The Bar Review

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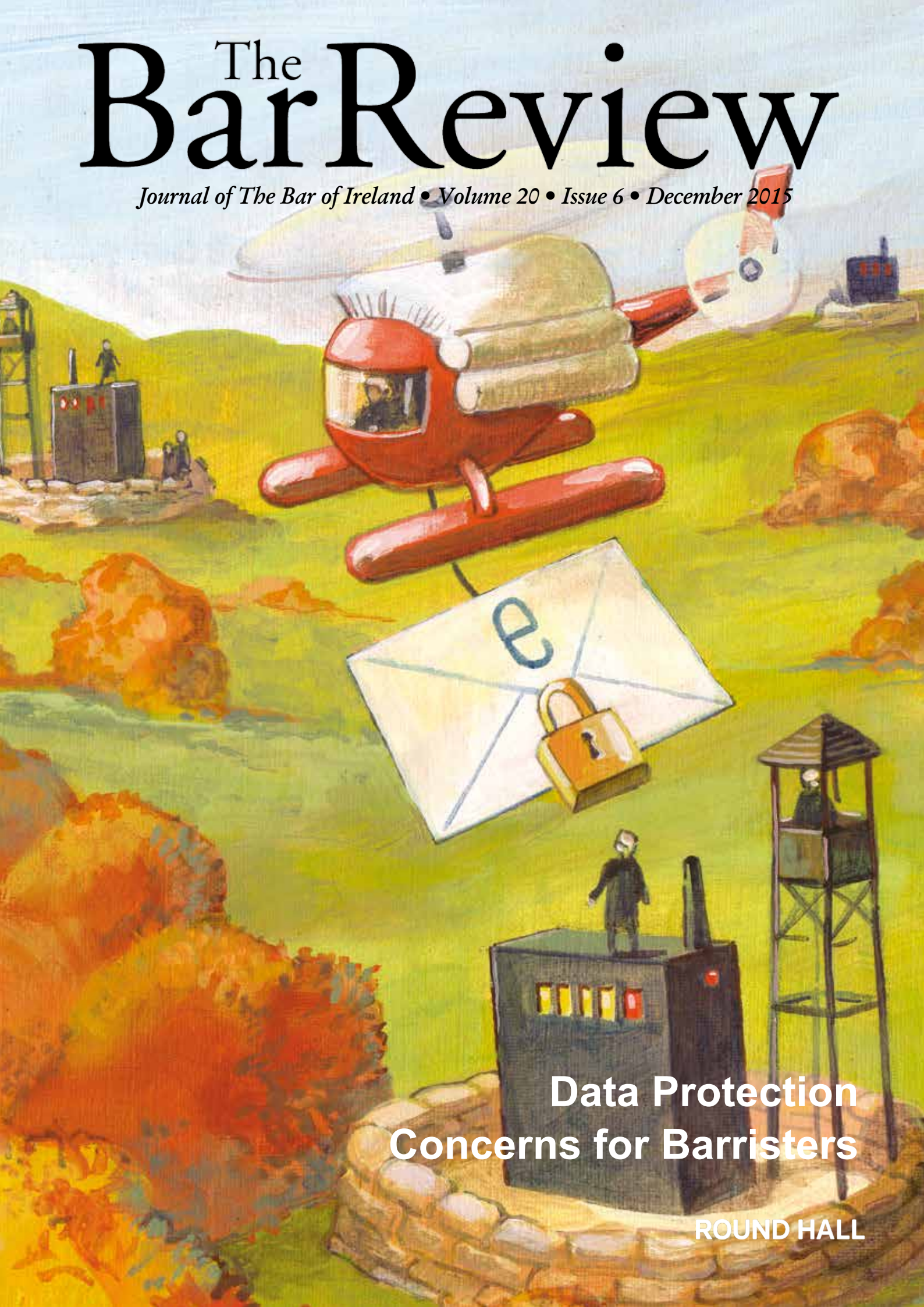

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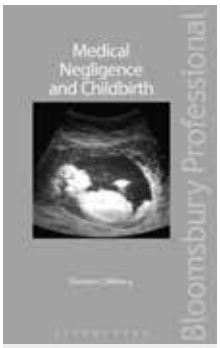

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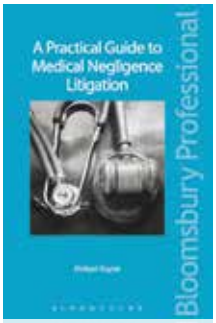

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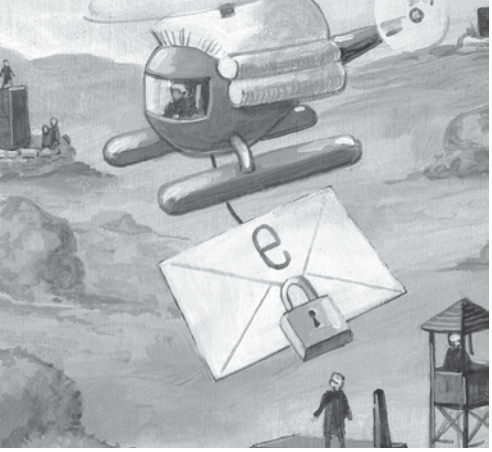

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Courtus Interruptus – New Case Law on Interruptions By Judges

Matthew Holmes BL

It is no secret that some judges feel that cases would run a lot more smoothly if they asked all the questions. One divorce case from Liverpool in 1952 was overturned because the judge made 587 interventions.[1] The issue of excessive or inappropriate judicial interruption can arise in both civil and criminal hearings and has done so throughout the common law world.[2] Excessive or inappropriate judicial intervention may ground a successful judicial review or result in a rehearing. Three recent cases, *DPP v Heaphy*[3], *Farrelly v Watkin*[4] and *McCann v Halpin*[5], have shed new light on this. This article hopes to provide an overview of the new decisions and the law here.

Appropriate interventions

Judges are of course entitled to ask questions during a case, however these should be confined to seeking clarification of questions asked of witnesses or resolving ambiguities. In *Donnelly v Timber Factors Ltd and Robert Rogers*[6] McCarthy J. considered the roles of judge and advocate, where it was claimed that the judge had intervened excessively. He held:

> "The role of the judge of trial in maintaining an even balance will require that on occasion, he must intervene in the questioning of witnesses with questions of his own- the purpose being to clarify the unclear, to complete the incomplete, to elaborate the inadequate and to truncate the long-winded. It is not to embellish, to emphasise or, save rarely, to criticise."

Excessive judicial intervention

It is hardly unknown for judges to go beyond those limits. Where a judge makes excessive or inappropriate interventions during examination or cross-examination of witnesses, this can be a breach of fair procedures and may give rise to an apprehension of bias.

The Court of Appeal in *Heaphy* re-iterated that *DPP v McGuinness*[7] is the leading Irish case on judicial interruption. In *McGuinness,* a retrial was ordered where the trial judge's interventions rendered a rape trial unsatisfactory. He interrupted cross-examination of the complainant on a number of occasions and the questions were not confined to seeking clarification of questions asked or resolving ambiguities. The Court of Criminal Appeal noted that the defence had probably planned cross-examination carefully before the trial and would be severely handicapped if diverted from this plan. The defence must be allowed to follow this without unnecessary interruption. The Judge had asked 123 questions of the complainant and made 60 remarks to counsel. At one point, he asked 20 consecutive questions of the complainant's mother during cross-examination by the State. To put this in context, a total of 423 questions had been asked of the complainant during the case- almost a third coming from the judge. The CCA was of the opinion that the number of questions and interventions made by the judge made it impossible for the defence to conduct an effective cross-examination and could have caused the jury to believe he had formed a definite opinion as to the credibility of the complainant.

The Court in *Heaphy* followed *McGuinness* but found on the facts that the interventions were nowhere near as serious as those in *McGuinness*. They occurred at the conclusion of two separate cross examinations and did not interrupt the trial. The court held that whilst they did not help the applicant, they were relevant and added little to the trial. This approach was also taken in the subsequent civil case of *Kurzyna v Michalski*.[8]

Farrelly v Watkin is a recent example where Kearns P was scathing of the conduct of a District Court trial. The applicant had been tried for a sexual assault alleged to have taken place in the Palace nightclub in Dublin. Kearns P found that the conduct was unfair to such a degree as to divest the trial from the requirements of constitutional justice. He went on to find;

> "Historically, it has been a source of considerable annoyance to District Court Judges, and in my view rightly so, to read in judicial review court papers, or worse, in national newspapers, what they regard as wildly distorted accounts by applicants or their solicitors of the judge's conduct of a particular case or cases.
>
> …
>
> Having read the transcript the Court finds, regrettably, that the contentions advanced on behalf of the applicant are borne out to a significant degree. In fairness to the respondent, the lack of clarity in the CCTV and in other parts of the prosecution

1 The Times, 8th March 1952
2 See for example; *Jones v National Coal Board* [1957] 2 QB 55 (Britain), *R v Kwatefana* (1983) SILR 106 (the Solomon Islands) *R v Thompson* [2002] NSWCCA 149 (Australia), and *R v Hinchy* [1988] 3 SCR 1128 (Canada)
3 *DPP v Heaphy* [2015] IECA 61
4 *DPP v Watkin* [2015] IECA 117
5 *McCann v Halpin* [2015] 1 ICLMD 31
6 *Donnelly v Timber Factors Ltd and Robert Rogers* [1991] 1 IR 553
7 *DPP v McGuinness* [1978] 1 IR 189
8 *Kurzyna v Michalski* [2015] IECA 135

evidence was such as to fully justify attempts by her to clarify exactly what had happened. Unfortunately, the frequency of the respondent's interventions during both witness evidence and the questioning by counsel on both sides went, however unintentionally, well beyond the mere seeking of clarification."

It appears that more intervention is tolerated in non-adversarial tribunals. In *AH v RAT*[9] a RAT decision was challenged where the tribunal member had asked more questions than all the lawyers combined! The court found that the hearing may have been dominated by the Tribunal member but that there was no hostility in the questions and that they were not asked with the aim of supporting a particular position. Further, as the hearing was an inquisitorial style investigation and the tribunal's function was to inquire or search into a matter, it was entitled to ask questions directed towards fulfilling its role as a fact-finding inquiry. In the recent *McCann* decision, Cross J. noted that interruptions in a summary trial by a judge are of a different nature than in a trial before a jury, however he did not elaborate on this.

Inappropriate interventions

McCann v Halpin concerned a criminal damage hearing where the District Judge had made a significant number of interruptions during cross examination of the complainant. It was claimed that he had, in the words of Birmingham J. in *Paddy Power v. Doyle*[10], "sacrificed objectivity by entering the fray". Whilst it was clear there was a heated exchanges between counsel and the judge, Cross J. in the High Court did not believe that counsel was prohibited from making his case or asking the witness the questions he wanted and he did not believe the interruptions of themselves did not render the trial unsafe or unsatisfactory. However, comments made during the questioning of a prosecution witness were such that a reasonable informed observer would have concluded that the trial judge had made up his mind before the case had concluded to convict the applicant and that one of the prosecution witnesses was a credible and truthful witness. Judicial review was granted on that ground of objective bias. Bearing this in mind, it is worth looking at a number of cases where interventions have been found to be inappropriate or indicative of bias.

In *State Hegarty v Winters*[11], referred to in *Farrelly*, an arbitrator repeatedly told the prosecutor during cross-examination that if he did not answer correctly, he would have to leave the witness box. There was no similar behaviour towards the County Council witnesses, although their solicitor had great difficulty getting his witness to answer questions. At one stage, the arbitrator asked an employee of the County Council for information, although he had not been sworn in to give evidence. The Chief Justice found that the fundamental rule that justice be seen to be done was broken. The Court did not discuss what interventions can be made but instead saw the interventions as being indicative of bias on the part of the arbitrator and quashed his decision.

Dineen v Delap[12] was also referred to in *Farrelly*. There the defence made repeated objection during a drink driving hearing to the fact that the garda appeared to be reading his evidence from a prepared statement. The judge reacted to counsel's objections by saying that there was Supreme Court authority allowing the garda to read from whatever he liked. He added "The days of the garda making a slip in the witness box are long gone and if he does make a slip I will recall him". When the garda indicated that he was reading from his notebook, the respondent advised him not to bother responding to counsel and that counsel was only trying to trip him up. It was held that the judge's attitude to the valid objections was an unwarranted interference with counsel in the performance of his duty. The conviction was quashed.

In *Sweeney v Brophy,*[13] the Supreme Court quashed a conviction due to the conduct of a District Court judge. When that case was heard, a prosecution witness gave evidence that he saw a Garda beat the applicant. The judge then invited the prosecution to make an application to treat the witness as hostile and said: "I am going to read your statement and if you are lying, you are going to jail for contempt of court." The prosecution hadn't made any attempt to have him treated as hostile. The judge asked for the original statements and read them. He then pointed to the witness and said: "You lied. I am sending you to Mountjoy Jail for contempt for seven days."

In *State (O'Reilly) v Windle*[14],a District Court Judge's intervention "opened the door to let in evidence of previous convictions". The conviction was quashed as a result. In *Landers v DPP,*[15] the High Court granted an injunction restraining the further prosecution of the applicant by the DPP. The Judge intervened on a number of occasions and indicated the evidence he wished to have adduced.

In *R v Kartal*[16], interruptions included remarks to the defence such as "You may be fairly inexperienced, and by the colour of your wig you are, but you know perfectly well how to cross-examine" and "Will you stop bleating". There the English Court of Appeal found that interventions by the judge during the trial will lead to the quashing of a conviction in the following circumstances;

(a) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing up that the facts are for the jury, and that they may disregard anything said on the facts by the judge with which they do not agree;
(b) when they have made it impossible for defending counsel to do his duty;
(c) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way.

9 *AH v RAT* [2002] 4 IR 387
10 *Paddy Power v Doyle* [2008] 2 IR 69
11 *The State (Hegarty) v Winters* [1956] 1 IR 320
12 *Dineen v Delap* [1994] 2 IR 228
13 *Sweeney v. Judge Brophy* [1993] 2 I.R. 202
14 *State (O'Reilly) v Windle* Unrep, High Court, Blayney J. November 4 1986
15 *Landers v DPP* [2004] 2 IR 368
16 *R v Kartal* [1999] EWCA (Crim) 1987 (July 15 1999)

This was adopted in Ireland in *DPP v Willoughby.*[17] In that case, the CCA also found the appropriate time for a judge to clarify any point in evidence is at the conclusion of the witness's evidence and that the CCA would not, and should not, intervene to quash a conviction unless the interventions are so pointed and persistent as to create a real risk of seriously influencing the jury.

Transcripts

The reviewing court will be working off a transcript of the hearing where it is alleged a judge made inappropriate or excessive interventions. In *DPP v Kiely,*[18] it was held that in considering the strength of these grounds of appeal, the Court must consider the transcript of the trial as a whole. In *Paddy Power v Doyle,* Birmingham J. noted that the transcript is unhelpful when assessing the conduct of a hearing because it does not give any indication of the tone, nor does it fully illustrate the pace and flow of the dialogue. He also found that a judge who intervenes to prevent the prosecution making a tactical error would be subject to criticism. In *Hay v. O'Grady,*[19] McCarthy J. noted

> " An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial."

If an advocate feels thrown by an intervention during cross examination, vocalising this to get it on the transcript may be of assistance when before a reviewing court.

17 *DPP v Willoughby* [2005] IECCA 4
18 *DPP v Kiely* Unrep CCA 21/3/2001
19 *Hay v. O'Grady* [1992] 1 I.R. 210

Conclusion

Judicial interruptions cause a number of problems during a hearing, which may give rise to a successful judicial review or result in a retrial. When a judge intervenes during examination, or worse cross-examination, problems can arise depending on the tone and frequency of the interruptions. The judge may be in danger of appearing to favour to one side over the other. This can arise from hostile manner or implied criticism of the examining counsel, or if the judge is impressed by a witness, perhaps suggesting explanations for a witness's behaviour which would be open to attack by the other side. What's more, frequent interruptions can disrupt the thread of cross-examination, jarring trains of thought and frustrating the examiner. Cross examination loses much of its effectiveness if the witness is given time to think out the answer to awkward questions After all, as Lord Denning pointed out in *Jones v National Coal Board,* "The very gist of cross-examination lies in the unbroken sequence of question and answer."

As can be seen from the case law, this is an issue which practitioners have come across for a long time and continue to come across. In particular, we can now see from *Heaphy* the exact limits of this rule, but from *Farrelly* we can see that the Superior Courts are more than willing to intervene and quash a decision where they feel that there has been a violation of this rule. These cases provide analysis and guidance on the pre-existing case law. *McCann* gives us a good example of a case where judicial interruptions may not be enough to prevent counsel from carrying out their job, but may be such to give rise to apprehension of bias. That is an issue which has been fought over for some time in previous case law and has finally been clarified. This new case law is to be welcomed for bringing clarity to this area and will be of assistance to practitioners. ■

Mr Justice Frank Clarke visits the School of Law, University College Cork

The Hon Mr Justice Frank Clarke, visited the School of Law, UCC from 27-29 October 2015 in his capacity as Adjunct Professor.

During his visit, Mr Justice Clarke delivered a series of lectures and seminars for both undergraduate and postgraduate students. The Judge also gave a CPD lecture on the new jurisdiction of the Supreme Court to the members of the Cork Bar.

Pictured on the steps of the Courthouse, Washington St., Cork, the Hon. Mr. Justice Frank Clarke, with members of the Cork Bar are (left to right) Conor Lehane BL, Mr. Justice Frank Clarke, Denis Collins BL, Emma Barry BL, Helen Boyle BL, James O'Mahony SC, Tom Creed SC, Marjorie Farrelly SC.

Passing Off: An Uncertain Remedy: Part 3

Peter Charleton and Sinéad Reilly*

This is the concluding part of a three part article dealing with the topic of passing off. Parts 1 and 2 appeared in the July and November editions of the Bar Review.

Instruments of deception

Internet domain names dominate the marketplace in consumables and in travel and have become the new high-street where those with a will to purchase now wander. It is not surprising that these are zealously protected. Registration has encompassed national suffixes such as '.ie' or '.co.uk' or '.hu' or '.cz' and since 2006 '.eu' and most recently domains entirely defined in Chinese or Arabic which do not need to use Roman letter designations. The tort of passing off does not need a confused ultimate consumer. It is all about fairness to the actual holder of existing goodwill. Cases in the 19th century established the principle that passing an instrument of deception to a middleman knowing that it would likely be used in the marketplace ultimately to confuse consumers allowed equity to step in and injunct both the manufacturer of the infringing product and the holder against even putting those goods out for ultimate sale.[1] We are not sure whether the intellectual foundation for this was the simple application of the joint tortfeasors liability doctrine or whether equity protected against an unfair practice. As the law of passing off develops, new rules become established and it no longer matters and, more importantly, is no longer challengeable. Thus, shipping whiskey to South America for blending with native spirits and applying a process for waving hair that is not the branded process of the plaintiff are actionable.[2] Thus identifications with the goodwill of the plaintiff apart from branding, packaging and general get-up can furnish proof of confusion, or in the case of internet domain names, that instruments of confusion should be acted against. It is not essential, and it was never essential, that an ultimate consumer actually buy the product out of confusion that it was produced by the plaintiff.

In modern internet commerce, the leading decision is *British Telecommunications v One In A Million*.[3] In that case, the defendants registered the names likely to be associated with British Telecom in order to extract funds for purchase from the plaintiff. The triple principles to address this situation are sufficiently flexible: reputation as a result of goodwill in the marketplace; misrepresentation by a defendant leading to real or potential confusion; and damage. The tort is that adaptable. Aldous LJ analysed the prior cases, essentially instruments of deception cases passing from a manufacturer to a middleman, and stated:

> "In my view there can be discerned from the cases a jurisdiction to grant injunctive relief where a defendant is equipped with or is intending to equip another with an instrument of fraud. Whether any name is an instrument of fraud will depend upon all the circumstances. A name which will, by reason of its similarity to the name of another, inherently lead to passing off is such an instrument. If it would not inherently lead to passing off, it does not follow that it is not an instrument of fraud. The court should consider the similarity of the names, the intention of the defendant, the type of trade and all the surrounding circumstances. If it be the intention of the defendant to appropriate the goodwill of another or enable others to do so, I can see no reason why the court should not infer that it will happen, even if there is a possibility that such an appropriation would not take place. If, taking all the circumstances into account the court should conclude that the name was produced to enable passing off, is adapted to be used for passing off and, if used, is likely to be fraudulently used, an injunction will be appropriate.
>
> It follows that a court will intervene by way of injunction in passing off cases in three types of case. First, where there is passing-off established or it is threatened. Secondly, where the defendant is a joint tortfeasor with another in passing off either actual or threatened. Thirdly, where the defendant has equipped himself with or intends to equip another with an instrument of fraud. This third type is probably a mere *quia timet* action."

The principle is of general application. In *Lifestyle Management v Frater* [2010] EWHC 3258 (TCC), Edwards-Stuart J injuncted a Scottish company which deliberately registered domain names similar to those of Lifestyle Management and in addition set up at least one of these websites to bear a very close resemblance to its active trading website. Lifestyle Management had registered the domain name

* Peter Charleton is a judge of the Supreme Court of Ireland; www.supremecourt.ie. Sinéad Reilly is a solicitor and professional support lawyer in Arthur Cox; www.arthurcox.com. This is the text of a paper delivered at the April 2015 Fordham Intellectual Property Conference in the Law School Cambridge. The views expressed are the authors' own.

1 *Johnston v Orr-Ewing* (1882) 7 App Cas 219.

2 *John Walker v Ost* [1970] 1 WLR 917 and *Sales Affiliates v Le Jean* [1947] 1 All ER 287 and the cases therein cited and see Fleming's, *The Law of Torts*, fn 2 above, at pp 804-805.

3 [1999] 1 WLR 903 and see Clerk & Lindsell, fn 32 above, at para 26-02.

"offshorelsm.com" but Frater, the defendant, had registered the domain names "offshorelsm.net", "offshorelsm.org" and "offshorelsm.co.uk". Perhaps it was the demand for funds or the presence of what the judge thought was uncomplimentary material about the plaintiff that secured the injunction. In any event, the decision was short, indicating application of a general principle:

> "Whilst the facts of this case are not the same as those in *One in a Million*, it seems to me that the essential ingredients of a deceptive use of a company name with an acquired goodwill in order to damage the owner of that name are present here."

As time goes on, perhaps new realms of commerce to which the tort of passing off may adapt will emerge. But, adaptable it is if it is anything.

Account of profits anomaly

For a successful plaintiff, there is a choice: an election may be made by a wronged plaintiff between a remedy in damages and an account of profit.[4] Why should there be such an election? It does not apply in trade marks or copyright, but here the choice is deeply embedded in the case law. Also part of Irish law, and possibly that of England and Wales as well, even in relation to breach of contract is the principle of not allowing a defendant to take advantage of his wrong. Thus, where a defendant deliberately breaks a contract with a conscious view to making a profit for himself, such profit will be recoverable by the wronged plaintiff; *Hickey v Roches Stores*.[5]An account of profit and loss is an equitable remedy and this explains why a plaintiff has this unique choice. To this election there appears to be one exception. Where an injunction is sought for passing off but is not granted on the discretionary basis that damages are an adequate remedy, the plaintiff will be left without the choice of an account in compensation for the tort. In *Falcon Travel Ltd v Owners Abroad Group plc, t/a Falcon Leisure Group,* the defendant was a major tour operator abroad. On penetrating the Irish market, the defendant discovered that it had a similar name to the plaintiff, a retail travel agent in Dublin and Wicklow.[6] Murphy J held that while there had been appropriation of goodwill and that while reputation was a property right which would ordinarily be properly safeguarded by the grant of an injunction, the circumstances of confusion could be overcome by the award of such damages as would fund a public relations campaign which would explain to both the public and other professionals in the travel agency business the difference between the parties.

Actual damage is integral to the definition of injurious falsehood and thus special damage must be proved.[7] Proof of actual damage is not a proof integral to passing off.[8] In the *Falcon Travel* case, Murphy J gave a very liberal interpretation to what damages might consist of:

> "In my view the defendant is correct in saying that a plaintiff in an action for passing off must establish damage or the likelihood of damage but I am convinced that the defendant is mistaken as to what is involved in the word "damage" in that context. No doubt it will be possible to establish in many actions for passing off (particularly when the passing off relates to the goods of the plaintiff as opposed to his business) that the result of the defendant's conduct is to induce members of the public to purchase from the defendant goods which the customer believed to be of the plaintiff's manufacture thus "diverting to himself orders intended for and rightfully belonging to the plaintiff" (see the analysis by Kenny J in *C&A Modes v C&A (Waterford) Ltd* [1976] IR 198 at p 215). Not only might this occur but clearly this is what would be intended in the case where fraud or deceit (though not required for the tort) is in fact present. Again nobody would doubt that damage is established where the wrongdoer gains business by his improper conduct even though there is no corresponding loss to the plaintiff. Similarly if it were to happen that the plaintiff suffered a loss of business without any corresponding gain to the defendant, this too would be an observable and perhaps measurable loss to the plaintiff. However it seems to me that these three categories of loss are no more than the consequences of the wrongful (though perhaps unintentional) appropriation by the defendant of the goodwill of the plaintiff in its goods or business and it is this appropriation of goodwill which constitutes the damage necessary to sustain an action for passing off.[9]"

The situation is anomalous. It is only the plaintiff who has the choice. This may be unfair. In several Anglo-American jurisdictions, a choice is often given by legislation to the trial judge to adopt the appropriate remedy where a breach of intellectual property is established.[10] As to when the choice ought to be made, Charleton J in *McCambridge Ltd v Joseph Brennan Bakeries* made this observation:

> "… where there has been an egregious misuse by a rival in the marketplace of the attributes of a product enabling an award of aggravated or exemplary damages or where a potentially excellent firm has been caused to collapse through this form of tortious competition or where an examination of the accounts of a tortfeasor shows no profit, a wronged plaintiff might reasonably elect for damages instead of an account of profit. There is perhaps also the instance

4 *House of Spring Gardens Ltd v Point Blank Ltd* [1984] IR 611 at 706 per Griffin J citing *Peter Pan Manufacturing v Corsets Silhouette Ltd* [1964] 1 WLR 96 at 106 per Pennycuick J and see *Edelsten v Edelsten* (1863) 46 ER 72 and *Weingarten Brothers v Bayer & Co* [1904-07] All ER Rep 877 at 880 per Lord MacNaghten.

5 *Hickey & Co Ltd v Roches Stores (Dublin) Ltd (No 1)* (Unreported, High Court, Finlay P, 14 July 1976) and *Hickey & Co Ltd v Roches Stores (Dublin) Ltd (No 2)* [1980] ILRM 107.

6 [1991] 1 IR 175.

7 Fleming's, *The Law of Torts*, fn 2 above, at pp 798 to 799.

8 Ibid 802.

9 [1991] 1 IR 175 at 182.

10 For instance see *Sheldon v Metro-Goldwyn Pictures Corporation* (1940) 309 UK 390 and *Zupanovich v B&N Beale Nominees Pty Ltd* [1995] RCA 1424, which are both copyright cases.

> where an injunction *quia timet* is taken on notice that passing off is imminent. There, there is no room for an account of profit since none will have been made. Instead the appropriate remedy is in damages.[11]"

Is the plaintiff always to be allowed to pursue an account of the defendant's profits trading on his goodwill? After all, extra buoyancy in the marketplace may be achieved through the defendant's advertising campaign, benefiting both. There is authority in a breach of confidence case for the proposition that where a plaintiff has opted for an account of profit but, on analysis, if the judge hearing the issue considers that the remedy is inequitable in all of the circumstances, damages may be ordered in lieu.[12] Equity, and an account is an equitable remedy, should not do what is inequitable: classically – he who seeks equity must do equity.

On the one hand, England and Wales: that jurisdiction has the decision in *Woolley and Timesource Ltd v UP Global Sourcing UK Ltd & The Lacmanda Group Limited*.[13] There, Judge Pelling QC of the Chancery Division reasoned that the profits from all goods bearing a brand of the goodwill of the plaintiff were to be captured in equity. Here, it was the attribution on watches of a name which was "*virtually identical*" and was such as to "*be perceived as such by all, or almost all, prospective customers*" as that of the legitimate holder of the goodwill in the brand. Judge Pelling QC rejected the proposition that there should be an analysis as to how much profit was made through the attribution of the brand and how much of that profit would probably have been made anyway. He rejected such an approach as virtually impossible to take and this despite being invited to assess the relevant accounts on a broad-brush approach. Such an exercise would be impractical, he said. Since, the learned judge reasoned, the tort required a substantial number of consumers to be misled for liability to be found for a plaintiff, cases on mixed products or on products bearing the brand and not bearing the brand did not apply. An appeal was either dismissed or withdrawn by the appellant.

On the other hand, we have Ireland. Here the remedy in an account is very much restricted. Yes, you can choose an account if you win as plaintiff, but, your return will certainly be different to damages in the sense that you will be getting the defendant's profits and not your own loss, but only such profits as were made from the exercise. How is that possible.? Judge Pelling QC rejected such an exercise as impractical? Well, courts are used to doing almost impossible damages exercises. Among the questions are: what was the degree of confusion, it has to be substantial, but was it 1:2 or 1:5; where does the undiscerning customer fit in; and where are the charts showing dips in the plaintiff's sales or boosts to the defendants? This, broadly, was the approach of the High Court in *McCambridge Ltd v Joseph Brennan Bakeries*.[14] There had been plenty of authority for that kind of approach in other jurisdictions in analogous intellectual property remedies. The United States Supreme Court derived that approach from patent decisions and in particular the statement in *Westinghouse Electric & Manufacturing Co v Wagner Electric Co* where the same court ruled that "*if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains.*"[15] As to impracticality or even impossibility of assessment, Hughes CJ ruled:

> "We see no reason why these principles should not be applied in copyright cases. Petitioners cite our decision in the trademark case of *Hamilton-Brown Shoe Co v Wolf Brothers* (1916) 240 US 251, but the Court there, recognizing the rulings in the *Westinghouse* and *Dowagiac* cases, found on the facts that an apportionment of profits was "inherently impossible." The burden case upon the defendant had not been sustained. … Where there is a commingling of gains, he must abide the consequences unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him. When such an apportionment has been fairly made, the copyright proprietor receives all the profits which have been gained through the use of the infringing material, and that is all that the statute authorizes and equity sanctions."

In Australia, a similar approach was taken by the Federal Court in *Zupanovich Pty Ltd v B&N Beale Nominees Pty Ltd*.[16] There it was copyright in builder's plans. After an analysis of various authorities at paragraph 70, Carr J stated:

> "If upon the taking of the account in this matter the respondents are unable to establish that the whole of the profit (if any) made by Beale Nominees was not attributable to the infringement of the copyright in the drawings and the applicant's buildings then the result will be an order that they pay all of those profits to the applicant. To the extent that the respondents are able to establish that factors other than such infringement caused such profit then they will only have to account for a lesser amount. The relevant comparison would appear to be between the profits which Beale Nominees would have made if it had not used the drawings and the profits which they did in fact make. That is my provisional view but the matter will have to be decided in the course of taking the account of the profits. If that view is correct then as Millet J observed in Potton Ltd "in practice this will come to the cost of commissioning similar drawings from another source.[17]"

In patent cases, naturally it may be only a tiny section of a product that infringes, a particular form of SIM card in a mobile phone. Then, it has been recognised that complete profits resulting from the sale of that article are not appropriate: *Celanese International Corporation v BP Chemicals Ltd*.[18] In that case, it was a method of production that was

11 [2014] IEHC 269, (Unreported, High Court, Charleton J, 27 May 2014), at page 5.
12 *Walsh v Shanahan* [2013] EWCA Civ 411; *Hollister Inc & Anor v Medik Ostomy Supplies Ltd* [2012] EWCA Civ 1419.
13 [2014] EWHC 493.
14 [2014] IEHC 269, (Unreported, High Court, Charleton J, 27 May 2014).
15 (1912) 225 US 604.
16 [1995] FCA 1424.
17 Ibid at para 70.
18 [1990] RPC 203.

patented and the unauthorised use of it gave an entitlement to an equivalent share of profits, it not mattering that the same product might have been arrived at had a non-infringing approach been used. It can be the case, Laddie J recognised, that an entire article is made through infringement; in which case the entire of the profits are part of the account. He cited Windeyer J in *Colbeam Palmer Ltd v Stock Affiliates Pty* [1968] HCA 50, cited in *Dart Industries inc v Décor Corp Pty Ltd* [1994] FSR 567 at 580:

> "If one man makes profits by the use or sale of some thing, and that whole thing came into existence by reason of his wrongful use of another man's property in a patent, design or copyright, the difficulty disappears and the case is then, generally speaking, simple. In such a case the infringer must account for all the profits which he thus made.[19]"

Concluding a similar principle in relation to passing off avoids unjust enrichment and the impossibility of assessment argument avoids what can amount to a penal approach. In the *McCambridge Limited v Brennan Bakeries* case, the Irish High Court ended with a series of propositions:

1) If through legislation a wronged plaintiff in an intellectual property case is enabled to choose either damages or an account of profits, or if that choice is left to the court on making a finding of liability, it is a matter of statutory construction as to how the court proceeds as to the choice of remedy …
2) Since an account of profits is an equitable remedy, restorative rather than punitive, it may be refused by the court if the result is unfair (*Walsh v Shanahan* [2013] EWCA Civ 411) but at common law a wronged plaintiff in intellectual property actions, particularly passing off, retains the right to seek an account of profits as opposed to damages though, as a separate equitable principle, damages may be declared the proper remedy by a court in refusing an injunction application …
3) The form of account of profits in trade mark cases is ordinarily for the entirety of the profits made on articles or services wrongly bearing the mark … though instances exist where even a trade mark owner cannot fairly claim the entirety of profits …
4) Some passing off cases are close to trade mark cases as to their colourable nature and the blatant approach of the tortfeasor, hence, in those circumstances there is little warrant for seeking a nuanced approach of division of profits …
5) Where in patent cases the profit results only partially from the use of the process as part of a wider manufacturing or production system, only the portion of profits properly attributable to that wrongful misuse are recoverable as an account of profits ...
6) Copyright mandates a similar approach. The reasoning of basic fairness underpinning this equitable remedy of an account of profit generates that nuanced approach …
7) Ordinarily, where a new product is put on the market and passed off by a defendant who has never produced that product before as that of the plaintiff, or where the expiry of a licence to use indicia of goodwill has been deliberately ignored, the measurement of an account tends to be all profits …
8) There are neither reasons of policy or of legal analysis which enables the proper approach to an account of profit in passing off to be treated differently from patent, copyright or trade mark cases, though the statutory foundation on which each of these is based may require particular cases to be treated differently. It would offend common sense to claim, for instance, that because a hotel used a name associated with a protected mark that all the profits of everyone who stayed there are those of the owner of that goodwill and it is to be noted in relation to passing off that such a claim was not made in *Hotel Cipriani SLR v Cipriani (Grosvenor Street) Ltd* [2010] EWHC 628.
9) Depending of the facts, passing off may be approached differently as to a product already made by the defendant and then got up so that it may be seen as calculated to deceive or where it is clear that only a proportion of the customers switching to the product passed off in infringement of the plaintiff's entitlement to its goodwill and there the approach may be a nuanced one of part of the profits only …
10) Though intention has long since ceased to be part of the ingredients of the tort of passing off, provable malice may make it more worthwhile for a plaintiff to seek damages than the equitable remedy of an account of profit because damages in those circumstances can be, but need not be, aggravated or exemplary.
11) A broad approach to apportioning profits should be taken by a court, remembering that the plaintiff is the wronged party and that obscure argument by economists is not what drives consumption in the marketplace.
12) Apportioning profits is not an impossible task. Jobs as hard in damages cases are done every day by the courts. Primarily, profit levels before and after should be considered as should the make up of the offending goods and the probability of the confusion resulting as to what proportion of customers.

Time will tell how well these principles stand up in later litigation in England and Wales or perhaps elsewhere. The

19 *Palmer Ltd v Stock Affiliates Pty* [1968] HCA 50 cited in *Dart Industries inc v Décor Corp Pty Ltd* [1994] FSR 567 at 580.

parties settled that case just as the judgment was handed down, so there was no appeal.

Conclusion

Trade mark infringement was a tort at common law. Since the trade marks legislation in Britain[20] and Ireland[21] and the unified Directives in the European Union, passing off has become the dominant residual cause of action for injunctive relief where a mark is unregistered or where one seeks to protect goodwill as a propriety right. Copyright differs, as remedies there concern themselves with precise forms as opposed to the fleeting impressions of those who "*want beer and not explanations*."[22] As a remedy, copyright will protect an author from false attribution of a literary or artistic work. Passing off will do the same but only after an analysis to establish reputation: and if the attribution is of personality, litigation enters the realm of guess-work where more and more the common law is moving towards the American and Canadian right of publicity. That form of legal protection is not patentable, registrable or capable of definition in form. Yet, protection is there; cynics may say for the big firm or the big personality at the expense of competition. We would not join in that comment; goodwill is expensive to build up in a marketplace and good products will find consumers without cheating. Both the tort of passing off and trade mark actions have nothing to do with protecting the consumer against misrepresentation or inferior products: rather both are about defending the goodwill attached to products and services. The tort of trade mark infringement, which later assumed statutory form and Europe wide legislation is really not similar to passing off. The differences between trade mark enforcement by legislation and passing off are summarised by Professor Heuston thus:

1) Passing off does not recognise a monopoly, as does trade mark registration, rather passing off is about "damage done to the plaintiff in his business by the deceptive mode in which the defendant carries on his own."
2) Passing off can be used as a weapon in litigation broadly, beyond anything to do with a mark and can encompass imitation of packaging or even the attribution of personality.
3) Passing off only protects established lines of business from predatory practices that confuse consumers but trade mark protection is fixed from the registration.
4) An action for trade mark infringement "may be simpler and less costly" since it avoids the practical difficulties of proof that the defendant's "mode of conducting business is bound to cause confusion."[23]

Practice has shown that he is correct in the implied criticism in the last point. As Professor Fleming points out, while the formulation of the tort is "*essentially modern*", nonetheless prediction of outcome continues to evade practitioners swamped in mounds of case law because passing off's "*potentialities for growth [are] not yet exhausted.*"[24]

All of the challenges faced relate to what some have praised as the flexibility of the remedy. Some would say that in a number of areas, passing off has the potential to go in several directions and that it takes the hard earned cash of clients to demonstrate where. Most subject to shifts in unforeseeable directions are: character merchandising; instruments of deception as opposed to actual confusion establishing liability; whether deception is merely a useful element of proof or a definitional element of the tort; how goodwill can in an information age be inter-jurisdictional despite almost no penetration into the market that the plaintiff wishes to protect; and how an option in damages or an account, capturing either all profits using the mark or only the proportion resulting from confusion, survives 150 years after the fusion of law and equity at the option of a successful plaintiff.

Similar build-ups of cases have led in the past to legislation. Here, the pressure on the dam is perhaps not so great as in other areas of law that have thrown up anomalies and mutations of settled principles. If there is a reason for this, it is the very flexibility of passing off. Where domain names are deliberately made similar to those of established brands; where fake apparent endorsements spring up from goods and services with no relationship to their celebrity champion; where proof of deception is impossible but those in need in the marketplace are confused; where your competitor takes your packaging and looks for an escalator ride to profits: you have your remedy. And you may wonder why? Well, it seems to the practitioner that the answer really is because law takes a back place in the fusion of equity and tort that represents the passing off action in real life litigation. The tort is all about what is fair: you build up goodwill, someone else makes their product look like yours; they steal. Lets be nice, it might be an accident. At very least, there is confusion. The packages are produced to the judge and it is her or his educated response to facts that drives the definition of the remedy: perhaps more so than the law. ■

20 Initially the Trade Marks Act 1938 and now the Trade Marks Act 1994.

21 The Trade Marks Act 1996, the EU purpose of which emerges from the long title as being similar to the British motivation: an Act to make new provision for registered trade marks, implementing Council Directive No 89/104/EEC of 21st December 1988, … to make provision in connection with Council Regulation (EC) No 40/94; to give effect to the Madrid Protocol relating to the international registration of marks of 27th June 1989 and to certain provisions of the Paris Convention for the Protection of Intellectual Property of 20th March 1883, as revised and amended; to permit the registration of trade marks in relation to services and for connected purposes of 16th March 1996.

22 *Montgomery v Thompson* [1891] AC 217 at 225 per Lord Macnaughten.

23 RFV Heuston – Salmond on the Law of Torts (London, 1977) (17th ed) at p 407.

24 Fleming's, *The Law of Torts*, fn 2 above, at para 30.270.

Data Protection Concerns for Barristers Post-*Schrems*

Stephen Fitzpatrick BL

Data protection requests are now, largely thanks to the case of *Dublin Bus v. The Data Protection Commissioner,*[1] a common method of obtaining documents in parallel to discovery. However, it would appear that many practising barristers do not necessarily fully appreciate their duties under data protection legislation as data controllers.

In large part, this is down to the traditions of confidentiality and discretion of the Irish Bar, but it was in some respects also down to the hidden protections of the Safe Harbour Scheme. The striking down of the Safe Harbour Decision[2] by the CJEU in the recent *Schrems*[3] case (discussed below) lends urgency to the need for members of the Library to reassess their practices in the light of the data protection regime.

As such, this article will seek to deal with a sample of the technological data protection risks that some members may be unaware of, including some which existed prior to *Schrems*.

Schrems

This article is not focused on the general law of the *Schrems* decision and data protection at large, and as such, what follows is a brief introductory outline of the issues. The main relevant statutory provisions, and a synopsis of the Snowden revelations are set out in a most clear, cogent and digestible manner in the judgment of Hogan J[4]. In typical fashion, the subsequent judgment of the CJEU is significantly less palatable – for those of idle interest, the European Court issues detailed plain-language press releases to ensure that its decisions are understood by the media and public at large.

Very briefly and somewhat imprecisely, data protection law allows the European Commission to certify that a third country, that is, a country not in the European Economic Area, complies with a standard of data protection equivalent to those provided by our laws. Section 11 of the Data Protection Acts as amended places a general prohibition on the transfer of personal data by a data controller to a country or territory outside the European Economic Area unless certain conditions are met – these restrictions effectively do not have to be complied with once a Community Decision is in place, certifying that the third country complies with data protection requirements. In 2000, before 9/11, social media or the Charter of Fundamental Rights, the US data protection regime was certified as adequate and effective under the Safe Harbour agreement, with US companies allowed to self-certify their compliance.

This scheme of self-certification was in reality greatly undermined by the fact that "'national security, public interest, or law enforcement requirements' have primacy over the safe harbour principles, primacy pursuant to which self-certified United States organisations receiving personal data from the European Union are bound to disregard those principles without limitation where they conflict with those requirements and therefore prove incompatible with them"[5].

Maximilian Schrems made a complaint against Facebook Ireland to the Irish Data Protection Commissioner on the 26th June 2013, essentially arguing that the safe Harbour agreement violated his data rights, in particular in light of Edward Snowden's revelations regarding US agencies illicitly and indiscriminately spying on citizens of the EU – revelations that Hogan J described as surprising "only the naïve or the credulous"[6].

In short, American analysts are permitted to search with no prior authorisation or real oversight through vast databases containing emails, online chats and the browsing history of millions of individuals, the vast majority of whom are ordinary people innocent of any crime. The information gathering was authorised by a secret court which only heard submissions from government applicants – recipients could not address the court or reveal its order; one of the main Snowden revelations was a portion of the body of jurisprudence of the court. The companies providing such information included tech giants such as Google, Facebook and Microsoft.

The Data Protection Commissioner found that, due to the existence of the Commission Decision, he had no duty to investigate the complaint, and he found that the complaint was frivolous and vexatious (in the sense that the complaint was unsustainable in law). Mr Schrems sought to judicially review the decision of the data protection commissioner to refuse to investigate the complaint. Hogan J, in June 2014, made a preliminary reference to the Court of Justice of the EU under Article 267 TFEU.

The Advocate General gave his opinion on 23rd September 2015, finding for Mr Schrems, which was followed by the decision of the Court on 6th October 2015. The Court found *inter alia* that the Irish Commissioner

1 *Bus Átha Cliath / Dublin Bus v. The Data Protection Commissioner* [2013] 2 ILRM 213; [2012] IEHC 339, Hedigan J; unsuccessful appeal from written decision of Judge Linanne, Circuit Court, 5th July 2011

2 Commission decision 520/2000/EC of 26 July 2000 pursuant to Directive 95/46 of the European Parliament and of the Council on the adequacy of the protection provided by the Safe Harbour Privacy Principles and related FAQs issued by the US Department of Commerce in OJ 215 of 28 August 2000, page 7

3 *Schrems v Data Protection Commissioner* C-362/14 CJEU 6th October 2015. Preliminary reference to CJEU by Hogan J of Irish High Court in *Schrems v. Data Protection Commissioner* [2014] IEHC 310

4 *Schrems v Data Protection Commissioner* [2014] IEHC 310

5 *Schrems v. Facebook* C-362/14 CJEU 6th October 2015 at 86 and throughout citing fourth paragraph of Annex I to Decision 2000/520

6 *Schrems v. Data Protection Commissioner* [2014] IEHC 310 at para 4

had a duty to investigate the transfers notwithstanding the existence of the Community Decision, that if there was found to be a breach in data rights, only the CJEU could strike down a Community decision, and if such a breach existed, enforcement proceedings should be taken through the national courts. Further, the Court struck down the Safe Harbour regime.

On the 20th October 2015, Hogan J, sitting in the High Court, quashed on consent the decision of the data protection commissioner not to investigate the complaint.

Pre-*Schrems* Issues for the Bar

It is important to distinguish the issues thrown up by the *Schrems* case from those that existed already. The Data Protection Acts oblige data controllers to ensure the safety of personal data, with regard to the nature of that data. Elsewhere in the Act, sensitive personal data is singled out as being particularly important; many of the documents that members deal with daily would be considered sensitive for the purposes of the Acts[7] – medical reports, forensic reports, opinions on liability, criminal records, materials relating to sexual matters (equality or family cases) etc.

Section 2C of the Data Protection Acts is what makes cloud systems like dropbox, or free-to-use e-mail systems like GMail so problematic. In essence, it requires that a data controller must ensure, when getting a data processor to process data on its behalf, *inter alia* that the data processor has adequate security procedures in place, and also that there is a written contract in place dealing with the processing of that data, which specifies that the data processor carries out the processing only on and subject to the instructions of the data controller, and that the processor complies with data protection requirements. The terms of use of most 'free' services, which normally make their money from processing data, do not seem to comply with this requirement.

The Bar Council provide the @lawlibrary.ie e-mail service to members, which service is designed to be secure and safeguard the torrent of sensitive information that flows through the Library on a daily basis. A small number of members appear to use non-secure e-mail addresses in tandem, or in preference to, the secure @lawlibrary.ie accounts provided; it is possible that the use of these accounts constitutes a breach of the data rights of clients.

Further it is hard to see, in the unlikely event that there was an 'Ashley Madison'-style leak, wherein the systems of one of these ancillary sites were compromised, leading to the access to, and posting of, private data, how members using such systems could defend themselves against a complaint to the data commissioner, particularly when a secure system is freely offered.

Finally, it is worth noting that the use of third-party apps to access secure online services risks compromising those services. The data in question is only as secure as the app used to access it – if an unsecure app is given the access codes to a secure system, then the data inside can be accessed by compromising the app. Similarly, the auto-forwarding of e-mails from a secure server, to an unsecure one, utterly defeats the purpose of having a secure server.

The above issues to a large extent already existed before *Schrems* – the use of unsafe, possibly unencrypted, third-party servers in legal practice was already questionable long before Safe Harbour was shut down.

Post-*Schrems* Issues for the Bar

Section 11 of the Acts deals with transfers of personal data to third countries. Where barristers use non-secure servers, they may be in breach of data protection rights in a 'new' way – the information is being transferred out of the state by the companies in question, where it is being compiled and accessed by American intelligence agencies.

The Safe Harbour agreement allowed such companies to self-certify compliance with data protection norms, meaning that this particular issue was not an issue for barristers (or it was not a pressing one). It has been well known since the Snowden revelations that data sent to America was being abused – now, even the fig leaf of Safe Harbour is gone.

When a barrister transfers data, such as confidential medical records, or specifies that it be sent to a particular unsafe account, knowing it will be transferred to American servers where it will be collected by American security agencies, it would seem quite clear that they breach data protection legislation.

Members who are using non-secure third-party service providers are in breach of data protection rights, if not already, before *Schrems*, then almost certainly after.

The issue is not necessarily a hypothetical one; it seems that the gloves are off. There have already been signs that enforcement actions are anticipated throughout Europe. The Working Group on Data Protection in a press release said *inter alia* that:

> "If by the end of January 2016, no appropriate solution is found with the US authorities and depending on the assessment of the transfer tools by the Working Party, EU data protection authorities are committed to take all necessary and appropriate actions, which may include coordinated enforcement actions.
>
> ... In any case, transfers that are still taking place under the Safe Harbour decision after the CJEU judgment are unlawful. ...
>
> in the context of the judgment, businesses should reflect on the eventual risks they take when transferring data and should consider putting in place any legal and technical solutions in a timely manner to mitigate those risks and respect the EU data protection acquis."

While these comments are aimed towards service providers, they illustrate an awareness on behalf of enforcement agencies of the fact that previously compliant business practices are now no longer acceptable.

Consequences

The obvious concern would be that a single complaint, and the revelation that some of the most sensitive possible documents are being passed around on unsafe systems, might lead to a snowball of complaints against the wider membership, or damage to the reputation to the Bar as a

7 Section 2 B of Data Protection Acts (as amended)

whole. There are however other possible consequences that should be considered.

Moral/Clients' Rights

It is clear that to breach the data protection rights of clients may in general damage their interests. Sensitive personal information may be disclosed, and even if it is not in fact disclosed, the possibility of such disclosure may cause significant distress. It is the right of clients to have their data kept confidential.

In the particular context of the Snowden revelations, it is important to note also the possible consequences that a client might have to bear in the future. The argument that the American security agencies are unlikely to be interested in a particular person is without merit. To take the example of an infant Plaintiff, the obvious question arises: who knows what a child may become? If the infant grows up to be someone of prominence, a TD or person of commerce, information which that may have seemed insignificant, may take on a new importance.

Tortious Liability

Section 7 of the Data Protection Acts provides for the imposition of the duty of care for the purposes of tort. Given the requirement to show evidence of damage[8], most breaches by members are unlikely to be pursued under this avenue, but it is a possibility that must be acknowledged.

Enforcement by Data Protection Commissioner

The Commissioner cannot award damages. However, he can issue Notices such as an Information Notice[9] (to obtain information for the purposes of investigating a complaint), an Enforcement Notice[10] (to order compliance with data protection rights) or a Prohibition Notice[11] (to prevent the overseas transfer of data). To fail to comply with these notices can constitute an offence.

As well as the embarrassment and inconvenience of having such an enforcement action taken against them, members may find that the conditions of the enforcement notice could force them to make sudden and radical changes to their practices at relatively short notice.

Code of Conduct

The Code of Conduct does not specifically require members to guard the data of their clients. However, 3.3(a) lays a heavy emphasis on the duty of confidentiality of barristers, grounding it not just in the rights of the individuals themselves, but in the larger context of the functioning of the systems of justice. Further, 3.3(f) requires barristers to secure electronic documents with an appropriate level of encryption.

1.2(b) prohibits members from engaging in conduct which brings the Barrister's profession into disrepute. It is at least arguable that if the Commissioner is required to bring enforcement proceedings against a member for the manner in which they have dealt with client data, then this may have the effect of bringing the profession into disrepute.[12]

Considering the above, it is clear that there are provisions of the Code of Conduct that could be used to pursue members who deliberately or recklessly breached data protection rights in the course of their practices.

Conclusion

While data protection has been a part of the practices of all barristers for decades, the proliferation of 'free' services on the internet, often inviting users to trade privacy for convenience, has created a new risk for practitioners who may wish to avail of these services, and in so doing, breach their clients' rights.

The striking down of the Safe Harbour regime, alongside the Snowden revelations, places an onus on all practitioners to reassess their practices in the light of the new data protection landscape.

Failure to do so may have a range of consequences, ranging from enforcement proceedings by the data protection commissioner, to disciplinary proceedings under the code of conduct. ■

8 *Collins v. FBD Insurance* [2013] IEHC 137, Feeney J
9 Section 12 of the Data Protection Acts, 1988 and 2003
10 section 10 of the Data Protection Acts, 1988 and 2003
11 section 11 of the Data Protection Acts, 1988 and 2003
12 See also duty to report conviction to Bar Council 2.14 Code of Conduct

Launch of *The Companies Act 2014 – An Annotation*

Celebrating the official launch of The Companies Act 2014 – An Annotation *by Brian Conroy are: L–R: Naoise Cosgrove, Managing Partner, Crowe Horwath; Brian Conroy, BL; The Hon Mr. Justice David Keane; and Martin McCann, Editorial Manager, Thomson Reuters. The launch was held at The Merrion Hotel on 19 November 2015.*

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 20, Issue 6, December 2015

A directory of legislation, articles and acquisitions received in the Law Library from the 15th October 2015 up to 10th November 2015
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Deirdre Lambe and Vanessa Curley, Law Library, Four Courts.

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Application for review of sentence on ground of undue leniency – Rape – Sentence suspended–Applicable principles – Gravity of crime – Mitigation – General process of sentencing – Balancing of competing elements – Seriousness of rape – Suffering caused – Trauma involved in reporting and giving evidence – Position of responsibility – Absence of convictions – Good conduct – Family obligations – Needs of children of respondent – Whether imprisonment would interfere with rights of autistic children – Support available to family – Failure to admit responsibility – Whether trial judge erred in deciding on placement of sentence – Three year sentence imposed (154/2013 – CA – 24/3/2015) [2015] IECA 76
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Appeal

Appeal against conviction – Rape – Trial – Contention that insufficient evidence to go to jury – Prejudice in defence by failure to make medical records available to defence – Failure to accede to requisitions – Application for direction – Submission of no case to answer – Evidence to esta'sh essential elements of offence – Relevance of psychiatric evidence – Whether material information withheld by prosecution – Charge to jury – *The People (Director of Public Prosecutions) v Leacy* (Unrep, CCA, 3/7/2002); *DH v Groarke* [2002] 3 IR 522; *The People (Director of Public Prosecutions) v PO'C* [2006] IESC 54, [2006] 3 IR 238; *JF v Director of Public Prosecutions* [2005] IESC 24, [2005] 2 IR 174; *O'Callaghan v Mahon* [2006] IESC 9, [2005] IEHC 265, [2006] 2 IR 32; *The People (Director of Public Prosecutions) v Reid* [2004] IECCA 3, [2004] 1 IR 393; *The People (Director of Public Prosecutions) v O'Callaghan* [2013] IECCA 46, (Unrep, CCA, 31/7/2013); *The People (Director of Public Prosecutions) v Sweeney* [2001] 4 IR 101; *Breslin v McKenna* [2008] IESC 43, [2009] 1 IR 298; *R v Galbraith* [1981] 1 WLR 1039; *R v Shippey* [1988] Crim LR 767 and *The People (Director of Public Prosecutions) v M* (Unrep, CCA, 15/2/2001) considered–Appeal dismissed (297/2012 – CA – 27/3/2015) [2015] IECA 72
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Appeal

Appeal against conviction – Sexual assault – Contention that trial ought to have been stopped on foot of application in relation to delay and prejudice – Matters alleged to give rise to actual and specific prejudice – Absence of records in relation to fire – Death of witnesses – Dates of deaths unascertained – Speculation as to evidence of witnesses – *SO'C v Director of Public Prosecutions* [2014] IEHC 65 (Unrep, O'Malley J, 7/2/2014) considered – Appeal dismissed (267/2012 – CA – 27/3/2015) [2015] IECA 140
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Deportation

Application for judicial review – Decision refusing to revoke deportation order – Marriage to Irish citizen–Untruthfulness of applicant – Whether decision irrational – Whether failure to consider constitutional rights of applicants – Whether decision disproportionate – Alleged failure to accept *prime facie* right of applicants to live together as starting point – Alleged absence of specificity in analysis of constitutional rights – Whether necessary to refer to particular provisions of Constitution – Balancing of rights – Whether necessary to commencement assessment with express acceptance of *prima facie* right to reside together – Marriage based on deceit by husband – Reckless disregard as to immigration status by wife – Length of marriage – Relief refused (2014/567JR – MacEochaidh J – 14/4/2015) [2015] IEHC 226
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solvency – Jurisdiction of court – Nature and value of assets available – Extent of liabilities – Whether inability to meet engagements could be more appropriately dealt with by means of personal insolvency arrangement – Entitlement of creditors to vote on arrangement – Whether court could consider reasonableness of refusal of bank – Bankruptcy Act 1988 (No 27), ss 11 and 15 – Personal Insolvency Act 2012 (No 44), ss 99, 108 and 110–Order made adjudicating petitioner bankrupt (1450P – Costello J – 27/3/2015) [2015] IEHC 185
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PRACTICE AND PROCEDURE

Costs

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Costs

Appeal against refusal of order for security for costs – Claim for breach of contract to pay fees for facilitating provision of insurance policies to taxi drivers – Application for order for security for costs against plaintiff company dismissed by High Court – Contention that plaintiff company merely collecting agent for effective owner of company – Contention that finances managed in deficit – Manner in which plaintiff managed financial affairs – Whether *prima facie* defence to claim – Whether plaintiff unable to pay costs in event of successful defence of proceedings – Whether plaintiff had established actionable wrongdoing on part of defendant on *prima facie* basis – Whether inability to pay stemmed from wrongdoing ascertained – Whether causal connection between alleged breach of contract and practical consequence for plaintiff giving rise to specific loss – *Connaughton Road Construction Limited v Laing O'Rourke Ireland Limited* [2009] IEHC 7, (Unrep, Clarke J, 16/1/2009); *Usk and District Residents Association Limited v The Environmental Protection Agency* [2006] IESC 1, (Unrep, SC, 13/1/2006) and *Interfinance Group Limited v KPMG Peat Marwick* (Unrep, Morris P, 29/6/1998) considered–Companies Act 1963 (No 33), s 390–Appeal dismissed (1446/2014 – CA – 17/4/2015) [2015] IECA 75
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Discovery

Claims for breach of contract, negligence and breach of duty against former directors of society–Motions for discovery – Applicable principles – Relevancy of documents – Necessity of documents – Proportionality – Whether discovery oppressive to extent of being unreasonable – Available resources – Electronic discovery – Thematic discovery – Absence of evidence as to costs involved in making discovery proposed versus discovery sought – *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) 11 ABD 55; *Atrazeneca AB & Patents Acts* [2014] IEHC 189, (Unrep, Barrett J, 1/4/2014); *Framus Ltd v CRH plc* [2004] IESC 25, [2004] 2 IR 20; *Ryanair plc v Aer Rianta cpt* [2003] 4 IR 264 and *Dome Telecom Ltd v Eircom Ltd* [2007] IESC 59, [2008] 2 IR 726 considered–Rules of the Superior Courts 1986 (SI 15/1986), O 31, r 12 – Order for discovery (2012/3280P & 2012/3279P – Costello J – 15/4/2015) [2015] IEHC 296
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Jurisdiction

Proceedings seeking judgment in respect of sums allegedly due and owing–Settlement of proceedings with liberty to apply being given – Monies standing to credit of defendant in third party institution paid over to plaintiff without his knowledge–Application for order compelling bank to explain lack of information – Application for order compelling solicitor for bank to explain failure to take monies paid into account in negotiations – Application for order directing return of monies wrongfully removed – Settlement agreement – Jurisdiction of Court of Appeal – Appellate court – Absence of jurisdiction to make orders sought – Relief refused (94/2014 – CA – 13/4/2015) [2015] IECA 77
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Appeal of decision to strike out summary summons – Particulars of debt – Proceedings struck out by Master on ground that claim for interest not sufficiently particularised – Strike out upheld by High Court on appeal – Appeal to Court of Appeal – Indorsement of claim – Requirement under Rules – Object of pleadings – Obligation to supply particulars – Entitlement to sufficient particulars to enable determination as to whether obligation to pay sum existed – Role of Master – Distinction between power of Master in contested cases and uncontested cases – Absence of jurisdiction to make final orders in contested cases – *Cooney v Browne* [1984] IR 185; *Walker v Hicks* (1877) 3 QBD 8; *Allied Irish Banks Ltd v The George Ltd* (Unrep, Butler J, 21/7/1975); *Bank of Ireland v Keehan* [2013] IEHC 631, (Unrep, Ryan J, 16/9/2013); *ACC Bank plc v Heffernan* [2013] IEHC 557, (Unrep, Hogan J, 4/11/2013); *ACC Bank plc v Tobin* [2012] IEHC 348, (Unrep, Laffoy J, 27/7/2012); *Grace v Molloy* [1927] IR 405 and *Bank of Ireland v Dunne* [2013] IEHC 484, (Unrep, Kearns P, 8/11/2013) considered–Rules of the Superior Courts 1986 (SI 15/1986), O 4, r 4 and O 37–Appeal allowed and matter remitted to High Court (72/2015 – CA – 22/4/2015) [2015] IEHC 87
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Particulars

Appeal of decision to strike out summary summons and motion for summary judgment – Particulars of debt – Application for summary judgment transferred into High Court list – Contested case–Proceedings struck out by Master on ground that claim for interest not sufficiently particularised – Appeal to Court of Appeal – Whether special indorsement of claim defective or conformed to requirements of Rules–Appeal heard concurrently with *Allied Irish Banks Plc v Pierce* [2015] IEHC 87 – Appeal allowed (71/2015 – CA – 22/4/2015) [2015] IEHC 88
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Appeal against refusal to strike out proceedings for want of prosecution – Inordinate and inexcusable delay – High Court proceedings alleging rape and assault on part of employee of defendant – Alleged

vicarious liability – Findings of High Court judge – Jurisdiction of Court of Appeal – Entitlement of Court of Appeal to exercise own discretion – Applicable principles – Difference between *Primor* and *O'Domhnaill* tests – Right of access to courts – Obligations under article 6 of European Convention for Protection of Human Rights and Fundamental Freedoms – Inordinate delay – Whether delay excusable – Whether sound evidential basis for findings of High Court judge – Balance of justice – Absence of culpable delay on part of defendant – Specific prejudice – Death of defendant – Whether real risk of unfair trial–*Guerin v Guerin* [1992] 2 IR 287; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *O'Domhnaill v Merrick* [1984] IR 151; *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27, (Unrep, CA, 19/2/2015); *Desmond v MGN Limited* [2008] IESC 56, [2009] 1 IR 737; *Rainsford v Limerick Corporation* [1995] 2 ILRM 562; *McBrearty v North Western Health Board* [2010] IESC 27, (Unrep, SC, 10/5/2010); *Kelly v O'Leary* [2001] 2 IR 526; *Whelan v Lawn* [2014] IESC 75, (Unrep, SC, 18/12/2014); *H v JJ* [2012] IEHC 327, (Unrep, Hogan J, 5/7/2012); *Stephens v Flynn* [2008] IESC 4, [2008] 4 IR 31; *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290; *McGrath v Irish ISPAT Limited* [2006] IESC 43, [2006] 3 IR 261; *Rodenhuis v The HDS Energy Limited* [2010] IEHC 465, [2011] 1 IR 611 and *O'Keeffe v Commissioners of Public Works* (Unrep, SC, 24/3/1980) considered–Appeal allowed; action dismissed (1232/2014–CA – 16/4/2015) [2015] IECA 74
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Strike out

Appeal against decision to strike out proceedings for want of prosecution – Inordinate delay – High Court proceedings alleging physical and sexual abuse by brother – Delay in case – Pre-commencement delay – Post-commencement delay – Onus of proof lying on defendant – Prosecution of proceedings without undue delay until delivery of defence – Reasons for delay – Very serious medical difficulties of plaintiff's son – Whether extent of care of son so significant as justifying delay – Jurisdiction of Court of Appeal – Scope of appeal– Balance of justice – Whether defendant prejudiced by death of family members – *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *O'Domhnaill v Merrick* [1984] IR 151; *Sheehan v Almond* [1982] IR 235; *Quinn v Faulkner* [2011] IEHC 103, (Unrep, Hogan J, 14/3/2011); *Rainsford v Limerick Corporation* [1995] 2 ILRM 562; *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27, (Unrep, CA, 19/2/2015) and *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290) considered–Rules of the Superior Courts 1986 (SI 15/1986), O 122, r 11–Appeal allowed (582/2014–CA – 22/4/2015) [2015] IECA 80
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Appeal against order of High Court remitting application for summary judgment to plenary hearing – Failure to give reasons for decision – Jurisdiction of High Court – Need to give reasons – *Ex tempore* judgments – Obligation to set out principal reasons underlying decision – Ground of defence – Failure of plaintiff to notice defect in title to property–Assertion of reliance on inspection by solicitors for plaintiff – Whether arguable defence–*O'Donoghue v An Bord Pleanála* [1991] ILRM 750; *Grealish v An Bord Pleanála* [2006] IEHC 310, [2007] 2 IR 536; *Mulholland v An Bord Pleanála* [2005] IEHC 306, [2006] ILRM 287; *Deerland Construction Limited v Aquaculture Licences Appeals Board* [2008] IEHC 289, (Unrep, Kelly J, 9/9/2008); *Foley v Murphy* [2007] IEHC 232; [2008] 1 IR 619; *English v Emery Reimbold and Strick Limited* [2002] WLR 2409; *Flannery v Halifax Estate Agencies Limited* [2000] 1 WLR 377; *Aer Rianta v Ryanair* [2001] 4 IR 607 and *Harrisrange Limited v Duncan* [2003] 4 IR 1 considered–Rules of the Superior Courts 1986 (SI 15/1986), O 37–Appeal allowed; judgment entered (1465/2014 – CA – 26/3/2015)
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Wills

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SI 448/2015

BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 15TH OCTOBER 2015 TO THE 10TH NOVEMBER 2015

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

Electoral (Amendment) (Moriarty Tribunal) Bill 2015
Bill 96/2015 [pmb] Deputy Lucinda Creighton

Education (Amendment) Bill 2015
Bill 97/2015 [pmb] Deputy Jim Daly

Finance Bill 2015
Bill 95/2015

Health Insurance (Amendment) Bill 2015
Bill 100/2015

National Tourism Development Authority (Amendment) Bill 2015
Bill 92/2015

Social Welfare Bill 2015
Bill 98/2015

Thirty-fifth Amendment of the Constitution (Fixed Period for the Duration of Dáil Éireann) Bill 2015
Bill 93/2015 [pmb] Deputy Shane Ross

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 15TH OCTOBER 2015 TO THE 10TH NOVEMBER 2015

Child Care (Amendment) Bill 2015
Bill 94/2015

National Mortgage and Housing Corporation Bill 2015
Bill 99/2015 [pmb] Senator Sean D Barrett

PROGRESS OF BILL AND BILLS AMENDED DURING THE PERIOD 15TH OCTOBER 2015 TO THE 10TH NOVEMBER 2015

Assisted Decision-Making (Capacity) Bill 2013
Bill 83/2013
Report Stage
Passed by Dáil Éireann

Dublin Docklands Development Authority (Dissolution) Bill 2015
Bill 45/2015
Committee Stage – Dáil

Electoral (Amendment) (No.2) Bill 2015
Bill 87/2015
Committee Stage

Finance (Miscellaneous Provisions) Bill 2015
Bill 89/2015
Report Stage – Dáil

Financial Emergency Measures in the Public Interest Bill 2015
Bill 91/2015
Committee Stage

Garda Síochána (Policing Authority and Miscellaneous Provisions) Bill 2015
Bill 47/2015
Report Stage

Harbours Bill 2015
Bill 66/2015
Committee Stage

Social Welfare Bill 2015
Bill 98/2015
Committee Stage

Children First Bill 2014
Bill 30/2014
Report Stage–Seanad

Climate Action and Low Carbon Development Bill 2015
Bill 2/2015
Committee Stage–Seanad

Marriage Bill 2015
Bill 78/2015
Committee Stage–Seanad

Medical Practitioners (Amendment) Bill 2014
Bill 80/2014
Passed by Seanad Éireann

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So who is Donor 376? New Rules for Donor Assisted Human Reproduction

Inge Clissmann SC and Erika Coughlan BCL, LLM*

Introduction

Infertility, which has been depicted as "a disease of the reproductive system" by the World Health Organisation is a worldwide issue.[1] It has been suggested in the Report of the Commission on Assisted Human Reproduction that approximately one in six or seven Irish couples are sterile.[2] As we are all aware, the unremitting scientific advancements in reproductive technologies have served to assuage the plight of numerous individuals suffering from infertility by providing alternative means of conception.[3] One such mechanism which has garnered considerable use in the past two decades has been donor assisted human reproduction. Donor Assisted Human Reproduction (DAHR) is the practice of fertilising a woman through the use of a donated gamete or embryo in an effort to achieve a viable pregnancy. However, the use of donor assisted human reproduction, like other alternative reproductive methods, is challenging our societal norms as to what constitutes the nuclear family, traditionally identifiable by heterosexual marriage and genetic connections, with many same-sex couples and single individuals availing of this practice in an effort to found a family.[4]

Moreover, the practice has primarily been associated with anonymity, with donors choosing to remain unidentifiable, which is proving to have serious implications for donor-conceived children who desire an understanding of their biological heritage. However, Blyth and Farrand observe that while different jurisdictions "espouse similar commitments to basic human values concerning the protection of life, human dignity, autonomy and prevention of discrimination, these have not provided a means by which consensus regarding assisted conception has been achieved…"[5] Thus, legislatures and policymakers have had to grapple with the intricate moral and legal issues stemming from the practice, for which medical science is responsible and as a result, an array of diverging approaches to the regulation of assisted human reproduction subsists, ranging from the authorisation of anonymous donation, to its strict prohibition, to legislative silence.

The Children and Family Relationships Act 2015, which has yet to be given legal effect, provides for the first time in this jurisdiction, a comprehensive statutory framework for the regulation of assisted human reproduction and thus, aims to provide a resolution to the multiplicity of complexities associated with the practice. This article seeks to appraise the new legislation and its overall effectiveness in dealing with the method of donor conception and the issues of parentage arising from same.

Legal Parentage arising from Donor Assisted Human Reproduction

Over the past two decades, Irish society has witnessed a big change in family formations, bolstered primarily by the advent of modern reproductive technologies. The evolution of the 'functional family' has served to challenge the traditional understanding as to what constitutes 'a family', defined by recourse to biology as the exclusive basis for establishing legally enforceable relationships, by embodying "the idea that the role of the law is not to 'channel' people into certain accepted family forms but rather to reflect and support a diverse range of relationships."[6] Accordingly, the law's failure to keep abreast of the legal requirements for the increasing number of non-normative familial structures has resulted in what has been characterised as 'social parenthood' whereby many individuals have endeavoured to exercise a parenting role without having the concomitant legal rights in respect of a non-genetically related child.[7] Thus, the disassociation between genetics and active parenting for which DAHR and other reproductive technologies has made viable, serves to illustrate that there is not a flawless "overlap between the people who are the sources of the genetic material and the people who actually function as the child's social and/or legal parents."[8] Part 2 of the Act recognises this fact by providing a mechanism for the assignment of legal parentage of intending parents who choose to engage in the practice of DAHR. Accordingly, this is a highly significant development

* This article is based on a paper delivered at a Law Society Conference on the Children and Family Relationships Act 2015, which took place earlier this year.

1 http://www.who.int/reproductivehealth/topics/infertility/definitions/en/

2 *Report of the Commission on Assisted Human Reproduction* (April, 2005) available: www.lenus.ie/hse/bitstream/10147/46684/1/1740.pdf

3 Godwin McEwen A, "So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy" (1999) 32 *Vanderbilt Journal of Transnational Law* 271 at 272

4 Kerian C.L, "Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?" (1997) 12 *Wisconsin Women's Law Journal* 113 at 114

5 Blyth E & Farrand A, "Reproductive Tourism- A Price Worth Paying for Reproductive Autonomy?" (2005) 25 *Critical Social Policy* 91

6 Millbank J, "The Role of 'Functional Family' in Same-Sex Family Recognition Trends" (2008) 2(2) *Child and Family Law Quarterly 155* at 181, 182

7 Smith L, "Is Three a Crowd? Lesbian Mothers' Perspectives on Parental Status in Law" (2006) 18(2) *Child and Family Law Quarterly* 231 at 232

8 Shapiro J, "A Lesbian Centered Critique of 'Genetic Parenthood'" (2006) 9 *The Journal of Gender, Race and Justice* 591 at 594

in Irish law for it necessarily serves to validate the importance and benefits of ensuring the creation and fostering of a legal relationship between an intending parent and child.[9]

Parentage

Section 5 of the Act provides that the parents of a child who is born as a result of a DAHR procedure shall be "(a) the mother, and (b) the husband, civil partner or cohabitant, as the case may be, of the mother." In circumstances whereby there is no other party to the DAHR procedure, section 5(2) confirms that "the mother alone shall be the parent" of the donor-conceived child.[10]

A declaration of consent to the use of a gamete by the donor and consent to parentage of a child arising from the use of same by an intending mother and an intending husband, civil partner or cohabitant of the mother is a prerequisite to the performance of any DAHR procedure in accordance with sections 6, 9 and 11. All parties are entitled to revoke such consent by notice in writing under sections 8, 10 and 12. Notwithstanding this, a revocation of consent will prove ineffective in circumstances where notice has been received after the date in which a gamete was used in the formation of an embryo or where the DAHR procedure has already been performed.

Section 19 excludes the provision of financial payment in respect of a DAHR procedure save for the payment of reasonable expenses pertaining to "(a) travel costs, (b) medical expenses, and (c) any legal or counselling costs, incurred by him or her in relation to the provision of the gamete or, as the case be, the giving of consent under this Part."[11]

Section 21 enables intending parents to apply to the District Court for a declaration of legal parentage in respect of a donor-conceived child.[12] Section 22 further entitles a donor-conceived child to make an application for a declaration of parentage.[13] Section 20 provides that such a declaration may be sought in respect of a child who is born in the state and in circumstances where a child was born as a result of DAHR procedure performed in or outside of the State prior to the date on which section 20 comes into operation, irrespective of the anonymity of the donation. Section 24, discussed in greater depth later in this article, prohibits the practice of anonymous donation in the State. However, it is clear from the provision that individuals who have conceived a child with the aid of an anonymous donor prior to the implementation of the Act will be entitled to seek a declaration of parentage before the Court. However, this stipulation shall only operate in retrospect and therefore, should an individual decide to avail of the use of an anonymous gamete donation in the future, the implication of the provision is that they will be denied the opportunity of obtaining a declaration of parentage in respect of the child conceived.

Section 27 of the Act stipulates that where a DAHR procedure is performed, the intending parents shall inform the DAHR facility of the outcome of the procedure, so as to aid the obligations imposed on the DAHR facility of informing the Minister of all procedures that result in the birth of a child for the purposes of maintaining the Register, which will be discussed in greater detail later in this article.[14] Where the intending parents fail to provide the DAHR with the requisite information, subsection 3 states that "the operator of the DAHR facility concerned shall contact the intending parent concerned in order to obtain [such] information..."[15] Once the DAHR facility is in receipt of the information, under subsection 4, the operator is obliged to furnish the intending parent with a certificate detailing the particulars of the DAHR procedure performed.

Thus, one would assume that the production of this certificate before the Court would be required to secure a declaration of parentage in respect of a donor-conceived child. However, it is unclear whether this is the intended position as section 21 and 22 make no reference to such a requirement. Moreover, in consideration of the fact that intending parents who have availed of a DAHR procedure internationally prior to the implementation of the Act are entitled to obtain a declaration of parentage, this serves to weaken the proposition that the furnishing of a certificate is a prerequisite in view of the fact that DAHR facilities abroad may operate alternative procedures in which the practice of issuing a certificate is not exercised.

Accordingly, it is apparent that the failure to explicitly mandate the presentation of a certificate before the Courts seems to indicate that the effective operation of the Act is wholly reliant on a person's honesty and integrity in disclosing the particulars of the outcome of a DAHR to a (DAHR provider) clinic. In view of the secrecy that has for sometime governed the practice of DAHR, discussed in more detail below, it is conceivable that intending parents may choose not to obtain the certificate so as to avoid any record of the method of the child's conception and birth being maintained on the Register, in an effort to keep the child's genetic origins quiet. If this loophole in the law is permitted to materialise, it is suggested that it will undoubtedly serve to undermine one of the fundamental policy objectives of the legislation, namely of ensuring the child's right to know his or her true identity. Therefore, it will be essential that the accompanying Court Rules explicitly require verification of the existence of a DAHR certificate.

The Anonymity of Gamete Donation

In 2013, they were 77 licensed fertility treatment facilities in operation in the United Kingdom in which 6,285 patients availed of treatment using donated gametes (either donated sperm or donated eggs).[16] Similarly, in the same year in the United States, according to the CDC's Fertility Success Rates Report, there were 190,773 assisted reproductive technology cycles performed at 467 reporting clinics.[17] Thus, these statistics emanating from other jurisdictions are illustrative

9 *Supra*, note 7 at 251
10 Children and Family Relationships Act 2015, s. 5 ss.1
11 Children and Family Relationships Act 2015, s. 19 ss.3
12 Children and Family Relationships Act 2015, s. 21 ss.2
13 Children and Family Relationships Act 2015, s. 22 ss.2
14 Children and Family Relationships Act 2015, s. 27 ss. 1 and ss.2
15 Children and Family Relationships Act 2015, s. 27 ss.3
16 Egg and Sperm Donation in the UK: 2012-2013 *Human Fertilisation Embryology Authority* at 7.
17 Center for Disease Control and Prevention's *2013 Fertility Clinic Success Rates Report*, available: http://www.cdc.gov/art/reports/index.html

of the surge in the practice of DAHR which has proliferated in the past two decades.

Traditionally, the practice of gamete donation was one "shrouded in secrecy" and the preservation of the anonymity of the donor was seen as an essential element of the process of gamete donation for both social and legal reasons.[18] The rationale for this was threefold. Primarily, there was a social stigma attached to the inability to conceive a child naturally and so intending parents sought to keep the origins of the child's conception concealed in an effort to create the perception of a 'conventional family'.[19] In conjunction with this, anonymous donation provided the added security of non-interference in the family's life in the future.[20] Moreover, the provision of gamete donation was generally carried out in return for financial compensation as opposed to altruistic motivations and so anonymity provided the donor with protection from legal obligations arising in respect of the child.[21]

Dennison summarised the prevailing view when she remarked that "[n]o one considers how the child feels when she finds that her natural father was a $25 cup of sperm. ….There is no passion, no human contact…just cold calculation and manipulation of another person's life."[22] Thus, for many years, the long-term effects that this practice of gamete donation would have on donor offspring were wholly disregarded. From society's developing experience with adoption, it is now accepted that all children with unidentified biological parents have informational needs[23] and in order to fulfill such needs, the recognition of a child's right to know their genetic origins has been promulgated in recent times. This has been bolstered, predominantly, by identification of the right under the European Convention on Human Rights and the United Nations Convention on the Rights of the Child. Thus, the veil of secrecy that once covered the practice of DAHR is gradually being lifted in the wake of increased societal knowledge of the interests and benefits associated with knowing one's biological heritage. Accordingly, in order to ensure effective vindication of this right, Cowden highlights the importance of identifying such interests which ground this 'right to know'.[24]

While, informational needs may vary among children with a donor background, the particular interests can largely be categorised into three components, namely, 1. the importance of genetic medical history, 2. the risk of consanguinity and 3. the mental health of the child. There is no denying the inherent interests and benefits which stem from knowing ones biological history for it facilitates accuracy in the diagnosis and treatment of medical conditions and helps to alleviate the chances of a "donor child" inadvertently forsaking vital medical attention.[25] Moreover, many children are apprehensive about the risk of unsuspectingly developing a consanguineous relationship with his or her biological sibling. While the statistical chances of this occurring are low due to the quota which fertility clinics set on the number of families who may receive a donation from any one donor, Cowden notes that the real concern resonates psychologically with the child who is continually questioning whether every potential sexual partner could be a half-sibling.[26] This concern alone provides only one example of the impact that being the by-product of anonymous donation may have on the psychological well-being of donor children.

The predominant impetus for the recognition of a right to identifying information in respect of a donor has been the profound harmful implications anonymous donation can have for the mental health of donor-conceived children. It has been reported that donor children experience a lack of personal identity, often described as "genealogical bewilderment", which is characterised by a feeling of low self-esteem and a sense of incompleteness and tend to employ coping mechanisms such as fantasy as a form of escapism to avoid the threats associated with the reality of unknowing.[27] This is evidenced by the personal narratives of a number of donor-conceived children in a study conducted by Turner and Coyle on the experiences of individuals born via donor insemination. One individual's account epitomises this threat to personal identity:

> "Part of me was shaken and profoundly shocked. Part of me was utterly calm, as things suddenly fell into place, and I was faced with an immediate reappraisal of my own identity…The only way I can describe it is that it was like a trap door opening up under my feet–but in my heart. On the one hand, it was immensely liberating, and on the other, it meant the loss of the 'bottom' of my world and all the familiar parameters."[28]

Recognition of the Right to Know One's Identity under the ECHR and UNCRC

The importance of obtaining information necessary to ascertain significant aspects of one's personal identity has been recognised and affirmed by the European Court of Human Rights which has interpreted an individual's right to know their biological origins as being encapsulated within the protections afforded by Article 8. Article 8 of the European Convention on Human Rights guarantees that "everyone has the right to respect for his private and family life, his home and his correspondence."[29]

This was first recognised in the case of *Mikulić v Croatia*[30],

18 Cowden M, "'No Harm, No Foul': A Child's Right to Know Their Genetic Parents" (2012) 26(1) *International Journal of Law, Policy and the Family* 102 at 104.

19 Chestney ES, "The Right to Know One's Genetic Origin: Can, Should, or must a State That Extends This Right to Adoptees Extend an Analogous Right to Children Conceived With Donor Gametes?" (2001-2002) *Texas Law Review* 365 at 366

20 Andrews L & Douglas L, "Alternative Reproduction" (1991-1992) 65 *Southern California Law Review* 623 at 659

21 *Supra*, note 18 at 104

22 Dennison M, "Revealing Your Sources: The Case for Non-Anonymous Gamete Donation" (2008) 21(1) *Journal of Law and Health* 1 at 13

23 *Supra*, note 19 at 375

24 *Supra*, note 18 at 107

25 *Ibid*

26 *Ibid*, at 109

27 Turner A.J & Coyle A, "What does it mean to be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy" (2000) 15(9) *Human Reproduction* 2041 at 2042, 2046

28 *Ibid*, at 2044

29 *European Convention on Human Rights,* Article 8

30 *Mikulić v Croatia*, no. 53176/99, ECHR 2002

whereby the Applicant complained that her rights under Article 8 had been violated owing to the Domestic Courts inefficiency in determining her paternity claim which left her uncertain as to her personal identity. In holding in favour of the Applicant, the Court pronounced that "…respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality" and held that this encompassed knowing the identity of applicants natural father.[31]

The right was further reiterated in the case of *Odievre v France*[32] that "[b]irth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention."[33] Moreover, the importance of the preservation of mental stability in the context of personal development has been recognised by the Court as "an indispensable precondition to effective enjoyment of the right to respect for private life" in the case of *Bensaid v. the United Kingdom*.[34]

Moreover, Article 7 of the United Nations Convention on the Rights of the Child specifically guarantees that a child "shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents."[35] Furthermore, Article 8 provides that State Parties shall undertake "to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference" and "where a child is illegally deprived of some or all of the elements of his or her identity", State Parties are obliged to "provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."[36]

The Attitude of the Irish Courts to the Fostering of Biological Ties

The importance of fostering biological ties to enable one to know one's true identity has also been given significant recognition by the Courts in this jurisdiction. This is illustrated by the Supreme Court decision of *J McD v L*,[37] which was the first and only case in this jurisdiction to determine the issues of parenthood arising from donor assisted reproduction. The case concerned a same-sex couple who sought the assistance of their friend to act as a sperm donor to achieve pregnancy pursuant to a pre-conception agreement which stipulated that they would assume all parental responsibility in respect of the child. Following the child's birth, the sperm donor sought guardianship rights owing to an unanticipated paternal bond with the child. Mr. Justice Fennelly emphasised the prominence of the blood link when determining the rights of a biological parent over a child born as a result of a donor insemination procedure by asserting that:

> "The blood link, as a matter of almost universal experience, exerts a powerful influence on people. The applicant, in the present case, stands as proof that participation in the limited role of sperm donor under the terms of a restrictive agreement does not prevent the development of unforeseen but powerful paternal instincts. Dr. Byrne acknowledged that it would be "beyond what a man in that circumstance would be capable of" for him not to wish to be involved. More importantly, from the point of view of the child, the psychiatrists were in agreement that a child should normally have knowledge, as part of the formation of his or her identity, of both parents, in the absence of compelling reasons to the contrary. There is natural human curiosity about parentage. Scientific advances have made us aware that our unique genetic make-up derives from two independent but equally unique sources of genetic material."[38]

Moreover, Mr. Justice Abbott in the High Court decision of *MR and DR v An tArd Chláraitheoir*, *Ireland and the Attorney General*[39], which concerned the determination of parenthood arising from a surrogacy arrangement, stated that "the predominant determinism of the genetic material in the cells of the foetus permits a fair comparison with the law and standards for the determination of paternity" thereby emphasising his understanding of the determinative nature of chromosomal DNA.[40] Although this decision was later overturned on appeal by the Supreme Court, on the basis that the matter was one which necessitated legislative input by virtue of the complex moral and social issues which the practice of surrogacy presents, the authority is nonetheless informative of the Court's recognition of the importance of genetic heritage.

Prohibition of Donor Anonymity

Recognition of the right to know one's identity has garnered considerable traction in this jurisdiction, by reason of the increased recognition constitutional protections afforded to children's rights by virtue of Article 42A.1 of the Constitution which acknowledges that the "State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights." With the implementation of the Act, Ireland will become one of a mere thirteen jurisdictions worldwide to legislate for the proscription of anonymous gamete donation.[41] The prohibition of donor anonymity is provided for under Part 3 of the Act. Thus, this legal standpoint is profound for it serves to communicate internationally the State's commitment to ensuring respect for, and protection of, children's rights. It is important to note from the outset that this statutory position is reflective of the importance of having knowledge of one's biological heritage for the purposes of fulfilling personal development and is not

31 *Ibid*, at para. 54, 55
32 *Odievre v France*, no. 42326/98, ECHR 2003
33 *Ibid*, at para. 23
34 *Bensaid v. the United Kingdom*, no. 44599/98, ECHR 2001 at para. 47
35 United Nations Convention on the Rights of the Child, Article 7
36 United Nations Convention on the Rights of the Child, Article 8
37 [2010] 2 IR 199
38 *Ibid*, at para. 304
39 [2013] IEHC 91
40 *Ibid*, at para. 103
41 Tobin B, "The Revised General Scheme of the Children and Family Relationships Bill 2014: Cognisant of the Donor-Conceived Child's Constitutional Rights?" (2014) 2 *The Irish Jurist* 153 at 161

designed to bolster the proposition of the importance of genetics to the assignment of legal parentage.[42]

Section 24 of the Act provides for the proscription of anonymous gamete donation and places a requirement on a clinic (a DAHR facility) to acquire specific information in relation to every donor including, the name, date and place of birth, nationality, the date of provision of the gamete and contact details.[43]

This provision, in ensuring the exclusion of donor anonymity in this jurisdiction, is a truly welcome one for it indicates on an international scale Ireland's firm commitment to the vindication of the rights of donor-conceived children. Not only does this provision guarantee the State's compliance with its constitutional obligations under Article 42A.1, it also ensures adherence to the State's positive obligation under the European Convention on Human Rights Act 2003 and international standards laid down in the United Nations Convention on the Rights of the Child, outlined previously.[44]

While the benefits of the removal of anonymity for donor-conceived children are abundantly clear, it has been the contention of many commentators that such a restriction has the grave consequence of propelling a shortage in gamete donation, resulting in an encroachment of prospective parent's right to procreate[45] and an increase in what has been dubbed "DI tourism". The findings of a study conducted by Bay *et al*, on the perspective of sperm donors in Denmark spanning three decades, 1992, 2002 and 2010, may serve to affirm the assertion that non-anonymous donation will result in a decline of gamete donation. Of the donors interviewed in 2012, a staggering 70% opted to remain anonymous when given the choice, with a mere 17% stating that they would continue to donate if anonymity was not certain.[46] Thus, Klock acknowledges that the disparity between the wishes of donors and donor children "highlight a significant disconnect in the competing interests of donor insemination participants."[47] Notwithstanding such findings, the study indicates a clear change of attitude towards gamete donation with the progression of time, by showing an increase in the percentage of donors (85% in 2012) who agreed to the disclosure of non-identifying information.[48]

Thus, this rationale is consistent with Sweden's experience following the introduction of the Swedish Insemination Act 1984 which prohibits the practice of anonymous donation. Initially, there was a sharp decline in the number of donors willing to partake in the process of donation. However, with the passage of time, a significant divergence in type of donor profile has emerged which has resulted in a revival of donation rates.[49] This change in the motivation for gamete donation resulting from the removal of anonymity eliminates those individuals motivated solely and principally by the prospect of financial enrichment in favour of those with altruistic and procreative objectives.[50] Moreover, in light of the recent statistical data on the number of donors in the United Kingdom, the contention of an absolute reduction in gamete donation following the removal of anonymity may prove to be unfounded, for it has been reported that the number of newly registered sperm donors has actually increased from 541 in 2011 to 631 in 2012.[51]

In the wake of the legislative prohibition in Section 24, the State is to be commended for taking such a prominent legal stance in support of the vindication of children's rights. However, the overall effectiveness of taking this approach has been called into question. Shatter has argued that this will have the profound effect of creating an unintended barrier to donation in Ireland and is what he has described as "an Irish solution to an Irish problem". It is suggested that, in view of the experiences of other jurisdictions who have sought to effect a similar proscription, albeit in respect of the practice of commercial surrogacy, prospective parents will be encouraged to satisfy their procreative needs by seeking fertility treatment internationally, which today constitutes a forum for the acquisition of gamete donation with relative ease.[52] One need only conduct an internet search for "California Cryobank" to discover the array of donor options available to intending parents in the United States, which specify anything from personal characteristics such as eye or hair colour, to height, to university graduates, to the choice of obtaining a celebrity lookalike donor.[53]

While there is no solid evidence to support Shatter's contentions, it is suggested that even if they come to pass, this is not a justifiable reason for denying the child's right to knowledge of his or her genetic origins. Accordingly, Section 24 of the Act is a very much welcomed provision which enshrines a principle necessary to the operation of a rights-based legislative framework pertaining to donor assisted reproduction.

Section 26 of the Act specifies that for a period of three years from the date upon which the Act comes into operation, a gamete which has been acquired before such date may be used in a DAHR procedure.[54] However, the type of gamete which may be used is one for the purposes of extending or completing a family, in circumstances whereby intending parents wish to use the same donor from whom their other child has originated.[55] While retrospective anonymity is

42 Mulligan A, "Constitutional Parenthood in the Age of Assisted Reproduction" (2014) *The Irish Jurist* 90 at 121

43 Children and Family Relationships Act 2015, s. 24

44 Section 3 of the European Convention on Human Rights Act 2003 provides that "every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions." Thus, the State is not only obliged to interpret Irish law in accordance with Convention provisions but also ensure that the principles laid down in the jurisprudence of the European Court of Human Rights provide a guiding role in doing so.

45 *Supra*, note 18 at 121

46 Klock S, "A Survey of Sperm Donors' Attitudes: A Much-Needed Perspective" (2014) 101(1) *Fertility and Sterility* 43, at 43

47 *Ibid*

48 *Ibid*

49 Turkmendag I *et al*, "The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-be Parents" (2008) 22 *International Journal of Law, Policy and the Family* 283 at 288

50 Janssens P.M.W *et al*, "A new Dutch Law Regulating Provision of Identifying Information of Donors to Offspring: Background, Content and Impact" (2006) 21(4) *Human Reproduction* 852 at 855

51 *Supra*, note 16 at 10

52 "Shatter warns Family Bill will end Donor-Assisted Reproduction" *Irish Times* (March 5, 2015) available: http://www.irishtimes.com/news/crime-and-law/shatter-warns-family-bill-will-end-donor-assisted-reproduction-1.2127392

53 http://www.cryobank.com/

54 Children and Family Relationships Act 2015, s. 26 ss.5

55 Children and Family Relationships Act 2015, s. 26 ss.5(c)

guaranteed in respect of donated gametes, the same cannot be said for pre-existing embryos, as sub-section 7 states that "nothing shall operate to prevent the recording on the Register of the information specified in section 33(3)(d) in respect of the donor from whose gamete the embryo formed."[56] Retrospective anonymity is appropriate for it ensures respect for the donor's right to privacy in circumstances whereby he or she donated on the understanding of being provided with lifelong anonymity. Moreover, the restriction of the use of gametes acquired prior to the implementation of the Act over a relatively short period of three years is to be welcomed as a strong encouragement for the use of non-anonymous donation from the outset. No restrictive time limit for the use of pre-existing embryos is specified in the provision which can be explained by the inappropriateness of coercing intending parents to procreate.

The Establishment of a National Donor-Conceived Person Register

Section 28 requires every clinic (DAHR facility) to furnish all relevant information in relation to every DAHR procedure carried out at the facility to the Minister, 'on a date that is no later than 6 months after the performance of the procedure concerned, and on a date that is no earlier than 12 months and no later than 13 months after the performance of the procedure' to enable him to perform his obligations of maintaining the National Donor-Conceived Person Register, which is to be established by virtue of Section 33.[57] Under Section 33 the Minister is obliged to make an entry in the Register in respect of every child in the State as a result of a DAHR with the following information: the name, date and place of birth and sex of the child, the address of the child, information in respect of the parent of the child and in respect of the donor, the date on which the DAHR procedure was performed and the name and address of the DAHR facility at which the DAHR procedure was performed.[58]

Section 30 and 31 ensures proper regulation of every clinic (DAHR facility) by enabling the appointment by the Minister of an authorised person to inspect the premises of a DAHR facility to ensure compliance with its legislative obligations.[59] Section 32 provides a mechanism for enforcement by way of recourse to the Circuit Court.[60]

Non-identifying Information

Section 34 provides for a donor-conceived child, who has attained the age of 18, or a parent of a donor-conceived child under the age of 18, to request the provision of non-identifying information in respect of the relevant donor recorded in the Register, in addition to "the number of persons who have been born as a result of the use in a DAHR procedure of a gamete donated by the relevant donor, and the sex and year of birth of each of them."[61] While it is justifiable that an individual shall obtain the age of majority in order to be eligible to acquire identifying information in respect of one's donor so as to "avoid any potential conflicts with the parental right to raise the child as the parent sees fit",[62] as provided for by section 35 discussed below, the same cannot be said of non-identifying information. It is suggested that provision should have been made for the release of non-identifying information to a donor-conceived child on the basis of a "sufficient maturity" standard which would be reflective of Article 12 of the Convention on the Rights of the Child and the apprehension that children under the age of 18 who have attained a sufficient degree of maturity have the competency to make informed decisions.[63]

Informing the Donor-Conceived Child of his or her Conception

Legislative entitlement of a donor-conceived child to know the truth of his or her biological heritage is of particular use provided that he or she is cognisant of the nature of his or her conception.[64] Cowden notes that a donor child's right to know his or her identity can be separated into two distinct claims, each being of equal significance for ensuring the vindication of such right, namely, the "right to be told about the nature of their conception based on their interest in being treated with respect" and the "right to access identifying information regarding their donor based on their interest in being free from psychological harm."[65] Notwithstanding this, while the majority of international statutory frameworks claim to encourage openness by proscribing donor anonymity, they unfortunately fail to afford a precise disclosure mechanism and consequently, fail to provide an unequivocal right to children to know about their identity.[66]

Thus, the responsibility of disclosure falls wholly to the parents of a donor-conceived child. Allowing disclosure to be determined in accordance with subjective parental perspectives is troublesome in light of research which suggests that parents have a tendency to hide the method of his or her child's conception. In a study conducted by Golombok *et al* in 1999, 89% of parents had failed to inform their child of the origins of his or her conception.[67] Similarly, in a more recent study of attitudes to disclosure in New Zealand, it was found that only 35% of children had been told about their conception.[68]

Not only does parental non-disclosure have repercussions for the child's identity issue, studies have further illustrated that a failure to disclose may have profound adverse effects on familial relationships. In a recent study by Golombok *et al*, whereby the aim was to "examine the impact of telling

56 Children and Family Relationships Act 2015, s. 26 ss.7
57 Children and Family Relationships Act 2015, s. 28 ss.6
58 Children and Family Relationships Act 2015, s. 33 ss.3
59 Children and Family Relationships Act 2015, s. 30 ss.1 and s. 31 ss. 1(a) respectively.
60 Children and Family Relationships Act 2015, s. 32 ss.1(b)
61 Children and Family Relationships Act 2015, s. 34 ss.1
62 *Supra*, note 22 at 25
63 Blyth E, "Access to Genetic and Birth Origins Information for People Conceived Following Third Party Assisted Conception in the United Kingdom" (2012) 20 *International Journal of Children's Rights* 300 at 311
64 *Ibid*, at 312
65 *Supra*, note 18 at 119
66 Blyth E & Frith L, "Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity" (2009) 23 *International Journal of Law, Policy and the Family 174* at 185
67 *Supra*, note 18 at 115
68 Isaksson S *et al*, "Two Decades after Legislation on Identifiable Donors in Sweden: Are Recipient Couples Ready to be Open about Using Gamete Donation?" (2011) *Human Reproduction* 1 at 2

children about their donor conception in the preschool years on psychological adjustment and the mother-child relationship", gamete donation families who had not yet disclosed the nature of conception to the child obtained significantly lower scores than those families formed naturally for both "mother-child mutuality and maternal positivity."[69] Golombok *et al*, suggests that this finding is indicative of the negative outcomes which may result from the withholding of such information.[70]This finding is substantiated by Turner and Coyle's determination that a lack of communication in respect of a donor child's origins often results in feelings of mistrust in the family.[71]

To date, there has not been an effective means of ensuring the vindication of a donor child's right to know his or her true identity.[72] Section 39 of the Act provides that when the Minister makes an entry in the Donor Register, he must inform an tArd Chlaraitheoir of the existence of such a record for the purposes of retaining a note that the child is a donor-conceived child in the register of births.[73] Thus, "where a person who has attained the age of 18 years applies for a copy of his or her birth certificate, and the register of births contains a note referred to in subsection (2), an tArd Chlaraitheoir shall, when issuing a copy of the birth certificate requested, inform the person that further information relating to him or her is available from the Register."[74] This provision is profound, in that it comprises one of very few regulatory frameworks to explicitly provide the child (over 18 years) with the tools necessary to ensure knowledge of his or her identity. The establishment of a link between the Register and an tArd Chlaraitheoir necessarily ensures that a donor-conceived person may discover the truth of his or her origins upon the request for the release of his or her birth certificate. Thus, the possibility of securing such information is greatly enhanced by this link, for more often than not, an individual will seek a copy of his or her birth certificate at some point in their lives. Moreover, this link will undoubtedly serve as an inducement for improved parental disclosure in the future.[75]

Under section 35 of the Act, a donor-conceived child who has attained the age of 18 is entitled to request the provision of identifying information recorded in the Register in respect of his or her donor. When a request is made, the Minister shall inform the relevant donor by way of notice of such a request. The Minister is obliged to release the information to the child after "12 weeks from the date on which the notice is sent…unless the donor makes representations to the Minister setting out why the safety of the relevant donor or the donor-conceived child, or both, requires that the information not be released."[76] The Minister may refuse to release the information "if satisfied that sufficient reasons exist to withhold the information concerned…"[77] However, the donor-conceived person is entitled to be informed of the certain representations made on behalf of the donor and is afforded the opportunity to appeal a refusal by the Minister to the Circuit Court within 21 days of receipt of a notice of such refusal.[78]

Section 36 relates to a request for information to be provided to a donor in respect of a donor-conceived child. The procedure is similar to that outlined in section 36; however, the Minister may only request the release of information where the adult child has recorded a statement of consent to the release of identifying information on the Register.[79] Upon receiving a request by a donor, the Minister shall inform the donor-conceived adult child who then has 12 weeks from the date of notification to object to the release of information.[80] In the event that the donor-conceived child objects to the provision of information, no appeal mechanism is available to the donor. This process is provided for again under section 37, albeit in respect of a donor-conceived sibling.

Thus, it is clear from the aforementioned provisions that diverging standards exist for the withholding of information between the donor, the donor-conceived child and a donor-conceived sibling. It is apparent that the reasoning for such disparity derives primarily out of respect for the 'best interests' principle thereby ensuring that the requirements of the child remain the focal point of all decisions taken in relation to the release of identifying information.

Limitation on the Number of Children per Donor

The Act fails to establish a maximum limit on the number of children who may be conceived from any one donor. The imposition of limits serves to circumvent the risk of consanguinity and in light of the removal of anonymity, might alleviate the potential physical and emotional strain of the donor who may be contacted by multiple genetically-related children. Currently there is no consensus on the appropriate quota among jurisdictions imposing restrictions on the maximum number of children from each donor, with figures ranging from 6 in Sweden to 25 in the Netherlands.[81] Nevertheless, it is interesting that the legislature has remained silent on this particular issue.

Retention of Records

Another shortcoming in the Act is a failure to stipulate the length of time for which records must be kept by the Register of information in respect of each donor-conceived child. In view of legislative silence, it may be assumed that records shall be kept in perpetuity. Nevertheless, clarification by the legislature on this issue is required. The maintaining of records in perpetuity would facilitate access to records by descendants of a donor-conceived child who may also have an interest in ascertaining knowledge of their genetic

69 Golombok S *et al*, "Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7" (2011) 25(2) *Journal of Family Psychology* 230 at 234
70 *Ibid*, at 237
71 *Supra*, note 27 at 2045
72 *Supra*, note 63 at 313
73 Children and Family Relationships Act 2015, s. 39 ss.1
74 Children and Family Relationships Act 2015, s. 39 ss. 4. This provision mirrors S. 153 of the State of Victoria's Assisted Reproductive Treatment Act 2008.
75 Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014 (May 2014) at para. 3.21
76 Children and Family Relationships Act 2015, s. 35 ss.2(b)
77 Children and Family Relationships Act 2015, s. 35 ss.3(a)
78 Children and Family Relationships Act 2015, s. 35 ss.5
79 Children and Family Relationships Act 2015, s. 36 ss.1 & ss.3
80 Children and Family Relationships Act 2015, s. 36 ss.3
81 *Supra*, note 66 at 178

origins. Blyth and Frith suggest that in such circumstances, a descendant's interest in acquiring knowledge is independent of his or her parent's and is therefore deserving of respect.[82] Moreover, the legislation lacks a requirement to ensure that records containing identifying information in respect of parties to a DAHR procedure remain updated. While section 7 states that "it is desirable that [the donor] keep updated, in accordance with section 38(1), the information in relation to him or her that is recorded on the Register", neither the donor nor the clinic is legislatively compelled to do so.[83] As the law stands, the information retained on the Register will have been provided no later than 13 months after the birth of the child. Therefore, there is a real possibility that the information will be outdated by the time the child reaches the age of 18 and is entitled to the requisite information. This gap in the legislation is unfortunate.

82 *Ibid*, at 187
83 *Children and Family Relationships Act 2015,* s. 7(b)(v)

Conclusion

"The 'expressive' function of family law is not a novel concept. Glendon has remarked that the law, 'in addition to all other things it does, tells stories about the culture that helped to shape it and which in turn it helps to shape: stories about who we are, where we came from and where we are going"[84] While there is no doubt that legislating for the complexities associated with the practice of DAHR is a contentious task, the Children and Family Relationships Act 2015 is to be celebrated. Not only does it aim to reflect the reality of modern Irish society but it also underpins the State's commitment to the protection and vindication of children's rights. Thus, the Act epitomises the evolutionary nature of Irish family law and is certainly an indication of things to come. ■

84 Sifris A, "The Legal Recognition of Lesbian-Led Families: Justification for Change" (2009) *Child and Family Law Quarterly* 197 at 213 citing Glendon M.A, Abortion and Divorce in Western Law (Harvard University Press, 1987) at 9

Drugs in Packages

Garnet Orange SC

Larger quantities of controlled drugs are often transported or delivered inside packages (such as parcels, bags or boxes) in such a way that it is not immediately obvious what the package contains. This is particularly the case where drugs are being delivered in packages sent through the postal system or are being shipped by a courier service. Where such packages are detected by the gardaí, postal service, or the Customs and Excise, and a prosecution subsequently takes place, the fact that the drugs were concealed in packaging has given rise to two areas of particular controversy during the subsequent trial. Issue is frequently taken with the lawfulness of any interception of the package that is used during a controlled delivery. There have also been difficulties with the interpretation or explanation of the statutory provisions that apply in respect of possession of controlled drugs that are concealed inside such packages or bags.

Three recent decisions of the Court of Criminal Appeal and the Court of Appeal have dealt with the legal issues and justify a consideration of the law as it now stands.

Controlled deliveries and postal packets

There have been numerous trials in which the evidence has shown that the gardaí have detected the criminals concerned by using a package containing drugs that had been sent through the postal system, or by means of a courier, to a named person at a particular address. The evidence usually shows that the package itself is considered to be suspicious and is found, on technical examination, to contain drugs. If the gardaí set up a controlled delivery operation, the person who receives the package, and occasionally the next recipient also, is arrested and prosecuted for possession of the drugs. It invariably transpires that the name given for the recipient is fictitious but that the address for delivery is real.

The point often taken in these cases is whether the interception and examination of the package amounts to an unlawful action by the prosecuting authorities. The defence usually argue that there has been a breach of the accused's right to privacy or that there has been an unlawful interception of a postal packet contrary to the relevant legislation. This has led to a number of decisions of the Circuit Court without a great deal of consideration by the higher courts.

The argument in respect of postal packets[1] is that it is unlawful for anyone to interfere with a letter or package that is being transmitted through the postal system otherwise than as provided by the relevant statutory provisions.[2] The reality in these situations is that when a suspicious package is identified, the gardaí do not comply with the strict terms of the legislation but set about making the controlled delivery as soon as practicable. If the package is not a postal packet, the gardaí simply proceed by making the delivery using an undercover officer posing as an employee of the courier company.

The legality of this type of operation has now been clarified by the Court of Criminal Appeal. In *Lawel,*[3] a package that had arrived at the Dublin airport depot of a well known firm of couriers was technically examined by a customs officer and was found to contain cocaine. The package was addressed to a fictional person but at a real address in Co. Kildare. A controlled delivery was made and the accused signed for the package in the name of the fictitious addressee. Shortly afterwards, another man called to the address and took the package. The package was eventually seized by the gardaí and was found, on closer inspection, to contain €1,750,000 worth of cocaine. The accused was charged with possession of the drugs and brought an application pursuant to s. 4E Criminal Procedure Act, 1967. The trial judge, in dismissing the charges, found that the interception, inspection and seizure of the package was unlawful. She also held that the accused had "proprietary rights" in respect of the package and that these had been unlawfully breached by the prosecuting authorities.

On appeal by the prosecution, the Court of Criminal Appeal made a number of notable observations. The Court appeared to hold that the actions taken by the customs officer and the gardaí were unlawful in terms of the package based on the findings of fact made by the trial judge. However, the Court then went on to note that this was a case in which the accused had adopted a fictional name when signing for the package and characterised the defence argument that the accused's rights had been breached as the "conjuring up" of a constitutional right to which the accused was not entitled. The Court also stated that an accused could not rely on a proprietary right in an item that he could not legally possess and use that right to defeat the public interest in the detection of crime. In the circumstances, the Court held that the trial judge had erred in law in finding that the accused's constitutional rights had been breached and reinstated the charges.

The decision in *Lawel* must signal the end of challenges to the admissibility of the evidence seized on foot of this type of controlled delivery. The Court has determined that any rights claimed by an accused in these circumstances are, effectively, illusory. A package addressed to a fictitious addressee, even where sent to a real address, does not give proprietary or other rights to the person who takes delivery of the package. In addition, no person can claim a personal right in a substance that he must know he cannot legally possess and then use that right to trump the public interest in the detection of crime and the prosecution of criminals. The best that an accused can hope is that a trial judge will hold that a breach of the law has occurred, in which case he must exercise his discretion as to the admissibility of the evidence.

Possession of drugs in packages

The other recent judgments address issues that have arisen with the judge's charge where an accused is being tried for possession of drugs in light of the *Smyth*[4] decision. Briefly, it may be said that before an accused can be convicted of the possession of controlled drugs the prosecution must prove that he had control of the drugs and that he was aware of their existence.[5] These judgments are relevant in those drugs cases in which the prosecution can prove that the accused had physical control of the drugs but the accused argues that he was not in possession of the relevant drugs, in the legal sense, because they were concealed and he had no reason to know of their presence and, therefore, lacked the necessary knowledge.[6]

The manner in which the drugs are concealed is relevant to the way in which the prosecution must prove its case against an accused. At this point, it might be observed that a distinction can be made between those cases, first, in which the accused is charged with possession of drugs that are in a package (be it a parcel, bag, box or other container) and, secondly, those cases where the drugs are stored or concealed by different means.[7] In the former case, the prosecution will usually have little difficulty in proving that the accused had possession of the bag, parcel or container in which the drugs are stored, in which case the challenge will be proof of knowledge of what the package contained. In the latter case the prosecution must prove both knowledge *and* control of the drugs concerned.[8] However, regardless of which category a particular case falls into, the burden on the accused remains the same; namely, to identify evidence in the case that will show that a reasonable doubt remains as to his guilt.

Before considering the recent decisions, it is worthwhile considering the legal context in which they were given. The legal principles that are relevant in a trial in which the drugs are contained in a package may, for present purposes, be summarised into the following points:

1. The prosecution must establish a *prima facie* case against the accused. This is facilitated by the provisions of s. 29(1) of the Misuse of Drugs Act, 1977 which states that an accused person shall not be acquitted of an offence

1 Postal packets are defined by s. 6(1) Communications Regulation (Postal Services) Act 2011. The original definition was at s. 10 Post Office Act 1875.

2 S. 66(1) and s. 84(1) Postal and Telecommunications Services Act 1983 (until repealed from 2nd August, 2011); and s. 46(1) and s. 53 Communications Regulation (Postal Services) Act 2011.

3 *People (DPP) v Lawel* [2014] IECCA 33.

4 *People (DPP) v Smyth* [2010] 3 IR 688

5 *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256.

6 *In People (DPP) v Ebbs* [2011] 1 IR 778 at paras. 15 to 17 it was noted that "the actus reus of possession involves knowledge that the person possesses "something"."

7 This is acknowledged in *People (DPP) v Melenciuc* [2015] IECA 133 at para. 26.

8 The best examples of this type of case are those where the drugs are found to have been concealed in a car or other vehicle. In these cases the prosecution rely on circumstantial evidence, the behaviour of the accused, and admissions to prove guilt. See, *People (DPP) v O'Shea* [1996] 1 IR 556; *People (DPP) v Hunter* [1999] WJSC-CCA 1829; *People (DPP) v Tanner* [2006] IECCA 151; and, *People (DPP) v Melenciuc* [2015] IECA 133.

of possession of drugs by reason of the fact that the prosecution has not adduced evidence proving that he knew that a package in his possession contained drugs.

2. The burden of proof is not altered by this provision and the prosecution is obliged to prove the guilt of an accused person in these cases beyond reasonable doubt. However, by operation of s. 29(1), if the prosecution has proven that an accused had a package in his possession, that the package contained something and that the accused knew that the package contained something, and, that the package contained the drugs specified in the indictment, the accused is presumed to have known of the presence of the drugs.[9] Proof of these facts will constitute a *prima facie* case against the accused and a not guilty direction is less likely to be given at the conclusion of the prosecution case. This has all been summarised in the following terms:

   > "the prosecution should have the initial burden of proving that the defendant had, and knew that he had, in these circumstances the box in his control and also that the box contained something. That, in our judgment, establishes the necessary possession. They must also of course prove that the box in fact contained the drug alleged, in this case cannabis resin. If any of those matters are unproved, there is no case to go to the jury."[10]

3. Where the prosecution has established a *prima facie* case against an accused in reliance on s. 29(1), the accused can, nevertheless, be acquitted in accordance with s. 29(2) if he can "prove" that he had neither the right nor the opportunity to examine the package and its contents and, therefore, he lacked the necessary knowledge to be guilty of the offence. This provision is intended to avoid manifestly unjust convictions of genuinely innocent people who handle packages containing drugs.
4. The requirement to prove a defence is a reversal of the burden of proof. The burden on an accused is an evidential burden and he is not required to prove his defence on the balance of probabilities.[11] This is not a heavy burden and is similar to the burden on an accused when he intends to rely on the defence of self-defence in an assault case or provocation in a murder case.[12]
5. The burden on an accused to "prove" his defence requires no more than that he identify evidence that may give rise to a reasonable doubt of his guilt. This is evidence in the case that shows that a reasonable doubt remains as to the extent of the accused's knowledge of the contents of the package. An accused is not required to give evidence during the trial The evidence relied on by him may exist in the evidence as a whole during the trial, including any explanations given by the accused while in custody, or it may come from evidence given by the accused or adduced on his behalf.[13]
6. Where the accused has advanced a defence in accordance with the provisions of s. 29(2), the prosecution must negative the defence beyond reasonable doubt. It is at this stage that the evidence of the surrounding circumstances in the case will be relevant. In other words, the circumstantial evidence in the case must negative the defence case that a reasonable doubt exists as to the accused's knowledge of the contents of the package.

Tuma[14] is a relatively straightforward example of this type of case. In the early hours of the 2nd May, 2008, gardaí on patrol encountered the accused and two other men in suspicious circumstances in a rural and mountainous area of south Dublin. When the men realised that they had been seen by gardaí, they attempted to drive away. The car was stopped and two of the men escaped. The accused was the driver of the car and he made a further attempt to drive away from the scene. The gardaí could see a large plastic holdall in the rear passenger area of the car which, on being opened, was found to contain a substantial quantity of cannabis. The accused was arrested and, on being interviewed, he said that he did not know the other men and picked them up at a hotel in Tallaght because he was asked to do so by a man called "Leon". The accused was to be paid €500 for giving the men a lift to Bray. The men had the bag with them when the accused collected them. In these circumstances it seems fair to state that there was a strong case against the accused and were it not for an error in the judge's charge, the conviction would have been good.

The judge's charge

The problem that occurred in cases of this type is that until the decision in *Smyth*[15] it was generally accepted that the burden on an accused, who was relying on s. 29(2), was that he was required to prove his defence on the balance of probabilities.[16] In *Smyth,* the Court of Criminal Appeal accepted that there was a distinction between requiring an accused to prove his case on the balance of probabilities and requiring him to establish a reasonable doubt as to his guilt. The Court also accepted the reasoning of a line of authority that had emanated from the UK that to require an accused to "prove" a statutory defence on the balance of probabilities was inconsistent with the presumption of innocence in that the accused might be able to establish a reasonable doubt about his guilt but still fail to prove his case on the balance of probabilities.[17] It was accepted that this could lead to an injustice if an accused could raise a reasonable doubt about

9 *R v McNamara* [1988] Cr App R 246; also, *People (DPP) v Byrne* [1998] 2 IR 133 at p 435; and *People (DPP) v Power* [2007] 2 IR 509 at p 521.

10 *R v McNamara* [1988] Cr App R 246 at p. 252.

11 *People (DPP) v Smith* [2010] 3 IR 688. Also, *R v Lambert* [2002] 2 AC 545; *Henvey v HM Advocate* [2005] ScotHC HCJAC 10; and *Sheldrake v DPP* [2005] 1 AC 264.

12 See *People (AG) v Quinn* [1965] IR 366 per Walsh J at pp. 382 to 383.

13 *People (DPP) v Smith* [2010] 3 IR 688 at paras. 15 and 16; *People (DPP) v Melenciuc* [2015] IECA 133 at para. 18; *People (DPP) v Malric* [2011] IECCA 86; and *People (DPP) v PJ Carey (Contractors) Ltd.* [2011] IECCA 63. Also, *Hardy v Ireland* [1994] 2 IR 55 at p 564; and *O'Leary v AG* [1995] 1 IR 254.

14 *People (DPP) v Tuma* [2015] IECA 63. The conviction was quashed by the Court of Appeal and when the matter was returned to the Circuit Court for trial the accused pleaded guilty to an offence contrary to s. 15 of the Misuse of Drugs Act, 1977.

15 *People (DPP) v Smith* [2010] 3 IR 688.

16 Charleton *Controlled Drugs and the Criminal Law* p. 104.

17 *R v Lambert* [2002] 2 AC 545; *Henvey v HM Advocate* [2005] ScotHC HCJAC 10; and *Sheldrake v DPP* [2005] 1 AC 264.

his guilt but still be convicted because he had failed to prove his defence on the balance of probabilities. Therefore, the burden on an accused in cases of this type is an evidential burden rather than a legal burden (or persuasive burden).[18]

In *Smyth* and in *Tuma*[19] the trial judges had erred by instructing the jury that the accused was obliged to prove his defence on the balance of probabilities rather than the lesser burden of establishing a reasonable doubt. This error in law in the judge's charge appears to have been the only error in principle and the convictions in these cases were quashed even though the issue had not been raised at trial.

In *Tuma,* the Court of Appeal took the opportunity to set out a detailed sample judge's charge for possession cases where s. 29(1) and s. 29(2) apply. The judgment further clarifies the law in this area and will undoubtedly be very helpful in some difficult cases. This will most likely occur in those cases in which everything is in issue throughout the case and nothing is conceded. In the course of the sample charge, the Court identified the following principles as being relevant for cases in which the accused is being tried for possession of drugs found within a package:

> "where physical possession or custody of controlled drugs by the accused is established, the concurrent existence of mental awareness is in effect presumed to exist, as though it had been proven to the standard of beyond reasonable doubt. However, the law permits an accused to challenge that which is effectively presumed, and to seek to prove the contrary, i.e., the existence of a reasonable doubt as to his mental awareness. The contrary is proved if he establishes at least a reasonable doubt as to the existence on his part of actual knowledge of the drugs in his control or of reasonable grounds on his part to suspect that he had drugs in his control."[20]

This passage is a concise recital of the law as it is now understood. However, there is always the risk that some trial judges will feel that the safest course will be to adjust the sample charge to fit the circumstances in the trial before them and to then simply recite a formulaic charge to the jury whether or not this is necessary, helpful or appropriate, having regard to the circumstances of the case and the manner in which the trial has been conducted by the defence.

Factors may arise during the trial that will remove the necessity for the type of detailed charge suggested in *Tuma*. For instance, the trial judge is not required to charge the jury in relation to s. 29(2) where the accused does not expressly raise a possible defence in accordance with the provision.[21] This type of charge will also not be appropriate in those cases in which the accused denies knowledge of the existence of the drugs or the item containing the drugs. This point may be illustrated by the Court of Appeal judgment in *Melenciuc*.[22] In that case, the Appellant was driving a vehicle that disembarked at Rosslare ferry port. The vehicle was examined and was found to have €316,566 worth of cannabis resin concealed inside the petrol tank. The distinguishing fact in this case is that the Appellant claimed not to have been aware of the existence of the drugs or any other object (apart from fuel) inside the fuel tank in the first place. In this case, the prosecution was obliged to prove each allegation in the case and to rely on circumstantial evidence to rebut the Appellant's claim that he did not know of the existence of the drugs. The Court of Appeal quashed the conviction and held that the trial judge had erred when he directed the jury that burden on the accused to establish his defence was "a lower level of reasonable doubt than exists for the State to prove" its case against the accused. Even though the provisions of s. 29(1) and 29(2) were not apparently relevant in the case, the Court, nevertheless, made it clear that a similar burden rests on the accused in cases of this type. The Court stated that

> "The jury should have been advised, and have been left firmly with the view that all the defendant had to do was to raise a doubt as to whether he knew or had reasonable cause to suspect that the drugs in question were in his possession or under his control, and that he did not have to affirmatively establish anything."

There is also the reality that in many drugs cases, there is a particular point in the trial which may be described as a "tipping point". This is the point where the prosecution has done enough to put the package containing the drugs into the accused's possession at which point it is conceded, either expressly or by implication, that the prosecution has established a *prima facie* case against the accused. The defence will then move on to highlighting any piece of evidence that tends to show that the accused either did not know that the package contained drugs, that he had no reason to suspect that it did, and that he had no opportunity to discover that it did. In these cases, the detailed charge may be unnecessary because the prosecution will do what it always does (i.e. call as much evidence as is possible against the accused) and the defence will always do what it always does (i.e. endeavour to undermine that evidence).

It should also be borne in mind that the only error in the judge's charge in the cases in which the appeals were allowed was that the judge had instructed the jury that the wrong standard of proof applied to the defence case. Once this mistake is removed from the judge's charge, there is no reason for trial judges not to continue charging juries in the usual manner. One way to avoid complications in cases of this type in the future is for the trial judge to invite counsel to address him on whether the extended charge suggested in *Tuma* is necessary.

If the trial judge is satisfied that the extended charge is not necessary in any given case, he can simply charge the jury in the usual manner and in accordance with the six principles that were set out earlier. The charge would obviously be required to have regard to the evidence in the trial and should be contextualised accordingly. ■

18 For an explanation of the distinction, see *Sheldrake v DPP* [2005] 1 AC 264

19 *People (DPP) v Tuma* [2015] IECA 63. Also, *People (DPP) v Kelly* 10th February, 2014 Court of Criminal Appeal unreported *ex temp.*

20 *People (DPP) v Tuma* [2015] IECA 63 at para. 61.

21 *R v Lambert* [2002] 2 AC 545 para 158. This appears to be similar to the approach adopted in *People (DPP) v Cronin* [2006] 4 IR 329 where the Court of Criminal Appeal held that a trial judge was not obliged to charge on a defence that had not been raised by the accused.

22 *People (DPP) v Melenciuc* [2015] IECA 133.

Obituary: The Honourable Mr Justice Paul Carney

The many obituaries which followed the untimely death of Mr. Justice Paul Carney on 23 September last, which were automatic reading for readers of the Bar Review, leave little to be said about his very public career. Indeed they probably knew everything about what they read beforehand.

He was called to the Bar in1966 and when I first met him in 1977, he had a burgeoning practice in virtually every area of law. He practiced in criminal law, round hall cases, family law, judicial review, constitutional law, malicious injuries, trade union cases of every kind and in the Chancery Courts, to mention just some of his areas of expertise. That he could do so was no surprise. He had devilled with Donal Barrington who himself had expertly covered the whole gamut of possible legal endeavor at the Bar.

When I first met him, he was unsurprisingly in heavy demand as a master. My first introduction to him was unsettling. We had a brief conversation which from my point of view had run into a dead end. I was unaware whether I was to be accepted or not (I had been). From his point of view, I suppose, it was obvious I should know this and further waste of words was unnecessary.

Over the years that followed I tried, with remarkably little success, to imitate this approach. Paul's capacity to be content in silence was something I could not achieve. This contrast was remarked on by our Soviet hosts several years later, when both of us went as part of a group of barristers in 1990 to Russia under the perhaps rather inappropriate banner of the Youth Exchange Bureau for a visit of two weeks or so.

No sooner had I arranged to devil with him than, he was also snapped up by Catherine McGuinness, former Senator and later Supreme Court judge, and by Jim Farrelly, a noted newspaperman, both of whom had come through Kings Inns with me. That the three of us devilled together with Paul in the same year in no way diminished our devilling experience.

We learned from Paul that the bar was no 9 to 5 job and that much was learnt outside court hours, however valuable they may have been. In a legal world where paper had not mushroomed to its later proportions, it was possible to 'down tools' most evenings and to get to know those a long way senior to you in relaxed circumstances. Paul loved the company of his old friends. Kevin Haugh and John Farrell spring immediately to mind but there were many more.

Paul took silk in 1983 and was fascinated by criminal practice to a greater and greater extent from then on, despite his involvement in many notable civil cases as well. Some were memorable events, by night as well as day. Paul's leading Michael McDowell, protecting the National Union of Mineworkers assets from sequestration in Ireland, was an occasion, I recall, of many a very late night consultation.

He was elected to the Bar Council in a highly competitive and even controversial election and served there for some years.

Ireland nearly lost Paul Carney to the English Bar in the early 1990s but happily he returned, and shortly afterwards became a High Court judge.

Before moving to political impartiality, Paul was Michael Mc Dowell's election agent. He had adorned his large Peugeot 504 estate with the words Progressive Democrats on each side. After the election, he asked one of his children to remove the writing, which I believe was done with the exception of the letters 'ogre'. It was typical of Paul that he was sufficiently tickled by this that it took him quite some time to take them off.

He was appointed to the bench in 1991 and was as plain speaking on it as he had been off it. He had always been a man to say exactly what he thought about particular judges and when on the bench, was mostly indifferent to what others thought about what he did. This was not true of his views of what the Court of Criminal Appeal said about him, about whose views he frequently expressed his own.

There is no need to discuss Paul's career on the bench. So much has been said, both before and upon his retirement as well as in earlier obituaries, that it would be superfluous. Suffice it to say that he was fair, articulate, efficient and hard working. He adorned the Central Criminal Court in wig as he wished others to.

No account of Paul would be complete without observing that he loved a party or a dinner, whether given by himself or others. If a diplomatic aspect was added he liked it all the more. Travel too was a drug for him. It was typical of Paul that when he was terminally ill, he made no issue of it socially or professionally and when he reluctantly retired last April, he was eagerly looking for more work.

Much more has been and could be said about Paul's many qualities and no doubt it will.

He is missed by Marjorie and his four children. He is missed by the Bar.

P.O'H

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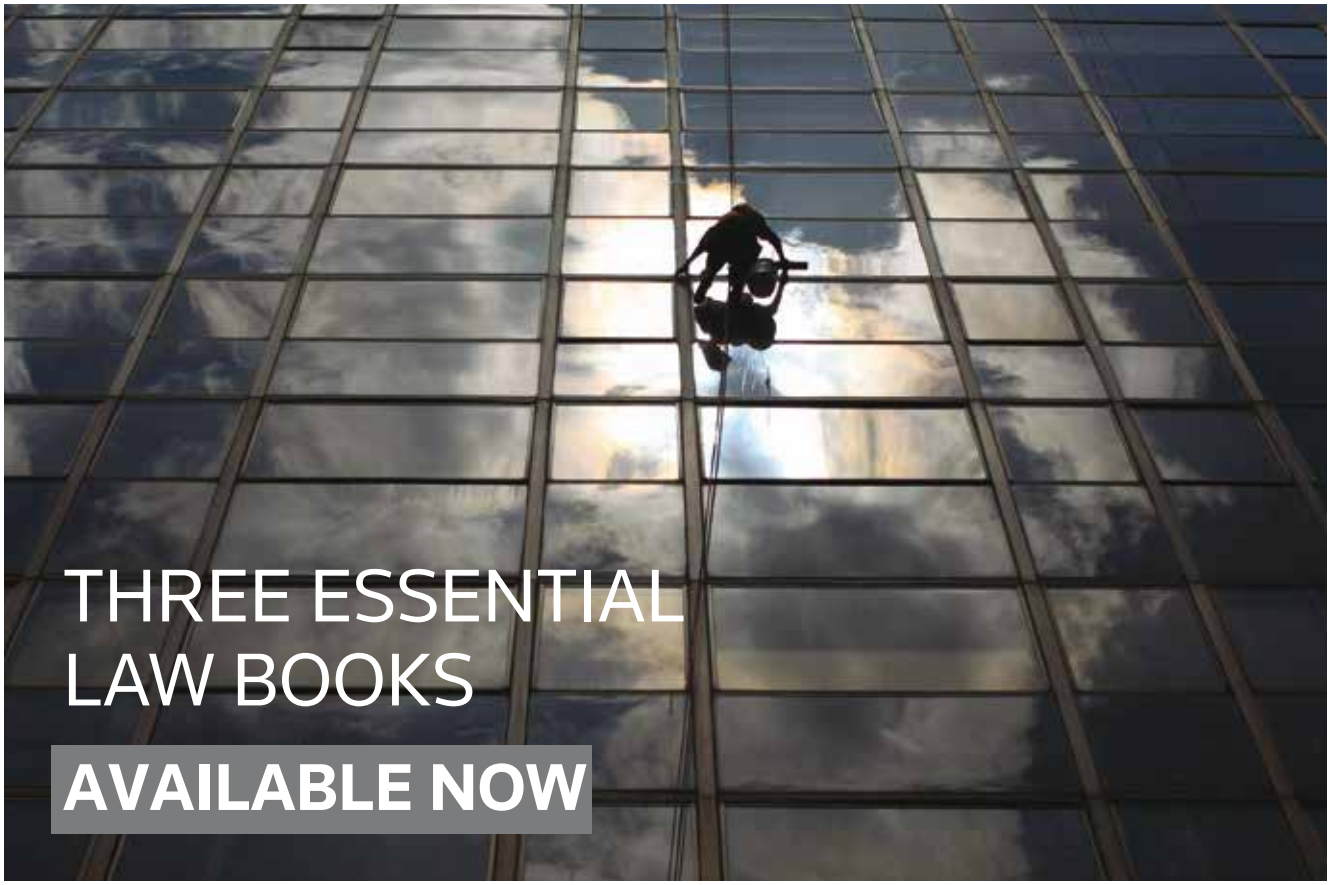

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