separate court proceedings and that the O'Byrne letter will be used to fix the wrongdoer with the costs of such proceedings.
j) where relevant, request an undertaking in writing that the recipient will preserve any real or movable property relevant to the accident in its unaltered state pending an examination or inspection by an expert witness.
k) warn the recipient that if the claimant does not receive the above undertaking within a specified period, an application may be made to court under section 12 of the Personal Injuries Assessment Board Act, 2003 (the PIAB Act), for such interlocutory order or orders as may be required and for the costs of this application.[10]

It is difficult to see how a claimant/plaintiff could draft such a complex letter without the help of a solicitor. Indeed, I think it is fair to assume that very few claimants/plaintiffs would even know that such letters of claim or O'Byrne letters are necessary. The key question is whether the court will punish them in terms of costs (which could amount to many thousands of euros) for a simple lack of knowledge of the law and civil procedure as the Civil Liability and Courts Act, 2004, seems to suggest.[11]

If the claimant/plaintiff does want to use a solicitor, it is clear that he or she will not be awarded any legal costs from the respondent by PIAB although Section 7(1) of the PIAB Act specifically states that nothing in the Act is to be read as affecting the right of any person to seek legal advice in respect of his or her claim. This means that the solicitor will need to have a written agreement in place with the client that a sum of money for legal fees and outlays which are not payable through the PIAB process will be the personal responsibility of the claimant (and thus may have to be paid to the solicitor out of the PIAB award).

3. The requirement for an application for an assessment of damages by the PIAB.

After the letter of claim and, if necessary, O'Byrne letters have been issued, it is then required in almost all personal injury claims[12] that the claimant apply to PIAB for an assessment of damages. The only exceptions are:

a) claims arising out of a medical or surgical procedure (medical negligence)[13]
b) claims where, as well as damages for personal injuries, there is a bona fide intention to pursue damages in respect of other causes of action (such as, for example, slander),
c) Garda compensation claims made under the Garda Siochana (Compensation) Acts 1941 and 1945,
d) claims where it is alleged that there has been a breach of a provision of the Constitution,
e) claims pursued under section 3 of the European Convention on Human Rights Act, 2003.[14]
f) claims which involve the Motor Insurers Bureau of Ireland (MIBI) as a respondent/defendant does not appear to be covered by the PIAB Act, which specifically only applies to "a civil action by a person against another person arising out of that other's ownership, driving or use of a mechanically propelled vehicle".[15] This provision wouldn't seem to cover a situation where there is an unidentified and untraced motorist in which case a claim will be made against the MIBI (as this claim doesn't arise out of the MIBI's ownership, driving or use of a motor vehicle).[16]

10 This list is not exhaustive. The Law Society has produced new precedents for the O'Byrne letter for its members.
11 The intention of the legislature would appear to be to reverse the general legal principle that the costs follow the event (i.e. that the successful plaintiff receives their costs from the unsuccessful defendant).
12 Section 4 of the Personal Injuries Assessment Board Act, 2003.
13 Specifically excluded by section 3 (d) of the Personal Injuries Assessment Board Act, 2003.
14 Exception b - e are excluded from the PIAB process in section 4 of the Personal Injuries Assessment Board Act, 2003.
15 Section 3 (b) of the Personal Injuries Assessment Board Act, 2003.
16 There is a full discussion of this issue in an article by Catherine Noctor BL and Richard Lyons BL in the November, 2004 issue of the Bar Review.

4. The PIAB Application

Rules concerning the procedure to be followed for applications for a PIAB assessment have been made by the Board pursuant to provisions of section 46 of the PIAB Act. Rule 3 (1) states that an application for an assessment by a claimant under section 11 of the Act (for an assessment) shall -

(a) be made in writing or by electronic mail,
(b) contain such information as may from time to time be specified by the Board, and
(c) be accompanied by the following documents:
  (i) a copy of a document that has been given or sent, by or on behalf of the claimant, to the person or persons whom he or she believes to be liable to pay compensation to him or her in respect of the claim, notifying the person or persons of his or her relevant claim and seeking the payment of compensation, which copy shall indicate the date on which the document was so given or sent (this would usually be the letter of claim);
  (ii) copies of any other correspondence between the claimant and that person or those persons in relation to the relevant claim,
  (iii) a report, containing such information as may from time to time be specified by the Board, prepared by a medical practitioner who has treated the claimant in respect of the personal injuries, the subject of the relevant claim, in relation to those injuries,
  (iv) receipts, vouchers or other documentary proof in relation to loss or damage in respect of which special damages are being sought in the relevant claim,
  (v) any other document that the claimant considers relevant to the claim,
  (vi) any other document that the Board or any member of the staff of the Board duly authorised in that behalf by the Board considers relevant to the claim and specifies in a notice in writing given or sent to the claimant before the receipt by the Board of the application.

The application is made by way of a form (Form A) which is available to download from the PIAB website (*www.piab.ie*) or can be posted to the claimant by PIAB. The form must be filled in and be returned with the fee (€50) imposed on the claimant by the Board pursuant to Regulations made by the Minister under section 22 of the PIAB Act.

The official date of the making an application under section 11 of the PIAB Act (which is the date on which the clock stops for the Statute of Limitations) is the date on which the fully completed Form A and the information specified above is acknowledged in writing as having been received by the Board. The acknowledgement will only be provided when the Board is satisfied that it has all the information that it needs, not necessarily when the form is first sent in.

5. The PIAB process

A simple personal injury claim should pass through PIAB reasonably quickly. Where there is one respondent and there are no real issues regarding liability, contributory negligence or the medical reports provided, consent to an assessment should be forthcoming quite quickly (along with the assessment fee of €850).

The Board will then make an assessment of the appropriate damages within 9 months. There is no oral hearing. The assessment is based upon the Book of Quantum (of damages) which is a guide to compensation levels for particular injuries based on factual data sourced from the Courts Services, the Irish Insurance Federation and the Small Claims Agency and compiled by an independent firm of analysts.

The claimant and the respondent are then informed of the amount of the assessment and there is an explanation provided of how this figure was reached. Both respondent and claimant are free to accept or reject the amount assessed. The claimant has 28 days to write to PIAB accepting the award. If the claimant rejects the award or fails to reply, an authorisation for court proceedings is issued. The respondent has 21 days to reject the assessment. If they do not reject it within that time, it is assumed that they have agreed to the award and PIAB will issue an order to pay against them, which has the same status as a court judgment.

If a claimant or respondent rejects the assessment and the case is brought before the courts on foot of an authorisation from PIAB, the respondent is free to contest liability and argue that there was contributory negligence on the part of the claimant/plaintiff. It is important to note that the respondent consenting to an assessment or failing to reply to the notification of an application for an assessment from PIAB does not constitute an admission of liability and cannot be used in evidence in a court case.[17] An assessment that was made in respect of a claim cannot be used as evidence in a case, if it is rejected. Neither can it be referred to in any affidavit or notice of pleading when the matter goes to court [18] (although the section of the PIAB Act under which the authorisation for proceedings was issued must be included in the proceedings and this will indicate to the judge why the action is now before him or her).

6. Authorisation for court proceedings from PIAB

A personal injuries claim can be transferred from PIAB to the courts where PIAB authorises proceedings against a particular respondent/defendant pursuant to the provisions of section 14, 17, 32, 36, 46 (3) or 49 of the PIAB Act.

17 Section 16 Personal Injuries Assessment Board Act, 2003
18 Section 51 Personal Injuries Assessment Board, 2003.

a) Section 14

Section 14 applies where the respondent/defendant does not consent to an assessment of damages by PIAB. The respondent has 90 days from the issue of a formal section 13 notice of application (for an assessment) to respond to PIAB in writing stating that they do not consent to an assessment being made. This would usually arise where the respondent believes that there has been contributory negligence on the part of the claimant or wants to contest liability.

If the respondent does not respond in writing to the notice within 90 days, the Board will proceed with the assessment as if the respondent had consented.

The difficulty I foresee is that there will often be more than one respondent to a claim and it is quite possible that one of these respondents will not consent to an assessment because they believe that they have no liability in the case (and have issued Notices claiming an Indemnity and/or Contribution to the other respondents). In these circumstances, the Board will continue to make an assessment of damages which is not binding on the non-participating respondent and issue an authorisation for proceedings against the non-participant respondent. Section 14 (2) of the PIAB Act indicates that this authorisation should be issued as soon as possible after receipt of a notice in writing that that respondent is not consenting to an assessment.

The issue of liability as between participating and non-participating respondents then becomes problematic because the Board cannot make a decision on the apportionment of liability as between respondents. If the participating respondent accepts the assessment of damages, then an order to pay, which operates as if it were a judgment of court, will be issued against them by the Board for the whole of the amount assessed.

The participating respondent should then pay to the claimant all of the amount specified in the order to pay. Section 15 (5) of the PIAB Act indicates that the proceedings authorised against the non-participating respondent would then cease to be maintainable - the assessment accepted by the claimant and paid in full by the participating respondent has the legal effect of a satisfaction by one wrongdoer which discharges all other concurrent wrongdoers in accordance with the provisions of section 16 (1) of the Civil Liability Act, 1961.

The issue of costs in the court proceedings against the non-participant would then arise. In this regard, the wording of the O'Byrne letter will become very important as the solicitors for the plaintiff/claimant will want to be assured that the participating respondent will bear responsibility for not releasing the non-participating respondent at an earlier stage (see 2 above).

Where the participating respondent only pays a portion of amount assessed this payment will constitute a partial satisfaction of the claim in accordance with section 16 (3) of the Civil Liability Act, 1961. The plaintiff's court proceedings against the non participating respondent are then 'maintainable in respect of only the balance outstanding'.[19] The important point is that the claimant/plaintiff can pursue the non-participating respondent in court for some or all of the amount of the assessment if the participating respondent becomes insolvent and does not pay the full amount specified in the order to pay.

The complexity of the issues as between respondents/defendants increases in circumstances where there are 3 respondents to a claim and 2 consent to an assessment being made, but one of these then decides to reject the assessment. You then have a non-participating respondent and non-accepting respondent. There may already be court proceedings in being against the non-participating respondent and a separate authorisation for proceedings against the non-accepting respondent. There is also an order to pay in existence which is binding on the participating respondent who may issue proceedings against any or all of the other respondents for a contribution or an indemnity pursuant to the provisions of section 21 of the Civil Liability Act, 1961 (becoming a plaintiff in this action).

The inescapable conclusion in relation to claims where there is more than one respondent, and there is any issue between the respondents in relation to liability, is that it would be unwise for one respondent to consent to an assessment. As the sole participating respondent, they could potentially find themselves in the unsatisfactory position of having to pay the entire amount of the assessment on foot of the order to pay and the PIAB fee (€850) as well as the costs of the claimant's court action against the non-participating respondent(s) and potentially, the court costs of the other respondents if they do not succeed in securing an indemnity from them.

b) Section 17

Section 17 applies where PIAB exercises its discretion not to arrange an assessment. This may occur where the Board considers that:

a) there is no case law or a sufficient number of settlements in relation to a particular type of personal injury to which the claim relates,
b) the medical issues in the claim are particularly complex involving the interaction between a number of different injuries including pre-existing conditions,
c) the injuries consist wholly or in part of psychological damage, the nature and extent of which it would be difficult to determine in an assessment (with no oral evidence),
d) there is a bona fide claim for aggravated or exemplary damages,
e) the claim arises out of a trespass to the person (because an assessment process would not respect the dignity of the claimant),
f) the gravity of the injury is such that there is a real danger that the claimant might die and an early trial would be ordered,
g) the period of time for making the assessment would have to be deferred beyond nine months (in order that a long term prognosis in respect of the injury can be made),

19 Section 15 (5) (b) of the Personal Injuries Assessment Board Act, 2003.

h) the person purporting to act as next friend or guardian or a respondent has a conflict of interest,
i) the claim is of a type which PIAB has, with the consent of the Minister for Justice, Equality and Law Reform declared that there are good and substantial grounds for its not arranging an assessment.

PIAB may also, in its discretion, decide not arrange an assessment if a charge imposed by it on a respondent pursuant to regulations under section 22 (1) of the Act (€850 plus €150 towards an extra medical report if required) has not been paid.

c) Section 32

Section 32 applies where the assessment is rejected by the claimant (within 28 days) or by the respondent (within 21 days).

d) Section 36

Section 36 applies where the court has not approved an assessment in a claim involving a minor, or a person of unsound mind (even if the next friend or committee has accepted the assessment) or where the claim relates to an action for damages for fatal injury under Section 48 of the Civil Liability Act, 1961. If the court does not approve an assessment in these cases, the Board has to issue an authorisation for proceedings to be brought.

e) Section 46 (3)

There is a general presumption as to the capacity of the claimant and respondent. [20] However, rules under section 46(3) enable PIAB to issue an authorisation for proceedings to a claimant where a medical opinion is furnished to the Board which show that the claimant or the respondent is not of sound mind (and a next friend or guardian is not already acting for the claimant or respondent).

f) Section 49

PIAB has a duty to make an assessment of damages within a period of nine months[21] from the date it receives the respondent's consent for an assessment or, if there is more than one respondent, from the date of the first consent. Where it appears likely that the Board will fail in this duty, it can provide notice in writing to the claimant and respondent stating that it will require an extension of time and explaining reasons why the extension is necessary. The extension can be for no more than nine months after the expiration of the nine month period. The notice must be served before the expiration of the nine month period. If the assessment is not made before the expiration date for the extension of time specified in the notice, PIAB must issue an authorisation for proceedings.

7. After the authorisation – important changes in procedure for court actions.

a) The PIAB procedure and the Statute of Limitations

The period from making an application to PIAB for an assessment to six months after the date of issue of an authorisation (for proceedings) can be disregarded for the purposes of the limitation period in the Statute of Limitations. The clock effectively stops for this period but starts to run again thereafter. At the moment, the limitation period for most personal injuries actions is three years from the date of accrual of the cause of action, or the date of knowledge of plaintiff of the cause of action. PIAB does not bar claims on the basis that the limitation period has passed but the respondent only has to refuse to consent to an assessment in such case and defend the action in court on the basis that it is statute barred.

On the 31st of March of 2005, when the rest of the provisions of the Civil Liability and Courts Act, 2004, come into effect, the limitation period for personal injury actions will be reduced from three years to two years.

b) Changes to the Rules of the Superior Courts

To allow for the bringing of proceedings on foot of an authorisation from PIAB, the following amendments to the Rules of the Superior Courts have been made by Statutory Instrument No. 517 of 2004:

i) the insertion in Order 4, immediately following rule 3, of the following rule:

"3. A. In the case of proceedings the bringing of which requires to be authorised in accordance with sections 14, 17, 32, 36 or 49, or rules under section 46 (3) of the Personal Injuries Assessment Board Act, 2003, the Indorsement of Claim shall contain a Statement

a) confirming that the proceedings have been authorised by the Personal Injuries Assessment Board,
b) specifying the section of the Personal Injuries Assessment Board Act, 2003, or rule made under section 46 (3) of that Act in accordance with which such authorisation has been issued, and
c) citing the date of the authorisation and any reference or record number relating to such authorisation."

c) The Verifying Affidavit

Section 14 of the Civil Liability and Courts Act, 2004, which will come into effect on the 31st of March, 2005, provides that the plaintiff shall swear an affidavit verifying the assertions or allegations made in their pleadings (as shall the defendant or third party where they make assertions or allegations in their Defence). This section is of relevance now because it will apply, not only to personal injuries actions brought after the commencement of the section, but also to actions brought before the commencement of the section where a party to the action requires (not later than 21 days before the hearing date) another party to swear such an affidavit. Making a statement which is false or misleading in the affidavit is a serious offence liable, upon conviction on indictment to a fine not exceeding €100,000 or to imprisonment for a term not exceeding 10 years, or both.[22]

20 Section 18 (1) Personal Injuries Assessment Board Act, 2003.
21 Section 49 (2) Personal Injuries Assessment Board Act, 2003.
22 Section 29 Civil Liability and Courts Act, 2004.

d) Affidavit evidence

Section 19 of the Civil Liability and Courts Act, 2004, provides the court with the power to direct that evidence in relation to any matter be given by affidavit (although the person who provided the affidavit can be cross-examined on the contents of the affidavit.)

e) Regard to the Book of Quantum

Section 22 of the Civil Liability and Courts Act, 2004, states that the court 'shall in assessing quantum in personal injuries actions have regard to the Book of Quantum'. This is already causing problems for defendants as plaintiffs now expect to receive the damages specified in the Book, which many observers believe to be quite generous (€14,400 for a whiplash injury to the neck from which the plaintiff has substantially recovered within 12 months is one example that is often quoted).

f) False evidence

Knowingly giving, or causing to be given, false or misleading evidence in a personal injuries action is now an offence [23] liable, upon conviction on indictment to a fine not exceeding €100,000 or to imprisonment for a term not exceeding 10 years, or both. On summary conviction, the fine is up to €3,000 and/or imprisonment for up to 12 months[24] This provision applies to actions brought on or after commencement and pending on the commencement date (20th of September, 2004). An action where false or misleading evidence has been given or adduced by the plaintiff must now be dismissed by the court unless this would cause an injustice.[25]

g) Exclusion of certain witnesses

The court in a personal injuries action may now, upon application of a party to the action, direct that a person (other than another party to the action) shall not attend the trial until he or she is required to give evidence and may give directions to prevent him or her communicating with other witnesses.

8. Major procedural changes to be introduced in March, 2005

A large number of significant provisions of the Civil liability and Courts Act, 2004, will come into effect on the 31st of March, 2005, including the introduction of mediation conferences during the action and a requirement for formal offers of settlement to be lodged in court. ●

23 Section 25 Civil Liability and Courts Act, 2004.
24 Section 29 Civil Liability and Courts Act, 2004.
25 Section 26 Civil Liability and Courts Act, 2004.

Court and Court Officers Acts 1995-2002
Judicial Appointments Advisory Board

APPOINTMENT OF ORDINARY JUDGES OF THE:

SUPREME COURT
HIGH COURT
CIRCUIT COURT
DISTRICT COURT

Notice is hereby given that applications are invited from practising barristers and solicitors who are eligible for appointment to the Office of Ordinary Judge of the Supreme Court, the High Court, the Circuit Court and the District Court.

Those eligible for appointment and who wish to be considered should apply in writing to the Secretary, Judicial Appointments Advisory Board, Phoenix House, 15/24 Phoenix Street North, Smithfield, Dublin 7, for a copy of the relevant application form.

Applications received in response to this advertisement for appointment to the Office of Ordinary Judge of the Supreme Court, the High Court, the Circuit Court and the District Court will remain on file until the 31st of December 2005.

Applications received will be considered by the Board during this period unless and until the applicant signifies in writing to the Board that the application should be withdrawn.

Applicants are advised to return completed application forms, in relation to this advertisement, by 31st of December 2004.

It should be noted that The Standards in Public Office Act, 2001 prohibits the Board from recommending a person for judicial office unless the person has furnished to the Board a relevant tax clearance certificate (TC4) that was issued to the person not more than 18 months before the date of a recommendation.

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

Canvassing is prohibited.

Dated the 2nd of December 2004

BRENDAN RYAN BL
SECRETARY,
JUDICIAL APPOINTMENTS ADVISORY BOARD

Legal The Bar Review Update

The Bar Review
Journal of the Bar of Ireland. Volume 9, Issue 6, December 2004

Edited by Desmond Mulhere, Law Library, Four Courts.

A directory of legislation, articles and written judgments received in the Law Library from the 29th October 2004 up to 24th November 2004.

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

ACCOUNTING

Article

Maguire, Tom
Accounting principles and tax - is there GAAP on Mars?
2004 (Sep) ITR 382

ADMINISTRATIVE LAW

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Competition law – Auxiliary dental workers - Statutory power to establish scheme to regulate practice of denturism – Legislative interpretation – Whether mandatory obligation to establish scheme – Whether defendants acted reasonably and fairly in exercising powers –Constitutional right to earn a livelihood – Whether plaintiff's right infringed – Whether breaches of competition law – Dentists Act 1985 (1998/1538P – Gilligan J – 27/2/2004)
Kenny v The Dental Council

Statutory Instruments

Appointment of special adviser (Minister for Agriculture and Food) order 2004
SI 692/2004

Appointment of special advisers (Taoiseach and minister of state at the department of the Taoiseach) order 2004
SI 686/2004

Marine (delegation of ministerial functions) order 2004
SI 236/2004

National Haemophilia Council (establishment) order 2004
SI 451/2004
Oireachtas (ministerial and parliamentary offices) (secretarial facilities) (no 2) regulations 2004
SI 396/2004

Presidential election (reimbursement of expenses) regulations 2004
SI 442/2004

AIR LAW

Article

Havel, Brian F.
Preparing for a new era in international aviation: a transatlantic common aviation union takes shape
2004 IJEL 5

ANIMALS

Statutory Instruments

Diseases of animals (inspection fees) order, 2004
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SI 423/2004

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SI 173/2004

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SI 415/2004

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SI 418/2004

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SI 416/2004

Asset covered securities act, 2001 (sections 61(1), 61(2) and 61(3)[prudent market discount] regulation 2004
SI 420/2004

Asset covered securities act 2001 (sections 61(1), 61(2) and 61(3))(over collateralisation) regulation 2004
SI 419/2004

Financial transfers (Burma Myanmar) (prohibition) order 2004
SI 466/2004

Financial transfers (counter terrorism) order 2004
SI 458/2004

Financial transfers (Iraq) (prohibition) order 2004
SI 460/2004

Financial transfers (Liberia) (prohibition) order 2004
SI 464/2004

Financial transfers (usama bin laden, al-qaida and taliban of Afghanistan) (prohibition) order 2004
SI 456/2004

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SI 462/2004

BUILDING & CONSTRUCTION

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Building regulations advisory body order, 2002 (amendment) order, 2004
SI 697/2004

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Planning and environmental law – Criminal prosecution by EPA – Whether waste licence audit report and records inadmissible in criminal trial as involuntary confessions (2003/739SS – Kearns J – 21/5/2004)
Environmental Protection Agency v Swalcliffe Ltd

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Children act 2001 (commencement) order 2004
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Heaphy v Heaphy

Sale of land
Damages for breach of contract – Whether there was a concluded oral agreement for the sale of the entire issued share capital in Whitefield Construction Ltd (2002/9954P – Finnegan P – 19/5/2004)
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Appeal
Appeal against conviction – Murder – Provocation – Self defence – Whether the trial judge erred in his charge to the jury (10/2003 - Court of Criminal Appeal – 6/7/2004)
O'Carroll v DPP

Appeal
New offence created by statute – Interpretation – Whether innovative point of law should be certified for opinion of court – Non-Fatal Offences Against the Person Act, 1997 section 13 (155/2002 – Court of Criminal Appeal – 28/7/2004)
People (DPP) v Cagney

Appeal
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People (DPP) v McGrath

Appeal
Offence of endangerment – Whether trial judge erred in failing to withdraw count from jury – Whether no evidence of specific intent – Non-Fatal Offences Against the Person Act 1997, section 13 (155/2002 – Court of Criminal Appeal – 27/5/2004)
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Leave – Planning permission – Permission granted by An Bord Pleanála on appeal subject to conditions contrary to recommendation of its inspector – Extent of obligation of An Bord Pleanála to state reasons for imposing conditions on grant of permission – Whether An Bord Pleanála indicated sufficient reasons for departing from recommendation of its inspector – Conditions – Nature of conditions imposed by An Bord Pleanála – Whether An Bord Pleanála has authority to impose as condition that certain matters be agreed between developer and planning authority – Whether substantial grounds advanced by applicant – Whether leave should be granted – Planning and Development Act 2000, sections 34(2), 34(5), 34(10), 37(1)(b), 131 (2003/362JR – O Caoimh J – 27/2/2004)
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Change of use – Permission granted for use of premises as hostel – Subsequent unauthorised change of use of premises – Respondent intending to abandon subsequent unauthorised use and use premises as hostel again – Whether valid grant of planning permission capable of being abandoned and displaced by subsequent unauthorised use – Whether former authorised use can be recommenced without fresh grant of planning permission – Whether respondent required to apply for planning permission to use premises as hostel – Local Government (Planning and Development) Act 1963, sections 3 and 28(5) (2001/73JR – Gilligan J – 30/4/2004)
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Committee – Dail

Planning and development (acquisition of development land) (assessment of compensation) bill 2003
1st stage - Dail

Planning and development (amendment) bill, 2003
1st stage – Dail

Planning and development (amendment) bill, 2004
1st stage – Dail

Planning and development (amendment) (no.2) bill 2004
1st stage -Dail

Postal (miscellaneous provisions) bill, 2001
1st stage –Dail (order for second stage)

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

Proceeds of crime (amendment) bill, 2003
1st stage – Dail

Public service management (recruitment and appointments) bill, 2003
1st stage – Dail

Railway safety bill, 2001
Committee – Dail

Registration of deeds and title bill, 2004
1st stage - Seanad

Registration of lobbyists bill, 2003
1st stage- Dail

Residential tenancies bill, 2003
2nd stage – Dail

Road traffic bill, 2004
1st stage- Dail

Safety, health and welfare at work bill, 2004
1st stage- Dail

Sea pollution (hazardous and noxious substances) (civil liability and compensation)
bill, 2000
Committee – Dail

Sea pollution (miscellaneous provisions) bill 2003
1st stage – Seanad

Sustainable communities bill, 2004
1st stage - Dail

The Royal College of Surgeons in Ireland (Charter Amendment) bill, 2002
2nd stage – Seanad [p.m.b.]

Transfer of execution of sentences bill, 2003
2nd stage – Seanad

Twenty-fourth amendment of the Constitution bill, 2002
1st stage- Dail

Twenty-seventh amendment of the constitution bill 2003
2nd stage – Dail

Twenty-seventh amendment of the constitution (No.2) bill 2003
1st stage – Dail

Veterinary practice bill, 2004
1st stage- Seanad

Waste management (amendment) bill, 2002
2nd stage- Dail

Waste management (amendment) bill, 2003
1st stage – Dail

Water services bill, 2003
1st stage – Seanad

Whistleblowers protection bill, 1999
Committee - Dail

Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
FSLJ = Financial Services Law Journal
GLSI = Gazette Society of Ireland
IBL = Irish Business Law
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IFLR = Irish Family Law Reports
IILR = Irish Insurance Law Review
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

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Planning Gain in Ireland and the Old Head of Kinsale

James Macken SC

Introduction

The decision of the Supreme Court in the case of *Ashbourne Holdings Ltd v. An Bord Pleanála* delivered on the 10th of March, 2003 and reported at [2003] 2 I.R. 114 is a landmark judgment delineating the manner in which planning authorities can exercise their powers. This article will analyse its importance under four distinct headings:

Firstly, this is the first time since 1987 that the Supreme Court has considered the topic of planning gain in Ireland, i.e, the power of planning authorities or An Bord Pleanála to impose in planning permissions conditions relating to the construction or improvement of public facilities, either on adjoining lands controlled by the developer, or on other lands outside the ambit of the particular planning permission. Secondly, the case provides a reaffirmation by the Supreme Court of the restrictive or "strict construction" approach to the interpretation of powers granted to planning authorities. This approach serves as a counter balance to the prevailing view that if the grant of planning permission confers a benefit on a developer, it is legitimate to seek to recuperate some of that benefit to the advantage of the public domain. Thirdly, *Ashbourne Holdings* raises interesting possibilities in the field of judicial review by reaffirming the rule that, if the imposition of a certain condition is clearly ultra vires the powers of the planning authority, the fact that a person may have consented to or acquiesced in its inclusion in a planning permission does not disentitle him or her from seeking relief by way of judicial review. Finally, the case raises some interesting questions in relation to the validity or enforceability of conditions contained in a planning permission where a planning authority insists that there has been a substantial material breach of that planning permission and requires that an application be made for retention of the unauthorised development.

The Facts

Before setting out the facts of the case, we may set the scene, by quoting from the High Court judgment of Kearns J:

> "The Old Head of Kinsale is perhaps the most conspicuous headland along its particular section of coastline in County Cork. It incorporates a functioning lighthouse at its southern tip and a walled roadway thereto, the property of the Commissioners of Irish Lights. There are also the remains of an old lighthouse at a site further northeast on the headland. There remains on the neck of the northern isthmus the ruins of Downmacpatrick Castle (also known as de Courcey castle) which was a stronghold during the Anglo-Norman settlement of Ireland. It lies just outside the entrance gates to the Applicant's property.
>
> The entire headland is subject to a preservation order. The total area of the headland south of de Courcey castle is 90 hectares. The golf course development as now constructed comprises 60 hectares. At all times material hereto, the headland was in private ownership and while hundreds of visitors, particularly at weekends and bank holidays, used walk the headland, mostly via the walled roadway to the lighthouse, they did so as trespassers, undoubtedly encouraged by the minimal measures taken by previous owners to exclude walkers and ramblers."

The plan by Ashbourne Holdings Ltd and its associated companies to develop an exclusive luxury golf course on this headland led to a certain amount of public controversy and claims that there were time-honoured facilities, if not public rights of way, for ramblers and bird watchers to walk around the lands and the cliff edges. Notwithstanding this controversy, a golf course was eventually developed as exempted development prior to the coming into force of the Local Government (Planning and Development) Regulations of 1994, which effectively made it necessary to obtain planning permission for golf courses which had not been developed up to that date.

The development of a clubhouse was not exempted development and subsequently, the developer applied for and was granted, on the 6th of May, 1993, planning permission for the development of a golf clubhouse and ancillary equipment building together with various site works such as a car park, roadways and drainage. That permission was granted by An Bord Pleanála on foot of an appeal by An Taisce. Such had been the controversy surrounding the application that Ashbourne Holdings had offered to provide public access to the headland and agreed to allow the imposition of conditions guaranteeing that access. To quote again from the High Court judgment:

> "It is clear that, in approaching the project, the applicants were very conscious of the *de facto* access enjoyed by the public to the Old Head of Kinsale and of the need to secure local support, or at least to neutralise local opposition, if the golf development was to be successful.
>
> The applicants commissioned an Environmental Report from RPS, an environmental consultancy in Cork, in July 1992. Section 2.15 of the Report provided:-
>
> > 'The public would be provided with access to the entire existing roadway to the lighthouse and the area marginal to the neck and the northern rim of the headland to the old lighthouse. A gravel path and picnic areas would also be provided in the neck area between de Courcey castle and the old lighthouse compound. Access to the cliff paths and cliff edges for interest groups would be made available. Access to the restaurant and bar facilities would also be provided to the public'".

A dispute then arose between Cork County Council and Ashbourne Holdings Ltd in relation to the work that had been carried out. Cork

County Council insisted that these works were not in conformity with the planning permission granted and that they constituted a material breach of the planning permission. They served warning notices on Ashbourne Holdings, which then applied for planning permission for retention and completion of the golf club house, car park and access road, and for retention of the machinery shed and retention of modifications to the entrance. The County Council granted planning permission subject to certain conditions and Ashbourne Holdings Ltd appealed some of these conditions to An Bord Pleanála. The developer had changed its attitude to public access. The Board's inspector summarised the position as follows:

> "As it is now the preference of the Applicants, while allowing public access on to the lands they own, to restrict public access to the "neck" and the old lighthouse area, access to the new lighthouse and the roads and the cliff path and edges gives rise to conflict with golfers as well as potential danger from the sheer cliffs themselves. The way the course has been laid out, there are greens abutting the sheer cliff tops, therefore access around the "cliff edges" would need to be across the playing line, and with holes parallel to the new lighthouse road, there would again be danger to pedestrians from wayward balls"

The Board granted the application for retention subject to conditions providing for public access to the Old Head of Kinsale expressed (so far as relevant to this article) in the following terms:

(1) Access should be provided at all times during day light hours for the public to the lighthouse and the area marginal to the neck and northern rim of the headland to the old lighthouse.

(2) Access to the cliff face and cliff edges for interest groups shall be made available in accordance with details to be submitted to the planning authority for agreement within three months of the date of this permission. In default of agreement, this matter should be determined by An Bord Pleanála.

Reason: In the interest of amenity and orderly development and having regard to the planning history of the site."

In addition, the Board provided that the golf club could charge for access by the public to the lands but that charge was not to exceed the reasonable cost of insurance and of the administration of entrance control.

Ashbourne Holdings brought judicial review proceedings against the imposition of these conditions asserting that they were *ultra vires* the powers of the planning authority. Although they had originally offered this type of access to the headland and cliffs and it was incorporated by condition in the 1993 permission, this planning gain aspect of the decision of An Bord Pleanála was now unacceptable.

The reason given by the Board for this condition reads: "in the interests of amenity and orderly development and having regard to the planning history of the site." In the course of the argument in the Supreme Court, the Board sought to justify it on the basis that "having regard to the nature of the site, public access for those without the wherewithal to play golf is reasonable" and "since planning permission enhances the value of land, there can be no objection to making it subject to a condition which may in other respects reduce its value." They also argued that in the original 1993 grant of planning permission for the clubhouse development, access conditions were imposed with the consent of the clubhouse developer and that at no stage did the developer, prior to the judicial review proceedings, suggest that no access should be provided to the public.

The Decision of the Court

The Supreme Court approached the issues arising on the basis that it first had to decide whether the imposition of a condition requiring public access to the lands was within the powers of An Bord Pleanála under Section 26 of the 1963 Act (which in this respect is identical to Section 34 of the 2000 Act). As Hardiman J. states in his judgment

> "On the hearing of this appeal, the issues raised fell into two broad categories. The first of these related to the validity in principle of conditions directed at ensuring or regulating public access to the Old Head of Kinsale lands, adjacent to the lands for which permission or retention was sought, and being in the same ownership. The second category related to res judicata and whether the conduct of the applicant, in the planning history of the lands, disentitled itself to relief to which it might otherwise be entitled, or allowed the court in its discretion to refuse such relief. These are all estoppel or preclusion issues."

1. The Planning Gain Issue

The judgment deals first with the issue of whether the imposition of the condition was within the powers of the Board under Section 26. Having decided that it is not within the Board's powers, it deals with what are described as the estoppel and preclusion issues related to the previous planning permissions and the previous willingness of the golf course developer to accept a measure of public access to the headland. The judgment then goes on to deal with the issue of planning gain which is referred to as "certain practical aspects of the imposition of such conditions." In many ways, it is this last part of the judgment which is of the greatest interest and significance to planning authorities, to planners and to lawyers. It brings to the fore in this country, a debate on the question of the desirability of requesting or allowing developers to carry out works for the benefit of the public or of the public domain as part of a commitment entered into for the purpose of obtaining planning permission, whether or not such work is imposed as a condition in the actual grant of planning permission. The Supreme Court, through Hardiman J. disapproves of such types of arrangement, based on considerations of fairness and equality between developers and a desire not to see the well-resourced developer receive an advantage over others because of the scale of commitment they can make.

The topicality of the debate on this issue is heightened by the fact that under the provisions of the newly adopted development contribution schemes arising under Section 40 of the Planning and Development Act, 2000, every developer is required to make a financial contribution for the benefit of the public purse and the public domain in the county or city in which the development is being carried out, whether or not that has any direct relationship with the development proposed. An apartment building in Ballsbridge may be required to contribute to a general fund which may be spent on public parks in Ballyfermot. In those circumstances, many would argue that the Development Contribution Scheme takes care of the "planning gain" aspect of any development even without considering what have been termed the "external costs" of the development.

Hardiman J. cited with approval two passages from Professor Yvonne Scanell's book "Environmental and Planning Law in Ireland" (1995 edition) and in particular, the following passage:

> "Of course, in many cases, developers 'agree' to planning gain and do not appeal ultra vires conditions requiring them to provide facilities or services which were not necessitated by, or which did not facilitate their development. But there have been many instances when developers have been pressurised by conditions into conferring benefits on local authorities or local communities which would almost certainly be declared ultra vires if the developers had the courage, finances or time to challenge them in the courts."

Hardiman J. goes on to say:

> "Two things, in particular, underlie the state of affairs summarised by Ms. Scannell in the last paragraph. The first is that a local authority, like a court of limited jurisdiction or other decision-making bodies, may be concerned with matters which are hugely important to persons who come before it. In such circumstances, those who must appear before or apply to such a tribunal may be prepared to offer or agree to payments or other conditions which would be wholly outside the tribunal's jurisdiction to impose."

Later in the judgment, he adds:

> "As these cases and another yet to be cited show, not merely will an applicant for a license or permission acquiesce in some circumstances in a void condition: he may even suggest it. If he knows, or thinks he knows, that the authority which holds his fate in his hands, has some particular concern, preference or project, he may offer to fund it in its entirety even if it is barely related, or wholly unrelated, to the development he proposes. It may be quite unnecessary for the authority formally to ask for anything: the merest hint about its wishes or concerns, perhaps in quite informal circumstances, may be sufficient. This tends to discriminate in favour of the wealthier, as opposed to the poorer developer, and in favour of the well connected rather than one who relies on the ostensible criteria."

He concludes his judgment by stating" it is particularly important that this principle be maintained in the public interest so as to assert the principle of fairness as between one applicant for an identical or analgous permission, and another, and so as to safeguard the integrity and transparency of the administration of the planning code."

Thus, the judgment very clearly emphasises that acquiescence in the imposition of a particular condition should not debar an applicant from claiming that the condition itself is ultra vires. In current times, when the complexity of most urban developments and the requirement of the planning authorities that there be an integration of retail, residential, transport and other facilities (such as schools, for example) mean that the well resourced and well organised developer has a distinct advantage over any other type of developer, this is an important consideration for planning authorities to bear in mind. I might also add, (a point I will expand upon later) that it was the insistence of the planning authority that the development, as constructed, was materially different from the permitted development, that allowed the golf club developer to escape compliance with the public access conditions written in to the 1993 permission.

2. Section 26 - A Restrictive Construction

At this juncture, it is appropriate to deal with the reasons given in the judgment for declaring the An Bord Pleanála conditions to be invalid and ultra vires. Section 26 (1) of the Local Government (Planning and Development) Act, 1963 provided that a planning authority may decide to grant permission or approval subject to or without conditions. Subsection (2) goes on to provide that conditions under subsection (1) "may without prejudice to the generality of that subsection include all or any of the following conditions" and it then set out a list of types of conditions from (a) to (j) The only one considered to be of relevance to the Old Head of Kinsale case was (a) which reads:

> "Conditions for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the Applicant, insofar as appears to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission."

In construing this provision, which is similar to the provisions contained in Section 34 of the Planning and Development Act 2000, the Court laid emphasis on three points.

First, although conditions under subsection (2) are said to be without prejudice to the generality of conditions that may be imposed under subsection (1), that subsection itself is limited by the phrase that the planning authority in making its decision "shall be restricted to considering the proper planning and development of the area", with regard being had to a number of matters such as the development plan and so on (in the 2000 Act the planning authority, of course, is restricted to consider the proper planning and sustainable development of the area). As Hardiman J. states, "the structure of Section 26 then is that a general power to impose conditions is subject to a general restriction." Secondly, while the planning authority can impose conditions regulating the development and use of land which adjoins, abuts or is adjacent to the land to be developed, such a condition must be "expedient for the purposes of or in connection with the development authorised by the permission." Thirdly, although a condition can be imposed which is outside the scope of any of the subparagraphs of subsection (2), if a condition comes within the scope of any of those subparagraphs of subsection (2), then it must conform exactly to it.

In reviewing the arguments in relation to this aspect of the case Hardiman J. quotes from the Department of Environment Development Control Advice and Guidelines, which suggest that a condition must:

> "-serve some general planning purpose in relation to the development permitted; - be directed at securing the object for which the powers of the Act were given; - fairly and reasonably relate to the permitted development."

Although Hardiman J. accepts that the document cannot be said to be legally authoritative, it appears to him to be "a reasonable commonsense view of Section 26."

In deciding that the condition for public access to the lands was ultra vires, the Court relied on the dictum of Henchy J. in *Killiney & Ballybrack Development Association v. Minister for Local Government* [1978] ILRM 78 to the effect that the power to impose a condition in a development must be exercised within the limitations imposed by Section 26. The judgment also relied on the dicta in *Newbury District*

Council v. *Secretary of State for the Environment* [1981] A C 578 to the effect that conditions must be reasonably related to the permission which is being granted. In that case, a permission to allow change of use of World War II aircraft hangars for industrial storage was granted subject to a condition which required the removal of the hangars after 10 years (the condition was held to be invalid). The Court also relied on the judgment of McCarthy J. in the *State (FPH Properties SA) v. An Bord Pleanála* [1987] IR 698. In that case, the Supreme Court held that where permission was granted for a residential development on lands forming part of the grounds of Furry Park House, an historic building on the Howth Road in Killester, County Dublin, a condition requiring the retention and restoration of the house itself on the adjoining site, to which the planning application did not relate, was held not to be "expedient for the purposes of or in connection with the development authorised by the permission."

Thus, the Supreme Court in the *Ashbourne Holdings* case applied the principle of strict construction not only to the construction of the words of the statute but also to the scope of the permission sought. In the first instance, the Court held that:

> "Firstly the disputed conditions are all within the scope of Section 26(2)(a) in the sense that they relate to the development or use of lands adjoining the clubhouse development. If however they fail to meet the requirements of that subparagraph, that they be expedient not in some general planning sense but for the purposes of, and or in connection with the club house development, I do not consider the conditions can be justified by the general words of Section 26(1). These words require that regard be had to the various matters set out in the subparagraphs of subsection (2) if, therefore a particular condition is within the scope of one of those subparagraphs but does not meet its requirements, it would appear to contradict the intendment of subsection (1) to permit the condition to be imposed on the authority of general words."

If there was a single factor that appeared to influence the Supreme Court in rejecting this condition, it was that to allow it to stand would involve the creation of a public right of way, or a right in the nature of a public right of way over the land. The Court in this regard was particularly impressed by and relied on the judgment of the Court of Appeal in *Hall & Co Ltd v. Shoreham-by- Sea Urban District Council* [1964] 1All E. R. 1.

> "There a planning permission for a sand and gravel plant was subject to a condition that the developer would construct an ancillary road over the entire frontage of the site at its own expense and give a right of passage over it to and from other ancillary roads to be constructed on adjoining land. This road was anticipated to have a five year lifespan. The English Court of Appeal found the condition to be *ultra vires* and void for unreasonableness because it required the applicant to construct a road at its own expense and effectively to dedicate it to the public without the local authority being obliged to pay compensation. There was a "more regular course" for constructing a road at public expense under which compensation for compulsory acquisition would have to be paid, pursuant to the Highways Act 1959 (Willmer L.J. at p. 251)"

The Supreme Court laid emphasis on the fact that the disputed condition would affect not only the clubhouse development but the earlier development of the adjoining lands as a golf course. Hardiman J. went on to say "I cannot see any power or vires to impose a condition which will have an effect only on the exempt development of the adjoining lands and which is incapable of any advantageous affect for the purposes of, or in connection with the development to which the permission relates," namely the clubhouse development for the benefit of the golfers on the golf course.

If *Hall & Company v. Shoreham By Sea* was, as it appears to be, one of the cornerstones of the judgment in this case, it is appropriate to point out that that decision appears to be a very narrow one and has created quite a significant problem within the context of English planning law as outlined by Lord Hoffman in the case of *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 2 All E R 636.

> "This judgment shows no recognition of the possibility that the need to widen the Brighton Road could in part be regarded as an external cost of the applicant's ready mixed concrete business, to which they could in fairness be required to contribute as a condition of the planning permission. It is assumed that the 'regular course', the natural order of things, is that such costs should be borne by taxation upon the public at large. The fact that the local authority has power, on payment of compensation, to take land for highway purposes from any person, whether or not he imposes external costs upon the community, is treated as a reason for denying that it can use planning powers to exact a contribution from those who do."

This principle would also appear to ignore a significant feature of Irish planning law present in the Local Government (Planning and Development) Acts, 1963 - 1999 and also present in the Planning and Development Acts, 2000 - 2002 : in most residential and commercial developments, the provision of public access by means of roads or pathways is an integral part of the development and entails the creation of public rights of way by dedication and acceptance on the roads and pathways thus provided. In addition, Section 34 (4) (m) specifically authorises a planning authority to impose conditions requiring "the provision of roads, including traffic calming measures, open spaces, car parks, sewers, water mains and drains, facilities for the collection or storage of recyclable materials and other public facilities in excess of the immediate needs of the proposed development". If one were to apply the decision of *Ashbourne Holdings Ltd* to such conditions, it could create significant difficulties, even though provision is made for payment of the extra cost and for taking in charge.

Indeed, Lord Hoffman points out that the decision in *Hall v Shoreham by Sea* led the Ministry for Housing and Local Government to issue a circular in 1968 stating:

> "No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute, except where there is specific statutory authority. Conditions requiring, for instance, the cession of land for road improvements or for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. Similarly, permission cannot be granted subject to a condition that the applicant enters into an agreement under Section 52 of the Act [now s 106 of the 1990 Act] or other powers. However, conditions may in some cases reasonably be imposed to oblige developers to carry out works, e.g. provision of an access road, which are directly designed to facilitate the development ..."

As Lord Hoffman says:

> "There developed a practice by which the grant of planning permission was regularly accompanied by negotiations for what was called a 'planning gain' to be provided by the developer to the local planning authority. The practice caused a good deal of public concern. Developers complained that they were being held to ransom. They said that some local authorities insisted that in return for planning permission, an applicant should make a payment for purposes which could in no way be described as external costs of the particular development. In the boom atmosphere of the time, in which a grant of planning permission could add substantially to the value of land, some authorities appeared to regard themselves as entitled to share in the profits of development, thereby imposing an informal land development tax without the authority of Parliament. Citizens, on the other hand, complained that permissions were being granted for inappropriate developments simply because the developers were willing to contribute to some pet scheme of the local planning authority. There was also a more general concern about distortion of the machinery of planning."

Since it was not lawful to impose conditions, agreements were entered into between the developer and the council under section 52 of the Town and Country Planning Act, 1971. Lord Hoffman points out that

> "...the shift from conditions to agreements meant that a crucial part of the planning process took place in secret, by negotiation between the developer and the council's planning officers. It began to look more like bargain and sale than democratic decision-making. Furthermore, the process excluded the appeal to the Secretary of State. The developer who had entered into a s 52 agreement could not appeal. Nor did anyone else have a right of appeal. The only possibility of challenge was if some sufficiently interested party applied for judicial review on the ground that the planning authority had taken improper matters into consideration when granting the permission. In this respect, the decision in *Hall & Co Ltd v Shoreham-by-Sea UDC* had been self-defeating. By preventing local planning authorities from requiring financial contributions or cessions of land by appealable conditions, it had driven them to doing so by unappealable s.52 agreements."

The result was that the Town and Country Planning Act, 1990 authorised such agreements and policy directive 16/91 gives guidance on their application: as Lord Hoffman says:

> "Parliament has therefore encouraged local planning authorities to enter into agreements by which developers will pay for infrastructure and other facilities which would otherwise have to be provided at the public expense. These policies reflect a shift in Government attitudes to the respective responsibilities of the public and private sectors. While rejecting the politics of using planning control to extract benefits for the community at large, the Government has accepted the view that market forces are distorted if commercial developments are not required to bear their own external costs."

Hardiman J's comment on this speech is as follows:

> "But the speech of Lord Hoffmann, where he reviews the earlier cases in depth and explains how the constraints imposed by *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 led to the development of planning obligations, not subject to the same processes of appeal as planning conditions, casts a useful if oblique light on the position of ultra vires conditions. He concluded that planning obligations could be used, quite legitimately, to cause the developer to contribute to the external costs of his development, thereby achieving what would be unobtainable by condition in view of the line of authority whose immediate starting point is *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council*.....It thus appears that the neighbouring jurisdiction has evolved a *via media* between planning conditions, with their requirement to relate to the permissions sought in a reasonably direct fashion, and the less directly related statutory agreements. These, however, are still envisaged as relating to the "external costs" of the development. Not even on this latter criterion could a condition of public access qualify. Nor, as we have seen, was legitimate public access to the Old Head of Kinsale a cost or a casualty of the exempt golf course development."

3. The Estoppel and Preclusion Issues

As we have seen above, the Supreme Court in this case was not impressed with the argument that, because the developer had acquiesced in and even invited the imposition of conditions providing for public access, it should not be allowed to challenge their imposition. As Hardiman J. pointed out, the planning authority is in a dominant position:

> "...a local authority, like a court of limited jurisdiction or other decision-making bodies, may be concerned with matters which are hugely important to persons who come before it. In such circumstances, those who must appear before or apply to such a tribunal may be prepared to offer or agree to payments or other conditions which would be wholly outside the tribunal's jurisdiction to impose."

Given that it is in the public interest to discourage such distortion or interference with the transparency and fairness of the planning process, it matters little whether consent is given:

> "I would not refuse relief in the exercise of discretion in the circumstances of the present case. First, the impugned conditions are *ultra vires* and against that most radical form of invalidity estoppel, acquiescence or consent does not avail. It is just that this should be so, in the case of a condition, which however invalid will run with the land."

One can think of many circumstances where this judgment can have application: where pre-planning consultations have identified a requirement or "pet project" that the planning authority have in mind for the area concerned; where the regulations and the planning authority require proposals to be made in respect of the provision of "social and affordable housing", even though the lands may not be "zoned solely for residential use or for a mixture of residential and other uses," and so on.

4. The Enforceability of the 1993 Conditions

Finally, another interesting aspect of the judgment is that the original permission granted in 1993 by An Bord Pleanála for the erection of the

clubhouse contained similar conditions relating to public access to those in the 1997 retention permission and they were not challenged by the clubhouse developer. An Bord Pleanála argued in the Supreme Court that the clubhouse could not now challenge similar conditions in the 1997 permission. There appear to be two grounds on which this argument was rejected by the Supreme Court and unfortunately one of them is characterised by an error of fact: in dealing with the question of *res judicata,* Hardiman J. stated:

> "a decision of a planning authority is capable of giving rise to a *res judicata* but not every decision will do it. For example, the earlier decision of the Board that there were no public rights of access to the lands prior to the commencement of the development is a decision of a mixed question of fact and law as it existed at a particular time. It was taken after the matter had been the subject of submissions by those interested in it and taken by the Board as an impartial arbiter. That is not what happened on the decision to grant planning permission in 1993: the question of vires to require public access was never raised or discussed and a point not argued is a point not decided. The condition was imposed by the county council and was not the subject of an appeal."

In fact, this last statement is incorrect because we know that the decision to grant permission for the clubhouse development in 1993 was made by An Bord Pleanála itself on foot of an appeal by An Taisce. Whether the question of the power of An Bord Pleanála to impose such a condition was raised in that appeal, I am not aware, but the fact is that there was an appeal to An Bord Pleanála.

The other ground on which the argument is rejected is of interest in itself and some significant implications for planning authorities could arise. The 1993 permission authorised the construction of the clubhouse and ancillary works. The council took the view that the development as constructed constituted a material breach of the planning permission and required a retention application. It served warning notices under Section 26 of the Act of 1976. As Hardiman J. noted:

> "It is thus quite clear that the county council did not regard a development for which permission had been granted in 1993 and that for which retention and other permissions were sought in 1997 as identical or near identical or as differing only in trivial or unimportant respects from that for which permission had been granted."

He goes on to say that the Board did not take the view that the issue of access had been determined in the former decision but went on to consider it on the merits and imposed somewhat differently phrased conditions as compared with those of 1993. The result of this is that the county council's insistence that an application for retention be made in respect of what they regarded as substantial material alterations to the permitted development, allowed the developer to reopen the question of public access, with the result that the conditions in relation to public access were ultimately quashed by the Supreme Court.

In the normal course of events, where a developer commences work on foot of a planning permission, it is bound by all the conditions of the planning permission such as, in this instance, the condition relating to public access to the Old Head of Kinsale. Because it did not complete the building exactly in accordance with this planning permission and applied for retention of modifications, it was able also to modify and ultimately to escape entirely from the conditions relating to public access. When one considers that the company's original suggestions in relation to a public access to the Old Head of Kinsale were put forward in an attempt to disarm opposition to the development as a whole, this represents a somewhat ironic conclusion. In particular, it must represent food for thought for planning authorities, suggesting, as it does, that "Gung Ho" may not always be the most effective approach.●

This article is based on a paper delivered at the Thomson Round Hall Planning and Environmental Law conference held in November.

"Slopping out" and the European Convention on Human Rights

Cathal Murphy BL

Introduction

With the enactment of the European Convention on Human Rights Act 2003, which incorporates the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") into Irish law, the State's obligations under the Convention have been brought into focus. This article considers the implications of the recent decision of the Scottish Court of Sessions in *Napier v. The Scottish Ministers for Prisoners* in Ireland and analyses whether the practice of "slopping out" is compatible with a prisoner's rights under the Convention.

Conditions of Detention

Article 5 of the Convention protects an individual's right to liberty and security. However, it is clear from the wording of Article 5 and the jurisprudence of the European Court of Human Rights (EctHR) that that Article is concerned with the legality of detention rather than the conditions of detention. While the ECtHR has recognised that the place of detention should bear some relationship to the grounds of detention[1], it would appear that conditions of detention are not open to challenge under Article 5. Accordingly, where a person in detention seeks to complain about the conditions of his detention, reliance will more than likely be placed upon other articles of the Convention and, in particular, Articles 3 and 8. Article 3, entitled "Prohibition of Torture" states "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Unlike other articles of the Convention, Article 3 provides for an absolute right. Article 8, entitled "Right to Respect for Private and Family Life " states "Everyone has the right to respect for his private and family life, his home and his correspondence". However, the rights protected in the first paragraph of Article 8 are circumscribed by the second paragraph which states: "There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

It is these two articles that were relied upon by the petitioner in *Napier v. the Scottish Ministers*[2], the much reported case concerned with the practice of "slopping out" in prison that has led to suggestions in the media in this jurisdiction that the State could be facing litigation similar to that of the army deafness cases.

In *Napier*, the petitioner, who suffered from eczema from an early age, brought proceedings seeking a determination that, prior to conviction and while on remand between May 20th 2001 and June 27th 2001, he was held in inhuman and degrading conditions contrary to Article 3 of the Convention or, failing that, in conditions that infringed his right to respect for personal and family life contrary to Article 8 of the Convention. In a comprehensive judgment, Lord Bonomy reviewed the particular facts of the case before him and the jurisprudence of the EctHR. The petitioner's case focused on three principal features of his detention: the accommodation of two prisoners in a cell designed for one, the washing and toilet facilities and the restricted daily activities outside his cell. His counsel described these features as the "triple vices" of overcrowding, slopping out and impoverished regime.

Overcrowding

The petitioner did not complain about having to share his cell with another inmate *per se*. His complaint related to having to share in circumstances where he and his cell-mate generally spent at least 20 hours out of 24 hours in the cell. They slept, ate and lived the bulk of their lives within in the cell. On this point, the court accepted the evidence of the petitioner's expert witness, concluding that having "...regard to the size of the cell, the way in which it was furnished, the useable space, free space and circulation space therein, the time that had to be spent there and the fact that almost all the normal activities of daily living had to be undertaken there, it was plainly small, cramped

1 *Aerts -v- Belgium* (1999) 29 EHRR 50
2 April 26th 2004. This decision is currently under appeal.

and overcrowded. It was not a bedroom alone; it was a livingroom, dining room, bathroom and bedroom. The cell was, in my opinion, not of an adequate size for the use to which it was put."

The court went on to give a detailed analysis of the expert evidence that was given in relation to the illumination and ventilation of the petitioner's cell, concluding that neither was adequate and that this contributed to the inadequacy of the cell.

"Slopping Out"

The court noted the two principal components to slopping out. Firstly, the use of a bottle and a chamber pot in the cell. Secondly, the practice of groups of prisoners emptying both in a communal sluicing area, known as the arches, up to four times a day. While the petitioner never used the chamber pot in his cell and one of his cell-mates[3] only used it on two occasions, the petitioner found the experience of being present in the room when his cell-mate was using the chamber pot disgusting. That experience was aggravated by the fact that on both occasions, the cell was infused with an unpleasant and sickening smell. The smell would remain in the cell until the chamber pot was emptied and the presence of an unpleasant smell was also associated with the use of the bottle for urination. Depending upon the time of day, the chamber pot and bottle might remain un-emptied for several hours or over night. In contrast to the relatively organised regime in the petitioner's cell, the process of emptying the containers in the arches was chaotic. The arches comprised 3 showers, 4 lavatories, 6 urinals and 14 wash-hand basins for use by up to 80 prisoners. Since the prison timetable was fairly inflexible, at any one time about 20 prisoners had about 15 to 20 minutes, to slop out and use the facilities at the arches. Each had to slop out, wash/shower, shave and go to the lavatory. As a result of the number of prisoners carrying several items converging and leaving the arches, often there were collisions and spillages that might contaminate the shoes, clothing or skin of a passing prisoner. The court concluded that it "...was left in no doubt, by the evidence of those who experienced slopping out in C Hall at the time of the petitioner's detention, that it was an abhorrent practice, and that people in general in Scotland would have found it to be so, had they had the misfortune to experience it."

Impoverished Regime

Having noted the limited activities outside of the cell, the court noted in particular that the petitioner had to attend court on three occasions and stated "going to and coming from court involved being held in the reception area of the prison for a significant period of time in a cramped reception cell, nicknamed a 'dog box'. These are cubicles about the size of a court witness box, with a wooden bench, a spy-hole in the door, and an electric light bulb. In coming from and going to court, the petitioner spent an average of two hours in each direction in the box, usually alone, but occasionally with another prisoner. No explanation was offered by the respondents for this oppressive form of detention."

Mental State and Skin Condition of the Petitioner

The court proceeded to consider the effect that the regime had on the mental state of the petitioner and it accepted the expert evidence called on behalf of the petitioner that the conditions of detention interacted to create circumstances that in total were more debilitating and dehumanising than could reasonably be expected for imprisonment. Evidence was given that the impact of the petitioner's eczema on his ability to make use of coping strategies that may have alleviated the brutalising quality of incarceration contributed to the overall effect on the petitioner. The fact that the petitioner suffered from eczema assumed a central role in the court's judgment and is addressed in great detail.

The evidence was undisputed that, upon admission on May 18th 2001, the petitioner's eczema was inactive. The condition flared up the following day and by the third day, the petitioner had blisters and yellow pus over a wide area of his face. A factor that became central to the judgment was the fact that the petitioner, in his own mind, made a link between the flare up and the conditions in which he was being detained. On May 22nd, the petitioner's solicitor sent a fax to the Governor complaining that the petitioner was being held in conditions that infringed his rights under Article 3 of the Convention and requesting that he be transferred to suitable conditions. This request was refused. In order to appreciate the nature of the petitioner's condition, the following passage from the judgment of the court offers some insight into its severity:

> "On examination Dr O'Keefe found that the petitioner had an extremely obvious eczematous eruption involving the whole of his face, most noticeable on his top lip, his forehead, his eyes and his nose. The angles of his mouth appeared cracked and fissured. He had noticeable and significant inflammation and fissuring of the skin behind his ears. He had scattered inflamed lesions on his scalp and less obvious lesions on his neck, back and upper anterior chest. He had two localised slightly septic lesions on his right lumbar area. Both elbows, forearms and hands showed evidence of recent inflammation with healing lesions on the dorsal or upper surface of his hands."

While accepting that the petitioner was indeed suffering from these symptoms, the court did not accept that the evidence established that it was the stress of the conditions of detention that initially triggered the flare up of his eczema, stating that "...whatever else might have contributed to the outbreak on 19 May, there is no basis for concluding that prison overcrowding, or any of the abhorrent elements of slopping out or the impoverished regime...did". However, the court then turned to consider the effect on the petitioner's eczema of his ongoing detention. Amongst other matters, the court noted that the impoverished regime resulted in the petitioner being unable to resist scratching at his skin and that the rushed nature of the slopping out procedure meant that the petitioner was unable to go through his

3 During his detention the petitioner's cell mate changed on a number of occasions

normal cleansing routine. On this point, the court concluded that:

> "these factors, considered in the light of the significance of stress as the cause of outbreaks of atopic eczema, lead me to the conclusion that his continued detention in C Hall, after he had sought removal therefrom, caused stress in the petitioner which in turn probably caused the resurgence and persistence of the outbreak of eczema.... I am satisfied that from the time the petitioner instructed his solicitor to seek his removal to Convention compliant conditions his predominant concern was the impact that these conditions were having on his skin".

The court then identified the conditions of detention in the case before it that might give rise to a valid complaint under Article 3 of the Convention:

> "My consideration of the evidence ... has led me to conclude that to detain a person along with another prisoner in a cramped, stuffy and gloomy cell which is inadequate for the occupation of two people, to confine them there together for at least 20 hours on average per day, to deny him overnight access to a toilet throughout the week and for extended periods at the weekend and to thus expose him to both elements of the slopping out process, to provide no structured activity other than daily walking exercise for one hour and one period of recreation lasting an hour and a half in a week, and to confine him to a "dog box" for two hours or so each time he entered or left the prison was, in Scotland in 2001, capable of attaining the minimum level of severity necessary to constitute degrading treatment and thus to infringe Article 3." [Emphasis added]

The court then went on to determine whether the petitioner was in fact subjected to conditions of detention reaching that minimum level of severity in light of a consideration of all the circumstances of his detention, having regard to his own personal circumstances. In its analysis, the court focused on the slopping out procedure and the effect that this had on the petitioner.

> "The crucial impact that it had on the petitioner was to overwhelm his efforts to maintain his hygiene routine. He gave up even trying to take a shower early in his period in C Hall, because his eczema made taking a shower distressing and he was discouraged by the difficulty of getting one in any event. Such water that he could take to his cell was inadequate for the purpose of washing his eczematous skin properly and, once it had been used, it was not appropriate for the care of infected skin. Of crucial importance to my determination in this case is the effect on the petitioner of the serious outbreak of eczema. It is important to my determination in three respects. Firstly, I have already determined that its resurgence and persistence were caused by the conditions of detention. Secondly, its very presence was a source of acute embarrassment and a feeling of humiliation to the petitioner which he described as causing him a degree of mental stress. Thirdly, the petitioner believed that his infected eczema was caused by the conditions of his detention, in particular slopping out. His belief that the two were linked was entirely reasonable."

The court found that in all the circumstances of the case, the petitioner was subjected to conditions of detention that resulted in degrading treatment infringing on his rights under Article 3 of the Convention.

The court then turned to the petitioner's complaint under Article 8(1) of the Convention. As its starting point, the court accepted that the detention of the petitioner in the squalid conditions already recounted, taken together with subjecting him to the regime of slopping out amounted to an infringement of Article 8(1). The court then proceeded to analyse whether such an infringement could be justified on any of the grounds set out in Article 8(2). The court held that the conditions in Hall C could have been improved prior to 2001 and prior to the petitioner's detention. Accordingly, while the court accepted that the petitioner was held "in accordance with law" as required by Article 8(2), it did not accept that to detain him in such conditions was "necessary in a democratic society" for the achievement of any of the aims set out in Article 8(2)[4].

Jurisprudence of the European Court of Human Rights

Does the jurisprudence of the ECtHR support the judgment of the court in Napier? In the case of *Yankov v. Bulgaria*, a judgment of the ECtHR delivered on December 11th 2003, and referred to in Napier, the ECtHR had an opportunity to restate the general principles it had developed with respect to the interpretation of Article 3 and it did so in the following terms:

> "Treatment has been held by the court to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be "degrading" because it was such as to diminish the victims' human dignity or to arouse in them feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, mutatis mutandis, the *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A no. 26, p. 15, § 30; the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no.161, p. 39, § 100; see *V. v the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX; and *Valasinas v. Lithuania*, § 117, no. 44558/98, ECHR 2001-VIII).
>
> In considering whether treatment is "degrading" within the meaning of Article 3, the court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Even the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (see, for example, *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III; and *Kalashnikov v. Russia*, no. 47095/99, § 101, ECHR 2002-VI).
>
> *Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age*

4 The ECtHR has consistently held that in order for a measure to be "necessary in a democratic society", the measure must address a pressing social need, be a proportionate response to that need and relevant and sufficient reasons must be offered by the state justifying the measure, e.g. *Silver v. the United Kingdom.*

> *and state of health of the victim* [emphasis added] (see, I*reland v. the United Kingdom*, Judgment of 18 January 1978, Series A no. 25, p. 65, § 162).
>
> The court has consistently stressed that the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. *The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured* (*Kudla v. Poland* [GC], no. 30210/96, § 93-94, ECHR 2000-XI)." [Emphasis added]

In *Öcalan v. Turkey*[5], the ECtHR emphasized the fact that the Convention is a living instrument that must be interpreted in the light of present day conditions where increasingly high standards are required in the area of human rights. The ECtHR reiterated this point in the case of *Selmouni v. France*[6] where it stated that, as a result of these increasingly high standards, acts previously classified as "inhuman and degrading" might now be regarded as torture. Presumably, the logic of that attitude extends to acts previously regarded as not constituting "inhuman and degrading" treatment being so regarded in light of the increasingly high standards. As a result of this approach to the interpretation of the Convention, accurate guidance on what constitutes a breach of Article 3 of the Convention is better gathered from recent judgments of the ECtHR. In a consideration of conditions of detention in the context of the Convention, the judgment of the ECtHR in *Peers v. Greece*[7] provides an insight into the attitude of the ECtHR as to what is or is not permissible. While accepting that there was no intention on the part of the relevant authorities to humiliate or debase the applicant, the court reiterated its position that such an intention is not essential to a complaint under Article 3. The ECtHR held that

> "...in the present case, the fact remains that the competent authorities have taken no steps to improve the objectively unacceptable conditions of the applicant's detention. In the court's view, this omission denotes lack of respect for the applicant. The court takes particularly into account that, for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell mate. The court is not convinced by the Government's allegation that these conditions have not affected the applicant in a manner incompatible with Article 3. On the contrary, the court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and arose in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the court considers that the condition of the applicant's detention in the Segregation Unit of the Delta Wing of the Koridallos Prison amounted to degrading treatment within the meaning of Article 3 of the Convention".

In light of the jurisprudence of the ECtHR on the issue of conditions of detention, it is clear that the ECtHR is at pains to emphasize that every case must be assessed on the particular facts of that case, including the personal characteristics of the applicant. However, it is also clear from this jurisprudence that it was within the range of decisions open to the court in *Napier* to conclude as it did that the petitioner had been subjected to conditions of detention that infringed Article 3 of the Convention.

Conclusion

Taking the relevant jurisprudence into account, the circumstances of a particular prisoner in this jurisdiction may be such as to give rise to a legitimate complaint under Article 3 of the Convention, but each case will turn on its facts. What is clear is that, to date, there has been no judgment of the ECtHR that has held that "slopping out", in and of itself, infringes a prisoner's rights protected under Article 3 of the Convention.

However, as a body of litigants, it seems that prisoners are more likely to succeed in an action founded on an infringement of Article 8 of the Convention. Clearly, attending to one's bodily functions forms part of one's private life, respect for which is guaranteed under Article 8(1). A state can only interfere with that right where it is necessary in a democratic society for the achievement of one or more of the goals specified in Article 8(2). It is hard to see how making prisoners "slop out" is necessary in a democratic society at all or for the achievement of one or more of the goals specified in Article 8(2). The point to note is that the interference is either justified, or it is not, and this is largely independent of the particular circumstances of a particular prisoner. Accordingly, if making one prisoner "slop out" is held to infringe that prisoner's rights protected under Article 8(1) and the infringement is not justified under Article 8(2), this must be so for all prisoners. ●

5 March 12th 2003
6 (2000) 29 EHRR 403
7 (2001) 33 EHRR 57

The One Year BL Degree Course at King's Inns

Sarah Macdonald
Dean of the Law School

On October 11th of this year, a new, one-year full-time BL degree course was introduced at King's Inns. It is an exciting development and a major undertaking - the preparation for the course has been underway for over a year and has involved many members of the Bar and of the Judiciary.

An Implementation Committee, chaired by the Hon. Mrs Justice Finlay Geoghegan formulated and agreed the overall template for one-year degree including the subjects to be covered, the structure and ethos of the course, the mode of delivery, and the assessment regime. The committee also carried out research amongst members of the Bar before deciding on the specialist options to be included in the course. Sixty four members of the Bar, of differing levels of seniority, took part in this research.

Steering Groups

The Implementation Committee appointed Steering Groups, chaired by a senior member of the judiciary or the Bar, to cover the following areas:

Civil Procedure (Superior Cts)
The Hon Mr Justice Kelly

Civil Procedure (Circuit and District Cts)
Sara Moorhead SC

Criminal Procedure and Evidence
The Hon Ms Justice Dunne

Advocacy, Negotiation and Consultation
The Hon Mr Justice Gilligan

Opinion Writing, Drafting & Legal Research
John Finlay SC

Family Law and Practice
Gerard Durcan SC

Land Law and Conveyancing
The Hon Ms Justice Lafoy

Ethics, Professional Responsibility and Practice Management
Kevin Feeney SC

In total, 58 members of the Bar and Judiciary took part in the Steering Groups. Their task was to agree the learning outcomes in relation to their subject(s), to review samples of course materials and to agree the approach to teaching the skills.

Course Co-ordinators

Course co-ordinators were appointed from members of the practising Bar to undertake the huge task of designing, in liaison with the Dean, the structure and detailed materials for the course, including all student materials and tutors' notes. All undertook training in course design.

Teaching Panel

There was an overwhelming response to the advertisement for members of the Bar to teach on the course. Following short-listing on paper and a two-day training programme, 75 members of the practising Bar were asked to join the teaching panel. Eleven members of the Bar were also selected to act as personal tutors in addition to teaching on the course. Each personal tutor is responsible for one group of students (16 students) and for meeting this group on a fortnightly basis.

The Aims and Ethos of the Course

The aim of the course is to enable students to acquire and develop the skills, knowledge and values needed to become an effective member of the Bar. It is a practical and interactive course and is intended to bridge the gap between the academic study of law and practice at the Bar. The following subjects are covered:

1. Remedies and Quantum
2. Practice and Procedure:
   * Civil Practice and Procedure
   * Criminal Practice and Procedure
   * Evidence
3. Legal Skills:
   * Advocacy
   * Negotiation
   * Consultation
   * Opinion Writing
   * Drafting
   * Legal Research
4. Ethics, Professional Responsibility and Practice Management
5. Participation in Mock Trials
6. Attendance at courts, tribunals and other specialist bodies
7. Advanced study of specialised areas of practice (students have a choice of areas from which they must choose two)

Throughout the course, teaching and learning focuses on what happens in practice. Teaching and learning takes place almost exclusively in groups of 16 students with the emphasis on student exercises and group work based on realistic case papers. Students are given numerous opportunities to practise and receive feedback in the skills workshops and are expected to participate in all classes. Attendance is monitored strictly and is considered part of the students' professional responsibility to their future clients.

The first two terms are structured to comprise the Foundation Course (2 weeks: remedies and quantum), the Civil Practice Course (9 weeks) and the Criminal Practice Course (7 weeks). Both the Civil and Criminal Practice Courses take the student through the stages of litigation from commencement to final appeal and enforcement of judgments. The courses are divided into week-long sections, each section covering a different stage in proceedings together with the skills relevant to that stage of proceedings.

Ethics, professional responsibility and practice management are central to the course and are taught discretely as well as being integrated into the other courses. In addition, the students take place in a clinical programme which involves them visiting courts and institutions such as Mountjoy Prison each Monday. Students have written exercises to complete in relation to these visits which are then discussed in class.

Facilities

A major renovation programme took place at King's Inns to create and equip sufficient teaching rooms for small-group teaching. All have whiteboards, appropriate classroom furniture, cameras, plasma screens and video equipment to record and view students' advocacy, negotiation and consultation (and to enable the viewing of demonstration videos of these skills). In addition, new IT and recreational areas have been created.

The Start of the Course

The one-year degree course commenced on 11th October 2004 with 177 students. By the end of the fourth week, students had completed a two-week Foundation Course in remedies and quantum and had undertaken the first week of both the Civil and Criminal Practice Courses. As part of the first week of each of these courses, students had, in relation to the skills outcomes, undertaken numerous research exercises and given presentations on their research, written four opinions and undertaken four negotiations.

It has been a busy time for both students and staff but the feedback so far is that it has also been hugely enjoyable. ●

"Brief Cases" An Audio Book

By Henry Murphy SC
Reviewed by Pat Geraghty SC

Pictured at the launch of "Brief Cases", is Mr Justice Michael Moriarty.

The barrister's profession is one not usually associated in the public mind with hilarity or even good humour. Its practitioners are expected to display a suitable gravitas, in keeping with the subject matter of their work, be that civil or criminal. For this, of course, they enjoy a degree of affectionate appreciation from the public, second only to that enjoyed by tax inspectors.

A charge of undue solemnity could not fairly be laid against the author of "Brief Cases". Henry Murphy is a Senior Counsel whose agile but mischievous mind fastens upon the unconventional, the humorously eccentric – be he or she litigant, fellow-practitioner or judge – whose unconventional approach to the matter in hand can occasionally temper the solemnity of the legal process. Such instances of light relief have been drawn upon by Henry, using a facility of verbal expression, that rivals that of the late P.G. Wodehouse. But more that that, Henry has managed to weave a subtle and seamless combination of his light humorous touch with what one suspects are his own real-life experiences from his early years at the Bar – the result carefully sanitised to preserve client confidentiality and to skirt around the law of libel.

While the book is not intended to be a text book or even, overtly, to give advice, it is worthy of some study by the novice or anyone who would seek to profit from the author's wide experience in dealing with some of the unexpected crisis situations which can arise in Court. Approbation is withheld, however, from one chapter entitled "Wigs on the Green", which opens with the dubious comment that membership of the Bar Golfing Society is the passport to success, and goes on to treat the Royal and Ancient game with regrettable levity.

A fine example of Henry's light-hearted approach to his subject has now been encapsulated in two CDs, in which extracts from "Brief Cases" are spoken by the well-known actor, Des Keogh. These CDs will interest donors and donees of Christmas presents, those who have read "Brief Cases" and those who have not, as well as those citizens who just have not the time to spare for reading, after putting the children to bed, washing-up, putting out the cat, and heading for the local. Merely listening to these CDs enlivens the printed word and enables one to reach further into the well-nigh unfathomable, but undoubtedly fertile, recesses of the Henry Murphy brain.

Both "Brief Cases" and the aforementioned CDs are whole-heartedly recommended to lighten the dullest day. ●